Vet.App. No. 19-1581

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

LUIS G. DE PAZ,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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I. ISSUE PRESENTED

Whether the Court should affirm the December 4, 2018, Board of Veterans' Appeals (Board) decision, which denied a claim of entitlement to a rating in excess of 10% for a right knee disability.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Luis G. De Paz, appeals from a December 4, 2018, decision of the Board that denied entitlement to a rating in excess of 10% for a right knee disability.

Notably, in this decision, the Board also granted Appellant entitlement to service connection for an acquired psychiatric disorder, to include posttraumatic stress disorder (PTSD) and generalized anxiety disorder. Appellant does not challenge, and the Court should not disturb, the part of the Board's decision that granted service connection, as it is a favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (holding that the Court may not disturb favorable findings).

The Board also remanded the issue of entitlement to a total disability rating based on individual unemployability (TDIU). The Court should not disturb this part of the Board's decision, as it is not a final decision. *See Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed.Cir. 2005) (holding that a Board remand is not a final decision within the meaning of 38 U.S.C. § 7252(a)).

C. Statement of Relevant Facts

Appellant served honorably on active duty in the U.S. Marine Corps from September 2000 to May 2004. (Record (R.) at 9753).

On September 8, 2000, during Appellant's recruit screening examination, it was noted that Appellant had injured his right knee "1 month ago by squatting [and]

running on wet cement." (R. at 9665). Appellant continued to complain of right knee pain throughout the month of September 2000. (R. at 9663).

Appellant's knee pain continued through 2001, with treatment notes indicating swelling and range of motion issues. (R. at 9655, 9645). He obtained a physical therapy consultation due to his diagnosed "right PFPS / B shin splints." (R. at 9649).

In October 2002, Appellant was recommended for administrative separation due to his right knee PFPS and chronic shin splints. (R. at 9615).

Appellant underwent a separation examination in April 2004. (R. at 9558-9565). During this examination, Appellant's right knee pain was noted. (R. at 9559).

In February 2004, Appellant filed a claim of entitlement to service connection for his right knee pain. (R. at 9836 (9830-9845)). This claim was granted in a July 2004 rating decision issued by the San Diego, California Regional Office (RO). (R. at 9790-9801). Appellant's right knee condition, diagnosed as patellofemoral pain syndrome (PFPS), was evaluated at 10% disabling, effective May 16, 2004. (R. at 9795).

In July 2006, Appellant submitted a claim for an increased rating of his right PFPS. (R. at 9527). The RO issued a January 2007 rating decision continuing Appellant's 10% rating and denying this claim for an increased rating. (R. at 9411-9414, 9467-9473). This decision went unappealed.

In November 2008, Appellant submitted another claim for an increased rating of his right PFPS. (R. at 9212).

In a May 2008 rating decision, the RO continued Appellant's 10% rating for right PFPS and denied his claim for an increased rating. (R. at 9018-9028). This decision went unappealed.

Appellant submitted another claim for an increased rating of his right PFPS in August 2012. (R. at 8981-8983).

In September 2012, Appellant underwent a VA examination. (R. at 1557-1567). During this examination, it was noted that Appellant's right knee flexion ended at 125 degrees and that there was no objective painful motion on extension. (R. at 1559). In the examination report, the examiner noted that Appellant's right PFPS did not result in a functional impact, despite Appellant experiencing daily flare-ups. (R. at 1567). The examiner further found that Appellant had functional loss and additional limitation of motion after repetition, reporting pain on movement and swelling as contributing factors of disability. *Id*. The examiner also reported that Appellant had normal muscle strength in both flexion and extension and normal joint stability upon testing. (R. at 1559).

In November 2012, the RO issued a rating decision continuing Appellant's 10% rating for right PFPS and denying his claim for an increased rating. (R. at 8671-8690).

Appellant submitted a timely notice of disagreement on December 18, 2012. (R. at 8668).

Appellant underwent another VA examination in April 2014. (R. at 8013-8027). During this examination, there was no range of motion test conducted and the examiner relied on the September 2012 test results. (R. at 8016). The examiner explained that she did not conduct a range of motion assessment because Appellant was "actively resist[ing]" a flexion exam. *Id*. The examiner hypothesized that Appellant's active resistance to a flexion test was due to either anxiety or pain. *Id*.

In February 2016, the RO issued a statement of the case, continuing its November 2012 decision to maintain Appellant's 10% rating for right PFPS and deny Appellant's claim for an increased rating. (R. at 7035-7071).

Appellant submitted a VA Form 9, appealing to the Board, in March 2016. (R. at 6335).

In May 2016, the RO issued a supplemental statement of the case, again continuing its November 2012 decision to maintain Appellant's 10% rating for right PFPS. (R. at 6312-6318).

Appellant participated in a hearing before the Board in August 2017, during which he reiterated his complaints of increased knee pain due to his right PFPS. (R. at 5759-5785).

In a November 2017 decision, the Board issued a remand, ordering the RO to obtain a new examination on Appellant's right knee. (R. at 3545 (3535-3549)). In this decision, the Board explained that the April 2014 VA examiner's reliance on the September 2012 range of motion testing rendered her opinion inadequate for

the purposes of determining the current severity of Appellant's right knee disability. (R. at 3545).

Following the Board's November 2017 remand orders, VA offered Appellant an examination in December 2017. (R. at 3071-3080). During this examination, Appellant's range of motion tests showed flexion to 110 degrees and extension of 110 to 0 degrees. (R. at 3072). The examiner noted that Appellant's range of motion contributed to functional loss, as his motion was limited by pain on flexion. *Id*.

Regarding both repeated use over time and flare-ups, the examiner offered no opinion, because she noted that the examination was medically consistent with Appellant's statements describing functional loss with repetitive use over time. (R. at 3074-3075).

Following Appellant's December 2017 examination, the RO issued a supplemental statement of the case in May 2018 and in September 2018, both times continuing its previous decisions to maintain Appellant's 10% rating for PFPS and deny his claim of entitlement to an increased rating. (R. at 1744-1749, 241-253).

The appeal returned to the Board's docket in November 2018. (R. at 90).

On December 4, 2018 the Board issued a decision denying Appellant's claim for an increased rating while granting a claim for acquired psychiatric disorder and remanding the issue of TDIU. (R. at 4-17). Appellant now challenges that decision.

III. SUMMARY OF THE ARGUMENT

The December 2017 VA examination is adequate. The examiner provided a reasoned opinion based on correct facts and a review of Appellant's record and medical history. Moreover, Appellant has failed to show that the Board's reliance on this examination was clearly erroneous. Contrary to Appellant's assertions, neither *Mitchell* nor *Sharp* invalidate this medical opinion. The Court in *Mitchell* did not promulgate a requirement that all examiners must note where pain "begins" during a joint range of motion test in the manner advocated by Appellant.

Likewise, the December 2017 examiner provided an opinion that adhered to *Sharp*, as it was based on range of motion testing and considered Appellant's functional loss during both repeated use over time and flare ups and posited that the examination results were medically consistent with Appellant's statements describing functional loss with both repeated use over time and flare ups.

The adequacy of the April 2014 and September 2012 VA examinations, quite simply, does not impact this decision.

Additionally, the Board provided an adequate statement of reasons or bases for denying Appellant's claim of entitlement to an increased rating. The Board's decision explained the basis of its material findings and conclusions, and sufficiently addressed the evidence relevant to Appellant's claim.

Unfortunately, Appellant's argument is based upon an incorrect summary of the Board's consideration and analysis, as the Board did consider a variety of Appellant's symptoms. Appellant argues that the Board must explicitly address

certain specific symptoms, however, the Board need not address every piece of evidence in the record. More importantly, the Board did, in fact, address Appellant's sundry symptoms—albeit not in the manner requested by Appellant. Moreover, the Board properly found and adequately explained its decision that Appellant's symptoms, altogether, are sufficiently compensated for by his current rating.

Lastly, the Board properly applied DC 5261 to Appellant's disability, and Appellant has not shown that this diagnostic code assignment was arbitrary and capricious. Despite Appellant's arguments to the contrary, the *Esteban* decision does not permit Appellant to obtain separate ratings for the same right knee disability. Appellant's condition, as compensated under DC 5261, would not be "separate and distinct" from a separate rating because his current rating encompasses both his functional loss and his reduced range of motion.

Accordingly, the Court should find that the Board relied on an adequate December 2017 VA examination, provided an adequate statement of reasons or bases, properly applied the appropriate rating code and criteria, and further, that Appellant has not shown that any of the Board's findings or determinations were clearly erroneous.

IV. ARGUMENT

A. The December 2017 VA Examination is Adequate, and the Adequacy of the April 2014 and September 2012 Examinations Does Not Impact the Board's Decision.

An adequate medical examination is one that is based on a consideration of the veteran's prior medical history and describes the veteran's condition with a level of detail sufficient to allow the Board to make a fully informed decision. *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). This requires the examiner to not only render a clear conclusion on the relevant medical question, but also to support that conclusion "with an analysis that the Board can consider and weigh against contrary opinions." *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007).

Generally, an adequate examination "must rest on correct facts and reasoned medical judgment so as to inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports." *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

Whether a medical opinion is adequate is a finding of fact subject to review under the "clearly erroneous" standard. *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). Under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990) (emphasis added); *see also Anderson v. Bessemer City, N.C.*, 105 S.Ct. 1504 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

i. *December 2017 VA Examination*

The December 2017 VA examination does not violate *Mitchell v. Shinseki*, nor does it violate *Sharp v. Shulkin*. Rather, this examination comports with the law, provides a clear conclusion supported with a sufficient analysis and rationale, and is based on the correct facts. Moreover, Appellant has not shown that the Board's implicit adequacy finding was clearly erroneous.

When a disability of the joints is evaluated based on limitation of motion, the Board must consider any additional limitations due to pain, weakness or fatigue. *DeLuca v. Brown*, 8 Vet.App. 202, 205-206 (1995). In *DeLuca*, the Court found that a medical examination that failed to opine on whether additional functional loss resulted from pain was inadequate, and instructed that, on remand, the examiner must opine on whether the veteran's pain could significantly limit his functional ability during flare-ups or on repetitive use. 8 Vet.App. at 205-206.

In *Mitchell v. Shinseki*, the Court clarified that pain may result in functional loss if it limits the ability to perform normal working movements even if present only on repetitive motion or during a flare-up. 25 Vet.App. 32, 44 (2011). The Court thus reaffirmed that an adequate medical examination must contain "an opinion on whether pain could significantly limit functional ability" either during a flare-up or as a result of repetitive use. *Id*. at 43-44 (quotations omitted). As the Court explained, functional loss may be caused by pain if the pain limits the ability of the veteran to perform the normal working movements of the body with normal excursion, strength, speed, coordination, or endurance. *Id*. at 37. It further emphasized that such functional loss need not be ever-present and can manifest during a flare up

or only as a result of repetitive use, and reaffirmed its instructions in *DeLuca* that when pain is associated with movement, an adequate medical examination must include an opinion on whether pain could cause significant functional limitations either during a flare-up or as a result of repetitive use. *Id*. The Court emphasized that it is the functional loss caused by pain that must be considered and that painful motion alone does not constitute limited motion. *Id*. at 38.

Here, the December 2017 VA examination is adequate, as it considered Appellant's entire medical history, his lay statements, and the results of the in-person examination. *See* (R. at 3071-3080). Moreover, the examiner offered a reasoned opinion on the functional impact of Appellant's right knee condition, based on the evidence before him. (R. at 3080). Appellant argues that the December 2017 VA examination violates *Mitchell*, because the examiner did not "specify where on ROM [Appellant's] pain began." (Appellant's Brief (App.) at 10). However, the Court in *Mitchell* made *no* mention nor requirement that VA must determine or consider where on a claimant's range of motion his or her pain begins. *See* 25 Vet.App. at 32-45. Rather, Appellant's argument is based upon a narrow reading of dicta in the *Mitchell* decision and does not properly represent the law promulgated by the Court. *Id*.

In other words, there is no requirement that an examiner must specify the point pain "begins" during a range of motion test. *Id*. The point at which pain "begins," as asserted by Appellant, is irrelevant because the rating adjudicator looks for functional loss, and the rating is determined by functional loss of the joints

based on range of motion. *See* 38 C.F.R. §§ 4.40, 4.45 (2019). For example, if a claimant's pain begins at 10 degrees, but the claimant has mobility to 50 degrees, then the claimant's pain at 10 degrees is not causing functional loss at 10 degrees, the claimant's functional loss is at 50 degrees. Therefore, Appellant's interpretation is incorrect, and the December 2017 VA examination does not violate *Mitchell*.

Similarly, the December 2017 VA examination does not violate *Sharp v. Shulkin*, because the examiner properly conducted range of motion testing and considered Appellant's functional loss during both repeated use over time and flare ups. (R. at 3074-3075). In *Sharp*, the Court explained that before the Board can accept an examiner's statement that he or she cannot provide an opinion regarding flare ups without resort to speculation, "it must be clear that this is predicated on a lack of knowledge among the 'medical community at large' and not the insufficient knowledge of the specific examiner." 29 Vet.App. 26, 36 (2017).

For an examination not conducted during a flare-up to comply with 38 C.F.R. § 4.40, the examiner must "obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veteran[]," and "offer [a] flare opinion[] based on [an] estimate[] derived from information procured from relevant sources, including the lay statements of [the] veteran[]." *Sharp*, 29 Vet.App. at 34-35. The examiner's determination in that regard "should, if feasible, be portrayed in terms of the degree

of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca*, 8 Vet.App. at 206.

Here, the examiner opined that the examination was medically consistent with Appellant's statements describing functional loss with both repeated use over time and flare ups. (R. at 3074-3075). The examiner further noted that Appellant had limited motion due to pain during flare ups and limited standing, walking, use of stairs, and squatting due to pain. (R. at 3072). This information regarding repeated use over time, and the examiner's note that the examination was consistent with the description of functional loss, meets the standard set in *Sharp*. *Compare* 29 Vet.App. at 34-35 *with* (R. at 3074). In fact, this notation suggests that Appellant's functional loss was constant and thus no repetitive test was required. (R. at 3074).

Therefore, Appellant's argument under *Sharp* is unpersuasive, because the examiner obtained information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from Appellant, and offered an opinion—that the examination was "medically consistent with the Veteran's statements describing functional loss with repetitive use over time." (R. at 3074); *see also Sharp*, 29 Vet.App. at 34-35. This opinion was based on an estimate derived from information procured from relevant sources, including the lay statements of Appellant. *Id*.

Appellant's remaining arguments against the adequacy of the December 2017 VA examination merely reassert the above-referenced arguments, using different vernacular in doing so, and thus must be considered as the same.

Accordingly, the Court should find that the December 2017 VA examination is adequate, and further, that Appellant has not met his burden to show that the Board's decision to rely on the medical opinion was clearly erroneous. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table) (appellant bears the burden of demonstrating error); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

ii. *April 2014 and September 2012 VA Examinations*

The adequacy of Appellant's VA examinations from April 2014 and September 2012 does not impact the Board's decision, as the Board used these examinations for background and context before relying on the December 2017 examination to reach its conclusion.

In the passage of its decision which provided the factual predicate of Appellant's claim, the Board referenced VA examinations from April 2014 and September 2012, amongst other evidence. (R. at 13-14). The Board's reference to these examinations, however, ended as the Board moved into its analysis, which relied on the December 2017 VA examination. (R. at 14-16). This reference to the April 2014 and September 2012 examinations does not negate the Board's decision, because the Board did not rely on either examination to decide the rating;

rather, the examinations were background information. (R. at 13-14). Consequently, the adequacy of these examinations does not impact the Board's decision.

Moreover, the adequacy of these examinations does not necessarily impact their probative weight, because as the Court has held, the mere fact that a medical opinion is inadequate to *decide a claim* does not render it without probative weight. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012) (emphasis added).

Accordingly, the Court should find that the Board did not rely on the April 2014 and September 2012 VA examinations to determine the appropriate rating, that the adequacy of these examinations does not impact the Board's decision, and further, that Appellant has failed to meet his burden in demonstrating that these examinations invalidate the Board's decision.

B. The Board Provided an Adequate Statement of Reasons or Bases.

A Board decision must be supported by a statement of reasons or bases which adequately explains the basis of the its material findings and conclusions. 38 U.S.C. § 7104(d)(1) (2019); *Gilbert*, 1 Vet.App. at 57. This generally requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir. 1996) (table).

The Board, however, need not comment upon every piece of evidence contained in the record, nor must it address issues that were neither raised

expressly by the claimant or reasonably by the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed.Cir. 2007); *Robinson v. Peake*, 21 Vet.App. 545, 552-556 (2008); *Sondel v. Brown*, 6 Vet.App. 218, 220 (1994). Even where the Board fails to provide an adequate statement of reasons or bases, remand is appropriate only if the inadequacy is preclusive of judicial review. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose).

In all cases, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert*, 12 Vet.App. at 151 (appellant bears the burden of demonstrating error). To warrant judicial interference with a decision, the claimant must demonstrate that an error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 129 S.Ct. 1696, 1706 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). If the appellant cannot demonstrate that the outcome of his claim could have been different had the alleged error not been committed, the error is necessarily non-prejudicial. *See Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) (error is nonprejudicial "where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision"); *see also Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose).

As factfinder, the Board is responsible for interpreting and weighing the evidence. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed.Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). The Board's interpretation of evidence and assignment of probative weight are entitled to deference and may not be disturbed unless clearly erroneous. 38 U.S.C. § 7261(a)(4) (2019); *Gilbert,* 1 Vet.App. at 52.

Under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52 (emphasis added); *see also Anderson*, 105 S.Ct. at 1504 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Here, the Board provided an adequate statement of reasons or bases which adequately explained the basis of its material findings and conclusions, and sufficiently addressed the evidence relevant to Appellant's claim. (R. at 14-16). The Board also analyzed the probative value of the evidence, accounted for that which it found persuasive or unpersuasive, and explained the basis of its rejection of evidence materially favorable to the claimant. *Id*.

Specifically, the Board found that Appellant's current rating adequately compensated him for his right knee condition, taking into account the functional loss he suffered, in addition to the results of range of motion testing during the

December 2017 VA examination. (R. at 15-16). The Board explained that because Appellant's range of motion does not rise to the level of a 20% rating[1], that his 10% rating accounts for both the range of motion loss and functional loss. *Id*. The Board also found Appellant to be a competent and credible lay person, but concluded that the December 2017 VA examination was more probative, as it was performed by a trained medical professional. (R. at 16). Altogether, this demonstrates that the Board provided an adequate statement of reasons or bases, and Appellant as not met his burden to show otherwise.

Appellant raises three main arguments against the Board's statement of reasons or bases, and the Secretary will address each argument in turn.

i. *Favorable Evidence*

First, the Board did not err by "fail[ing] to account for all evidence favorable and material" to Appellant's claim. *See* (App. at 17-18).

In its decision, the Board specifically pointed to Appellant's difficulties with standing and sitting, the results of the December 2017 VA examination, and Appellant's lay statements. (R. at 14-16). Although Appellant aptly notes that the Board did not specifically reference each individual piece of evidence showing Appellant's disability, he fails to recognize that the Board is not held to such a wide-reaching requirement regarding evidentiary discussion. (App. at 17-18). As the

[1] The Secretary notes that Appellant's range of motion did not even rise to the level of a 10% rating. *Compare* 38 C.F.R. § 4.71A (2019) *with* (R. at 3072).

Federal Circuit has explained, the Board does not need to comment upon every piece of evidence contained in the record. *Newhouse*, 497 F.3d at 1302.

Appellant asserts that "the only functional effects [the Board] actually assessed and considered . . . were [Appellant's] reports of pain, weakness, and limited movement." (App. at 18). Unfortunately, Appellant is incorrect in his summary of the Board's considerations and analysis. As noted above, the Board specifically considered Appellant's difficulties with standing and sitting. (R. at 15). The Board also specifically considered the December 2017 examiner's notations that Appellant's right knee condition "had functional impact on standing, walking, lifting, and carrying, all expected to cause flares." *Id*. The Board also considered the results of testing performed on Appellant's knee during the December 2017 VA examination. *Id*. The Board also noted specific considerations of Appellant's lay statements regarding the severity of Appellant's condition, finding them less probative than the December 2017 VA examination. (R. at 16). Therefore, as the record and Board decision illustrates, Appellant's argument is unpersuasive, because the Board did assess and consider more than merely Appellant's "reports of pain, weakness, and limited movement." *Compare* (App. at 18) *with* (R. at 14-16).

Appellant also argues that "VA regulations direct adjudicators to consider these precise impediments," citing to 38 C.F.R. §§ 4.40, 4.45 and ostensibly asserting that the regulations require the Board explicitly discuss all of his specific symptoms. (App. at 18). Contrary to this assertion, however, the Board adhered

to both § 4.40 and § 4.45, and specifically considered the requirements of these regulations in its decision. (R. at 15) (citing to § 4.40 and § 4.45). Indeed, Appellant's argument in this regard appears to take issue with the Board's application of the rating formula, rather than its adherence to the law. A determination by the Board as to the proper evaluation of a disability is a factual determination subject to review under the deferential clearly erroneous standard. *Pierce v. Shinseki*, 18 Vet.App. 440, 443 (2004). Appellant has not shown that the Board's rating decision was clearly erroneous.

Accordingly, the Court should find that the Board provided an adequate statement of reasons or bases for its decision, and further, that Appellant has not demonstrated that the Board's rating decision was clearly erroneous. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

ii. *Compensability of "Additional Functional Loss"*

Next, the Board did not err when it found that Appellant's current rating adequately compensates him for his right knee condition, rather than considering his "additional functional loss" as a separate, compensable disability. (App. at 18-19). Rather, the Board's consideration of higher ratings, analysis thereof, and subsequent decision that Appellant's 10% rating most closely approximates his condition, precludes a separate evaluation of the purported "additional functional loss." *See* (R. at 15-16); (App. at 18-19).

As the Court in *Lyles v. Shulkin* explained, a Board determination that "all the manifestations of [a claimant's knee] disability, including pain and swelling, were compensated by his . . . evaluation" *precludes* "separate evaluation of those manifestations." 29 Vet.App. 107, 117 (2017). Here, much like in *Lyles*, the Board found that all manifestations of Appellant's right knee condition were adequately compensated by his 10% rating. (R. at 15-16); 29 Vet.App. at 107-117. Specifically, the Board concluded that Appellant's "right knee disability has caused interference with standing or sitting, and *pain contributing to additional functional loss or contributing to his disability*. Therefore, the Veteran's right knee disability more closely approximates to a 10 percent rating." (R. at 15) (emphasis added). This illustrates that, contrary to Appellant's claim that the Board relied exclusively on range of motion limitations in its analysis, without considering functional loss, the Board *did* consider more than merely range of motion. In fact, the Board's subsequent discussion regarding range of motion further demonstrates this point. *See* (R. at 15-16).

Furthermore, under Diagnostic Code (DC) 5260 and 5261, to obtain a 10% rating, a claimant's extension must be limited to 10 degrees and flexion must be limited to 45 degrees. 38 C.F.R. §4.71A (2019). Throughout Appellant's entire appeal period, however, he "has had flexion greater than 60 degrees and at no point was there evidence of extension limited to 10 degrees." (R. at 15); *compare* (DC 5260, 5261) *with* (R. at 3072).

Thus, had the Board considered the range of motion test results alone, it would not have even found a 10% rating applicable. Instead, the Board demonstrably considered more than merely the range of motion testing and contemplated an even higher rating based on more than range of motion, before finding that the 10% rating adequately compensated Appellant for his condition. (R. at 15) (noting the requirements of §§ 4.40, 4.45, 4.59, and *DeLuca*).

Accordingly, the Court should find that the Board provided an adequate statement of reasons or bases for its decision, and further, that Appellant has not demonstrated that the Board's rating decision was clearly erroneous. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

iii. *Functional Loss Under § 4.45(f)*

Regarding Appellant's argument under 38 C.F.R. § 4.45(f) that "[the Board] should have explained whether and how [Appellant's] functional loss did or did not justify the assignment of a higher rating," the Board, again, did not commit error. (App. at 23). As mentioned above, the Board *did* take Appellant's functional loss into consideration when determining whether a higher rating was appropriate. (R. at 15-16); *supra* 18-19. Because the Board determined that Appellant's current rating adequately compensated him for his right knee condition, it did not need to consider his functional loss as a separate compensable disability—it was already accounted for. *See Lyles*, 29 Vet.App. at 117. In fact, this line of argument simply

reasserts Appellant's previous contentions, which have been proven to be unpersuasive by the foregoing.

Accordingly, the Court should find that the Board provided an adequate statement of reasons or bases for its decision, and further, that Appellant has not demonstrated that the Board's rating decision was clearly erroneous. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

C. The Board Issued a Proper Rating Decision.

The Board's decision to maintain Appellant's 10% rating under DC 5261 was not arbitrary and capricious, nor was its decision not to assign a separate rating for Appellant's functional loss or imbalance and instability.

It is the Board that is responsible for the assignment of the appropriate evaluation to a service-connected disability. *See* 38 C.F.R. § 4.6 (2019). Whether VA has selected the proper DC is "not a question of law because it is a determination that is completely dependent upon the facts of a particular case." *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc). This determination involves the application of the law to a specific set of facts. *Id*.

The Board's selection of the proper diagnostic code is entitled to deference under the "arbitrary and capricious" standard of review. *Butts*, 5 Vet.App. at 539; *see also Vogan v. Shinseki*, 24 Vet.App. 159, 161 (2010). The scope of review under the "arbitrary and capricious" standard is narrow, and a court is not to substitute its judgment for that of the agency. *Sorakubo v. Principi*, 16 Vet.App.

120, 123 (2002). If the Board articulates a satisfactory explanation for its decision, "including a rational connection between the facts found and the choice made, the Court must affirm" its decision. *Lane v. Principi*, 16 Vet.App. 78, 83 (2002); *Jordan v. Brown*, 10 Vet.App. 171, 175 (1997).

Here, the Secretary has—to the extent possible—interpreted Appellant's argument as one that ostensibly posits that the Board erred in applying DC 5261 to Appellant's claim. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped). As an initial matter, Appellant has presented no evidence that the Board's application of the diagnostic code to the facts was arbitrary and capricious, and the Board's decision represents a rational connection between the facts found and the rating decision.

Appellant asserts the Board "failed to conduct a separate rating analysis," and in so doing, violated its duty to maximize his benefits. (App. at 24). In making this argument, Appellant relies on *Esteban v. Brown* for the assertion that "when a veteran has separate and distinct manifestations attributable to the same injury, he may be compensated under different diagnostic codes." (App. at 24); 6 Vet.App. 259, 261 (1994). Unfortunately, Appellant has misapplied the nature of the Court's ruling in *Esteban* to the facts of this case.

In *Esteban*, the Court held that the "critical element" in determining whether separate disability ratings are proper is if the symptomatology of each rating is "distinct and separate." 6 Vet.App. at 262. The claimant in *Esteban* had four

different scars on his face as a result of a vehicle accident in service and had been assigned a 10% disability rating under 38 C.F.R. § 4.118 (DC 7800). *Id*. The Board in that case determined that the claimant's scars might also have been properly evaluated under two additional DCs, 7804 or 5325, but decided that the claimant was only entitled to one 10% disability rating, not three separate 10% disability ratings combined under § 4.25, because "the evidence of record show[ed] that the residual of an injury to the right side of the veteran's face is compatible with, but does not meet[,] any of the schedular criteria for a rating higher than 10 percent." 6 Vet.App. at 260. The Court, however, disagreed, holding that "[t]he critical element is that *none* of the symptomatology for any one of these three conditions is *duplicative* of or *overlapping* with the symptomatology of the other two conditions. Appellant's symptomatology is distinct and separate . . . ." *Id*. at 261-262.

Unlike in *Esteban*, here, Appellant is seeking two separate disability ratings for the *same* condition or disability—right PFPS. *See* (R. at 8981-8983). As established by the foregoing, Appellant's current 10% rating contemplates both his functional loss *and* his range of motion tests. Consequently, the addition of a separate rating based on the symptomology of Appellant's functional loss (to include imbalance and instability)—which he argues supports this separate rating—would necessarily overlap with the symptomology of his current rating. Such an overlap was expressly prohibited by the *Esteban* court. 6 Vet.App. at 261-262 (requiring that the symptomology giving rise to separate ratings be

"distinct and separate"). Therefore, the Could should hold *Esteban* inapplicable to this case and find Appellant's citation to and reliance on it unpersuasive.

Likewise, the Court should find that the Board selected the proper diagnostic code and provided a rational connection between the facts and its rating decision provided, and further, that Appellant has not demonstrated that the Board's diagnostic code selection was arbitrary and capricious. *See Butts*, 5 Vet.App. at 539; *see also Vogan*, 24 Vet.App. at 161; *Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

D. Appellant Has Abandoned All Issues Not Argued in His Brief.

It is axiomatic that issues or arguments not raised on appeal are abandoned. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed.Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned Board determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all issues that have not been addressed in Appellant's brief have therefore been abandoned.

V. CONCLUSION

For the foregoing reasons, the Secretary respectfully submits that the December 4, 2018, Board decision be affirmed in all respects.

Respectfully submitted,

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