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BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: November 30, 2018 SS [redacted]

CHRISTOPHER SCALLORN

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

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

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

Sincerely yours,

K. Osborne
Deputy Vice Chairman
Enclosures (1)
CC: Allen Gumpenberger, Agent

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
CHRISTOPHER SCALLORN
REPRESENTED BY
Allen Gumpenberger, Agent

SS [redacted]
Docket No. 16-37 429

DATE: November 30, 2018

ORDER

An effective date earlier than April 30, 2013 for the assignment of an increased rating for right knee mild early medial compartment arthritis is denied.

A rating in excess of 10 percent for right knee mild early medial compartment arthritis is denied.

A rating in excess of 10 percent for left knee mild medial joint compartment arthritis prior to April 23, 2015 is denied.

A rating in excess of 60 percent for left knee mild medial joint compartment arthritis, status post total knee replacement, for the period starting June 1, 2016 is denied.

A separate 10 percent rating since for slight left knee lateral instability is granted.

Service connection for erectile dysfunction is denied.

The application to reopen the previously disallowed claim for service connection for chronic low back pain with a history of L5-S1 fusion for L5-S1 spondylolisthesis is granted. To this extent only, the appeal is granted.

The application to reopen the previously disallowed claim for service connection for a foot disability, including chronic bilateral second and third metatarsal bone metatarsalgia and stress fractures, is granted. To this extent only, the appeal is granted.

IN THE APPEAL OF SS [redacted]
CHRISTOPHER SCALLORN Docket No. 16-37 429

REMANDED

Entitlement to service connection for chronic low back pain with history of L5-S1 fusion for L5-S1 spondylolisthesis is remanded.

Entitlement to service connection for a foot disability, including chronic bilateral second and third metatarsal bone metatarsalgia, stress fractures and plantar fasciitis, is remanded.

Entitlement to special monthly compensation (SMC) for loss of use of a creative organ is remanded.

FINDINGS OF FACT

1. The Veteran's claim for an increased rating for his right knee disability was received on February 6, 2014 but an increase in disability was factually ascertainable on April 30, 2013.

2. For the entire appeal period, the Veteran's right knee mild early medial compartment arthritis has been characterized by painful motion, flexion limited to 90 degrees, and extension limited to 0 degrees.

3. Prior to April 23, 2015, the Veteran's left knee mild medial joint compartment arthritis was characterized by painful motion, flexion limited to 115 degrees and extension limited to 0 degrees.

4. Since June 1, 2016, the Veteran's left knee mild medial joint compartment arthritis, status post total knee replacement, has been characterized by chronic residuals consisting of severe painful motion or weakness in the affected extremity.

5. Since September 21, 2016, the Veteran's left knee disability has been manifested by slight lateral instability.

6. The Veteran has not been shown to have a diagnosis of erectile dysfunction at any time since separation from active service in July 1989.

7. The Veteran's claims for service connection for chronic low back pain with history of L5-S1 fusion for L5-S1 spondylolisthesis and chronic bilateral second and third metatarsal bone metatarsalgia and stress fractures were denied in an unappealed rating decision in February 2011.

8. The evidence received since the February 2011 rating decision regarding service connection for a back disability and foot disability is not cumulative or redundant and raises the possibility of substantiating the claims.

CONCLUSIONS OF LAW

1. The criteria for an effective date earlier than April 30, 2013 for the increased evaluation for right knee mild early medial compartment arthritis have not been met. 38 U.S.C. § 5110 (2012); 38 C.F.R. §§ 3.1, 3.155, 3.400 (2018).

2. The criteria for entitlement to a rating in excess of 10 percent for right knee mild early medial compartment arthritis have not been met. 38 U.S.C. §§ 1155, 5107 (2012); 38 C.F.R. §§ 3.102, 4.1, 4.2, 4.3, 4.7, 4.40, 4.45, 4.59, 4.71a, Diagnostic Code 5260 (2018).

3. The criteria for entitlement to a rating in excess of 10 percent for left knee mild medial joint compartment arthritis prior to April 23, 2015 have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 4.1, 4.2, 4.3, 4.7, 4.40, 4.45, 4.59, 4.71a, Diagnostic Code 5260.

4. The criteria for a rating in excess of 60 percent for left knee mild medial joint compartment arthritis, status post total knee replacement, since June 1, 2016 have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 4.1, 4.2, 4.3, 4.7, 4.14, 4.71a, Diagnostic Code 5055 (2018).

5. The criteria for a separate rating of 10 percent for left knee lateral instability have been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 4.1, 4.2, 4.3, 4.7, 4.71a, Diagnostic Code 5257 (2018).

6. The criteria for entitlement to service connection for erectile dysfunction have not been met. 38 U.S.C. §§ 1101, 1131, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303 (2018).

7. The February 2011 rating decision denying entitlement to service connection for chronic low back pain with history of L5-S1 fusion for L5-S1 spondylolisthesis and chronic bilateral second and third metatarsal bone metatarsalgia and stress fractures is final. 38 U.S.C. § 7105(b), (d) (2012); 38 C.F.R. §§ 3.104, 20.302, 20.1103 (2018).

8. New and material evidence has been received since the February 2011 rating decision to reopen the service connection claim for chronic low back pain with history of L5-S1 fusion for L5-S1 spondylolisthesis. 38 U.S.C. §§ 1131, 5108, 7104 (2012); 38 C.F.R. §§ 3.156, 3.310 (2018).

9. New and material evidence has been received since the February 2011 rating decision to reopen the service connection claim for a foot disability, including chronic bilateral second and third metatarsal bone metatarsalgia and stress fractures chronic low back pain with history of L5-S1 fusion for L5-S1 spondylolisthesis. 38 U.S.C. §§ 1131, 5108, 7104; 38 C.F.R. §§ 3.156, 3.303 (2018).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from July 1986 to July 1989.

With regard to the issues on appeal for higher ratings, to include an earlier effective date, for right and left knee disabilities, as well as for service connection for erectile dysfunction, neither the Veteran nor his representative has raised any issues with the duty to notify or duty to assist. *See Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) (holding that "the Board's obligation to read filings in a liberal manner does not require the Board... to search the record and address procedural arguments when the veteran fails to raise them before the Board."); *Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016) (applying *Scott* to a duty to assist argument).

In light of the May 2015 correspondence from the Veteran's representative, if the Veteran wishes to reopen the issue of entitlement to service connection for infertility, to include sterility, he and his representative are advised that a claim for benefits must be submitted on the application form prescribed by the Secretary. 38 C.F.R. §§ 3.1(p) (2012), 3.155, 3.160 (2018).

The Board notes that the Veteran's combined schedular rating effective from April 23, 2015 has been 100 percent disabling and the issue of entitlement to a total disability rating based on individual unemployability (TDIU) was denied in a January 2017 VA rating decision. The Veteran did not file a timely notice of disagreement for that issue nor has it been subsequently raised in connection with the service-connected disabilities on appeal for the appeal period prior to April 23, 2015. Thus, the issue of entitlement to a TDIU is not currently before the Board for appellate consideration. *See Rice v. Shinseki*, 22 Vet. App. 447 (2009); *see also Jackson v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009).

1. Earlier Effective Date for Assignment of Increased Rating for Right Knee Mild Early Medial Compartment Arthritis

In general, the effective date of an award of disability compensation shall be the date of the claim, or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(o)(1). An exception to this rule is in the case of non-initial increased rating claims when it is factually ascertainable that an increase in disability occurred within the one-year period prior to the filing date of the claim. In this case, the effective date will be the date the increase was shown. 38 C.F.R. § 3.400(o)(2).

VA shall construe any communication or action from a Veteran indicating intent to apply for one or more benefits as an informal claim. For any informal claim received prior to March 24, 2015, VA is required to identify and act on such claims, provided such a claim identifies the benefit sought. 38 U.S.C. § 5110(b)(3); 38 C.F.R. §§ 3.1(p), 3.155(a). VA is not required to anticipate any potential claim for a particular benefit where no intention to raise it was expressed. *See Brannon v. West*, 12 Vet. App. 32, 35 (1998) (holding that before VA can adjudicate a claim for benefits, the claimant must submit a written document identifying the benefit and expressing some intent to seek it).

Here, the Veteran filed his claim for an increased rating for his right knee disability on February 6, 2014. The January 2015 rating decision granting the increase assigned an effective date of April 30, 2013, the date it is factually ascertainable that an increase in disability occurred. *See* July 2014 CAPRI, p. 56. There is no other evidence of record that demonstrates that an increase in disability occurred at any time from February 6, 2013 to April 29, 2013. Moreover, the evidence does not show, nor does the Veteran contend, that he submitted any communication that could be construed as a formal or informal claim for an increased rating for his right knee disability any time from February 6, 2013 to April 29, 2013. *See Brannon*, 12 Vet. App. at 35.

The Board finds that the preponderance of the evidence is against the assignment of an earlier effective date for the award of an increased rating for a right knee mild medial compartment arthritis. The Veteran submitted his claim for an increased rating on February 6, 2014 and the earliest date, within the one-year period preceding the filing date, that it is factually ascertainable that an increase in disability occurred is April 30, 2013. In the case of this non-initial increased rating claim, the appropriate effective date is April 30, 2013. *See* 38 U.S.C. § 5110; 38 C.F.R. § 3.400(b)(2)(i). Accordingly, the claim for an earlier effective date for the award of an increased rating for right knee mild medial compartment arthritis is not warranted.

Increased Ratings

Disability ratings are determined by applying the criteria set forth in VA's Schedule for Rating Disabilities, which is based on the average impairment of earning capacity. Individual disabilities are assigned separate diagnostic codes. 38 U.S.C. § 1155; 38 C.F.R. § 4.1. If two evaluations are potentially applicable, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. When reasonable doubt arises as to the degree of disability, such doubt will be resolved in the veteran's favor. 38 C.F.R. § 4.3.

Where entitlement to compensation has already been established and an increase in the disability rating is at issue, such as for the service-connected right and left knee disabilities in this case, the present level of disability is of primary concern.

Although a rating specialist is directed to review the recorded history of a disability to make a more accurate evaluation, the regulations do not give past medical reports precedence over current findings. 38 C.F.R. § 4.2; *Francisco v. Brown*, 7 Vet. App. 55, 58 (1994).

When evaluating musculoskeletal disabilities based on limitation of motion, 38 C.F.R. § 4.40 requires consideration of functional loss caused by pain or other factors listed in that section that could occur during flare-ups or after repeated use and, therefore, not be reflected on range-of-motion testing. 38 C.F.R. § 4.45 requires consideration also be given to less movement than normal, more movement than normal, weakened movement, excess fatigability, incoordination, and pain on movement. *See DeLuca v. Brown*, 8 Vet. App. 202 (1995); *see also Mitchell v. Shinseki*, 25 Vet. App. 32, 44 (2011). Nonetheless, even when the background factors listed in § 4.40 or 4.45 are relevant when evaluating a disability, the rating is assigned based on the extent to which motion is limited, pursuant to 38 C.F.R. § 4.71a (musculoskeletal system); a separate or higher rating under § 4.40 or 4.45 itself is not appropriate. *See Thompson v. McDonald*, 815 F.3d 781, 785 (Fed. Cir. 2016) ("[I]t is clear that the guidance of § 4.40 is intended to be used in understanding the nature of the veteran's disability, after which a rating is determined based on the § 4.71a [or 4.73] criteria.").

2. Right Knee Mild Early Medial Compartment Arthritis

In a February 2011 rating decision, service connection for a right knee disability was granted and assigned as noncompensable (0 percent) effective for the entire appeal period from June 3, 2010. 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5260. In February 2014, the Veteran requested a higher compensable rating. In the January 2015 rating decision on appeal, the RO increased the rating to 10 percent effective from April 30, 2013 (date entitlement arose within one year prior to the date of claim). *Id*. Thus, the Board considers whether a rating in excess of 10 percent for right knee mild early medial compartment arthritis is warranted at any time since April 30, 2013.

Under DC 5260, a 10 percent rating is assigned for flexion of the leg limited to 45 degrees; a 20 percent rating is assigned for flexion limited to 30 degrees; and, a

30 percent rating, the maximum available, is assigned for flexion limited to 15 degrees. *Id*.

Review of the evidentiary record since April 30, 2013 documents the following musculoskeletal symptomatology of the right knee.

The evidence demonstrates that the Veteran's right knee mild early medial compartment arthritis is characterized by painful motion, flexion limited to 90 degrees and extension to 0 degrees. The Veteran underwent VA examinations in August 2014 and September 2016.

At the August 2014 examination, the Veteran's right knee flexion was to 130 degrees and extension was to 0 degrees. The examiner observed pain to palpation over the joint line but there was no observed instability and muscle strength was normal. The Veteran described the functional impact of his flare-ups as pain with prolonged walking.

At the September 2016 examination, the Veteran's flexion was to 90 degrees and extension was to 0 degrees. The Veteran described his flare-ups as increased pain, moderate swelling and decreased range of motion that limits activity. The examiner was not able to describe the functional impact of flare-ups in terms of range of motion but indicated that increased pain, fatigue and lack of endurance resulted in additional functional loss. Moreover, the examiner indicated that the examination was medically consistent with the Veteran's statements describing functional loss during a flare-up. Muscle strength was normal and there was no instability.

Review of treatment records demonstrate that the Veteran experienced knee pain, occasional giving out, flexion to 103 degrees, and extension to 0 degrees. *See* January 2014 CAPRI, p. 13; July 2014 CAPRI, p. 56; January 2015 CAPRI, pp. 34, 75, 79; July 2016 CAPRI, pp. 7; April 2017 CAPRI, pp. 4-5; April 2017 CAPRI, p. 1.

The Board finds that the weight of the evidence preponderates against a finding of entitlement to a rating in excess of 10 percent for right knee mild early medial compartment arthritis. To receive a higher evaluation, the Veteran's right knee

flexion must be limited to 30 degrees. The evidence fails to demonstrate that the Veteran's right knee flexion was limited to 30 degrees at any point during the appellate period; rather, the evidence shows that the Veteran's flexion has been limited at most to 90 degrees. Thus, a rating in excess of 10 percent for right knee mild early medial compartment arthritis is not warranted under DC 5260.

The Board has considered whether the Veteran would be entitled to a higher rating under a different diagnostic code for his right knee disability. To receive a higher rating, the evidence must demonstrate a finding of right knee ankylosis; recurrent subluxation or lateral instability of moderate severity; cartilage, semilunar, dislocated, with frequent episodes of "locking," pain, and effusion into the joint; limitation of extension to 15 degrees or greater; or, impairment of the tibia and fibula with moderate knee or ankle disability. *See* 38 C.F.R. § 4.71a, DCs 5256, 5257, 5258, 5262. The Board finds that the objective medical evidence does not demonstrate any of the aforementioned characteristics in the Veteran's right knee at any time during this appeal period.

After a review of the evidence discussed above, the Board finds that the functional equivalent of ankylosis; recurrent subluxation or lateral instability of moderate severity; cartilage, semilunar, dislocated, with frequent episodes of "locking," pain, and effusion into the joint; limitation of extension to 15 degrees or greater; or, impairment of the tibia and fibula with moderate knee or ankle disability is not shown at any time. Such findings were not shown, even when considering the Veteran's reported symptomatology for the service-connected right knee disability. The Veteran's reported symptomatology did not, when viewed in conjunction with the medical evidence, tend to establish additional limitations of motion to the degree that would warrant a rating in excess of 10 percent for the service-connected right knee disability at any time during the appeal under 38 C.F.R. §§ 4.40, 4.45, 4.59 and the holdings in *DeLuca* and *Mitchell*.

3. Left Knee Mild Early Medial Compartment Arthritis

In a February 2011 rating decision, service connection for a left knee disability was granted and assigned a 10 percent disability rating effective for the entire appeal period from June 3, 2010. 38 C.F.R. § 4.71a, DC 5260. On February 6, 2014, the Veteran requested a higher rating and the 10 percent disability rating was

continued in a January 2015 rating decision. During the course of the appeal, in a September 2015 rating decision, a temporary total evaluation of 100 percent was granted effective from April 23, 2015 to May 31, 2016 and a 30 percent rating was continued thereafter. 38 C.F.R. § 4.71a, DC 5055. In a subsequent January 2017 rating decision, the RO increased the rating to 60 percent effective from June 1, 2016. *Id*. Since the 10 and 60 percent disability ratings are not the maximum ratings available prior to April 23 or since June 1, 2016, the issue has been characterized accordingly. *See AB v. Brown*, 6 Vet. App. 35 (1993).

As such, the Board considers whether a rating in excess of 10 percent prior to April 23, 2015 and in excess of 60 percent since June 1, 2016 for left knee mild early medial compartment arthritis is warranted in this case.

A. Prior to April 23, 2015

For the period prior to April 23, 2015, the Veteran's left knee mild early medial compartment arthritis was evaluated under 38 C.F.R. § 4.71a, DC 5260.

Again, under DC 5260, a 10 percent rating is assigned for flexion of the leg limited to 45 degrees; a 20 percent rating is assigned for flexion limited to 30 degrees; and, a 30 percent rating, the maximum available, is assigned for flexion limited to 15 degrees.

Review of the evidentiary record from February 6, 2014, to include within one year prior, to April 22, 2015 documents the following musculoskeletal symptomatology of the left knee.

The Veteran's left knee disability was characterized by painful movement, flexion limited to 115 degrees and extension limited to 0 degrees. The Veteran underwent a VA examination in August 2014. His left knee flexion was to 130 degrees and extension to 0 degrees. The Veteran reported the impact of flare-ups as pain with prolonged walking and additional functional impairment included pain on movement and disturbance of locomotion. There was also pain to palpation. Treatment records from this time demonstrate that the Veteran's left knee symptoms included pain, giving way, crepitus, and flexion to 115 degrees. July 2014 CAPRI, pp. 56, 80, 81; January 2015 CAPRI, pp. 34, 81, 83, 84; July 2016

CAPRI, p. 10; December 2016 Private Treatment Records, p. 9. A June 2013 clinician also documented minimal laxity per anterior drawers. *See* January 2015 CAPRI, p. 84.

The Board finds that the weight of the evidence preponderates against a finding of entitlement to a rating in excess of 10 percent for left knee mild early medial compartment arthritis. To receive a higher evaluation, the Veteran's left knee flexion must be limited to 30 degrees. The evidence fails to demonstrate that the Veteran's left knee flexion was limited to 30 degrees at any point during this appeal period; rather, the evidence shows that the Veteran's flexion has been limited at most to 115 degrees. Thus, a rating in excess of 10 percent for the period prior to April 23, 2015 for left knee mild early medial compartment arthritis is not warranted under DC 5260.

The Board has considered whether the Veteran would be entitled to a higher rating under a different diagnostic code for his left knee disability. To receive a higher rating, the evidence must demonstrate a finding of left knee ankylosis; recurrent subluxation or lateral instability of moderate severity; cartilage, semilunar, dislocated, with frequent episodes of "locking," pain, and effusion into the joint; limitation of extension to 15 degrees or greater; or, impairment of the tibia and fibula with moderate knee or ankle disability. *See* 38 C.F.R. § 4.71a, DCs 5256, 5257, 5258, 5262. The Board finds that the objective medical evidence does not demonstrate any of the aforementioned characteristics in the Veteran's left knee at any time during this appeal period.

After a review of the evidence discussed above, the Board finds that the functional equivalent of ankylosis; recurrent subluxation or lateral instability of moderate severity; cartilage, semilunar, dislocated, with frequent episodes of "locking," pain, and effusion into the joint; limitation of extension to 15 degrees or greater; or, impairment of the tibia and fibula with moderate knee or ankle disability is not shown at any time. Such findings were not shown, even when considering the Veteran's reported symptomatology for the service-connected left knee disability. The Veteran's reported symptomatology did not, when viewed in conjunction with the medical evidence, tend to establish additional limitations of motion to the degree that would warrant a rating in excess of 10 percent for the service-connected left knee disability at any time during the appeal period prior to April

23, 2015 under 38 C.F.R. §§ 4.40, 4.45, 4.59 and the holdings in *DeLuca* and *Mitchell*.

B. Since June 1, 2016

For the period starting June 1, 2016, the Veteran's left knee disability has been rated under the provisions of 38 C.F.R. § 4.71a, DC 5055.

Under DC 5055, a 60 percent rating is assigned for knee replacement with chronic residuals consisting of severe painful motion or weakness in the affected extremity, and a 100 percent rating, the maximum available, is assigned for one year following implantation of the prosthesis.

Review of the evidentiary record since June 1, 2016 documents the following musculoskeletal symptomatology of the left knee.

The Veteran's left knee disability has been characterized by severe painful motion and weakness. At the September 2016 examination, the Veteran reported severe swelling, pain and decreased range of motion in the left knee. The examiner further observed ankylosis, localized tenderness, crepitus, weakness, lack of endurance, recurrent patella dislocation, and slight lateral instability of the left knee. Treatment records demonstrate similar symptoms and include severe pain and recurrent effusion. *See* April 2017 CAPRI, pp. 1-3.

The preponderance of the evidence is against the Veteran's claim for a rating in excess of 60 percent for his left knee disability under DC 5055. A higher evaluation is only available for the one-year period following total knee replacement surgery. The Veteran underwent a left knee total knee replacement in April 2015 and was in receipt of a 100 percent rating from April 23, 2015 through May 31, 2016. *See* December 2016 Private Treatment Records, p. 8. Since June 1, 2016, the Veteran has been in receipt of a 60 percent rating, the maximum allowable rating for a knee replacement after the one-year period has elapsed.

Moreover, it is not possible for the Veteran to receive a higher rating under a different diagnostic code because 60 percent is the maximum allowable rating for all other applicable diagnostic codes for the knee. *See* 38 C.F.R. § 4.71a.

Accordingly, a rating in excess of 60 percent for left knee mild medial joint compartment arthritis, status post total knee replacement, for the period starting June 1, 2016, is not warranted.

Furthermore, given that the Veteran is already in receipt of the schedular maximum for limitation of motion of the left knee, inquiry into the *DeLuca* factors is moot for the appeal period since June 1, 2016. *DeLuca*, 8 Vet. App. at 206; *Johnston v. Brown*, 10 Vet. App. 80, 87 (1997).

C. Lateral Instability

Separate ratings may be assigned for distinct disabilities from the same injury if the symptomatology for the conditions is not duplicative or overlapping; however, the evaluation of the same disability under several diagnostic codes, known as pyramiding, must be avoided. *Amberman v. Shinseki*, 570 F.3d 1377, 1381 (Fed. Cir. 2009); 38 C.F.R. § 4.14. DC 5055 refers to chronic residuals consisting of painful motion or weakness. Although that criteria necessarily encompasses any other description of disability resulting from painful motion and weakness, reasonably including fatigue and any incoordination due to weakness or pain, it does not encompass instability—a manifestation that could exist without pain or weakness. *See* VAOPGCPREC 23-97 (July 1, 1997), 62 Fed. Reg. 63604 (1997); *Esteban v. Brown*, 6 Vet. App. 259 (1994). Therefore, a rating under DC 5055 does not preclude a separate additional rating under DC 5257 for instability.

The Board finds that, beginning September 21, 2016, a separate 10 percent rating is warranted for slight lateral instability of the left knee under 38 C.F.R. § 4.71a, Diagnostic Code 5257. 38 C.F.R. § 4.14. Under DC 5257, a 10 percent rating is assigned for slight lateral instability, a 20 percent rating is assigned for moderate instability, and a 30 percent rating is assigned for severe instability. The September 2016 examination report indicated that the Veteran has slight lateral instability of the left knee. Accordingly, a separate 10 percent rating for left knee lateral instability is warranted.

D. Additional Considerations

The Board considers the Veteran's reported history of symptomatology related to the service-connected right and left knee disabilities. He is competent to report such symptoms and observations because this requires only personal knowledge as it comes through one's senses. *Layno v. Brown*, 6 Vet. App. 465, 470 (1994). In this case, although the descriptions of his symptoms are competent and credible, they do not show that the criteria for higher ratings for his right and left knee disabilities have been met. *Kahana v. Shinseki*, 24 Vet. App. 428 (2011). In this case, competent evidence concerning the nature and extent of the Veteran's disabilities has been provided in the medical evidence of record. As such, the Board finds these records to be more probative than the Veteran's subjective reported worsened symptomatology. *See Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991).

The Board has considered the possibility of staged ratings and finds that the proper ratings for the right and left knee disabilities have been in effect for the appropriate appeal periods. Accordingly, additional staged ratings are inapplicable. *See Hart v. Mansfield*, 21 Vet. App. 505 (2007).

4. Entitlement to Service Connection for Erectile Dysfunction

Service connection may be established for disability resulting from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service. 38 U.S.C. § 1131. Direct service connection generally requires credible and competent evidence showing: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009). Service connection may also be granted for any injury or disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease or injury was incurred in service. 38 C.F.R. § 3.303(d).

The requirement that a current disability be present is satisfied when a claimant has a disability at the time a claim for VA disability compensation is filed or during the pendency of that claim, even if the disability resolves prior to the adjudication of the claim. *See McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007).

In this case, the Regional Office inferred a claim for entitlement to service connection for erectile dysfunction from a February 2014 Correspondence from the Veteran's representative. Review of the record does not indicate, nor does the Veteran assert that he has, a current diagnosis of or treatment for erectile dysfunction at any time since separation from active service in july 1989. In light of the evidence, the Board finds that the Veteran does not have a current disability related to erectile dysfunction and the first element of service connection has not been established. *See Holton*, 557 F.3d at 1366.

In the absence of a current disability, the evidence preponderates against the claim and there is no reasonable doubt to be resolved. Accordingly, service connection for erectile dysfunction must be denied. *See* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992).

5. Whether New and Material Evidence Has Been Received to Reopen a Previously Denied Claim of Entitlement to Service Connection for Chronic Low Back Pain

The claim for service connection for chronic low back pain with history of L5-S1 fusion for L5-S1 spondylolisthesis was denied in a February 2011 rating decision. The Regional Office determined that the evidence of record did not demonstrate a nexus between the Veteran's current disability and his service-connected left knee disability. The Veteran did not appeal this decision or submit new evidence within one year of the denial. The February 2011 decision thereby became final. *See* 38 U.S.C. § 7105(b), (d); 38 C.F.R. §§ 20.302, 20.1103.

Since that final decision, the Board finds that the Veteran has submitted new and material evidence. Specifically, the Veteran has submitted evidence that his service-connected knee disability results in an antalgic gait. *See* April 2017 CAPRI, p. 1. The Board finds that the newly submitted evidence reasonably raises the possibility of substantiating the claim for service connection on a secondary basis to additional service-connected musculoskeletal disabilities (other than the left knee), which was not considered at the time of the February 2011 rating decision. As a result, this claim is reopened. *Shade v. Shinseki*, 24 Vet. App. 110, 118 (2010); *see also Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (noting that new evidence could be sufficient to reopen a claim if it could contribute to a

more complete picture of the circumstances surrounding the origin of a claimant's injury or disability, even where it would not be enough to convince the Board to grant the claim).

6. Whether New and Material Evidence Has Been Received to Reopen a Previously Denied Claim of Entitlement to Service Connection for Chronic Bilateral Second and Third Metatarsal Bone Metatarsalgia and Stress Fractures

The claim for service connection for chronic bilateral second and third metatarsal bone metatarsalgia and stress fractures was denied in a February 2011 rating decision. The Regional Office determined that the evidence of record did not demonstrate a nexus between the Veteran's current disability and his active duty service. The Veteran did not appeal this decision or submit new evidence within one year of the denial. The February 2011 decision thereby became final. *See* 38 U.S.C. § 7105(b), (d); 38 C.F.R. §§ 20.302, 20.1103.

Since that final decision, the Board finds that the Veteran has submitted new and material evidence. Specifically, the Veteran has submitted evidence of an additional current disability that was not previously considered at the time of the prior decision. *See* July 2016 CAPRI, p. 1. The Board finds that the newly submitted evidence reasonably raises the possibility of substantiating the claim for service connection, and the Board will reopen the claim. *Shade*, 24 Vet. App. at 118; *see also Hodge*, 155 F.3d at 1363.

REASONS FOR REMAND

1. Entitlement to Service Connection for Chronic Low Back Pain with History of L5-S1 Fusion for L5-S1 Spondylolisthesis

The Veteran has been observed as having an altered gait as a result of his service-connected musculoskeletal disabilities. *See* April 2017 CAPRI, p. 1. In an August 2014 letter, the Veteran's representative asserted the Veteran's low back disability is related to service or secondary to service-connected disabilities. During the course of the appeal, a VA medical opinion was provided in January 2015. The

VA examiner rendered a diagnosis of degenerative arthritis of the spine and explained why it is less likely than not proximately due to or the result of the Veteran's mild knee arthritis. Nevertheless, a VA medical opinion has not been provided addressing whether the Veteran's service-connected knee disabilities have aggravated the back disability or whether his service-connected hip disabilities have caused or aggravated the back disability. Accordingly, the AOJ should obtain an addendum opinion that addresses whether the Veteran's back disability is etiologically related to his service-connected knee and hip disabilities.

2. Entitlement to Service Connection for a Foot Disability, including Chronic Bilateral Second and Third Metatarsal Bone Metatarsalgia, Stress Fractures and Plantar Fasciitis

The Veteran has a current diagnosis of plantar fasciitis during the appeal period, *see* July 2016 CAPRI, p. 1, and the Veteran contends that he has had bilateral foot pain since service in 1988. *See* October 2010 VA Examination, p. 8. There is no medical opinion of record that addresses whether the Veteran's current foot disability is etiologically related to his active duty service. On remand, the Regional Office should obtain an opinion on the etiology of the Veteran's foot disability. *See McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

3. Entitlement to SMC for Loss of Use of Creative Organ

The Veteran is service connected for bilateral chronic testicular pain claimed as testicle problem with residual epididymitis and scar tissue. The evidence of record is unclear as to whether the Veteran's disability constitutes loss of a creative organ under the provisions of 38 C.F.R. § 3.350(a)(1)(i)(c).

The matter is REMANDED for the following actions:

> 1. Return the Veteran's claims file to the examiner who conducted the January 2015 VA DBQ examination so a supplemental opinion may be provided. If that examiner is no longer available, provide the Veteran's claims file to a similarly qualified clinician. The entire claims file and a copy of this remand must be made available to the

examiner for review, and the examiner must specifically acknowledge receipt and review of these materials in any reports generated. A new examination is only required if deemed necessary by the examiner.

The examiner must opine as to the following:

> (a.) Whether it is at least as likely as not (50 percent or greater probability) that the Veteran's back disability began during active service, is related to an incident of service, if symptoms of arthritis began within one year after discharge from active service.
>
> (b.) Whether it is at least as likely as not that the Veteran's back disability was proximately due to or the result of his service-connected right knee, left knee, right hip, and/or left hip disability.
>
> (c.) Whether it is at least as likely as not that the Veteran's back disability was aggravated beyond its natural progression by his service-connected right knee, left knee, right hip, or left hip disability.

2. The examiner must provide all findings, along with a complete rationale for his or her opinion(s) in the examination report. If any of the above requested opinions cannot be made without resort to speculation, the examiner must state this and provide a rationale for such conclusion.

3. Schedule the Veteran for an examination with an appropriate clinician for his bilateral foot disability. The entire claims file and a copy of this remand must be made available to the examiner for review, and the examiner

must specifically acknowledge receipt and review of these materials in any reports generated.

The examiner must provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that the Veteran's disability began during active service or is related to an incident of service, to include his reported onset of pain during service.

The examiner must provide all findings, along with a complete rationale for his or her opinion(s) in the examination report. If any of the above requested opinions cannot be made without resort to speculation, the examiner must state this and provide a rationale for such conclusion.

4. Schedule the Veteran for an examination with an appropriate clinician to determine the severity of his service-connected bilateral chronic testicular pain. The entire claims file and a copy of this remand must be made available to the examiner for review, and the examiner must specifically acknowledge receipt and review of these materials in any reports generated.

The examiner must provide all findings, along with a complete rationale for any opinions provided, to include the effects of the Veteran's service-connected bilateral chronic testicular pain on the use of his creative organ.

If any of the above requested opinions cannot be made without resort to speculation, the examiner must state this and provide a rationale for such conclusion.

5. Then, review the examination reports and medical opinions to ensure that the requested information was

provided. If any report or opinion is deficient in any manner, the RO must implement corrective procedures.

6. Then, readjudicate the claims. If any decision is adverse to the Veteran, issue a Supplemental Statement of the Case and allow the applicable time for response. Then, return the case to the Board.

T. Blake Carter
Acting Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD W.V. Walker, Associate Counsel

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).