

Vet. App. No. 19-4123

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

STACEY D. DUFFEY
Pro-se Appellant

v.

ROBERT L. WILKIE
Secretary, of Veterans Affairs
Appellee

APPELLANT REPLY IN RESPONSE TO APPELLEE BRIEF

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

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
625 INDIANA AVENUE, NW SUITE 900
WASHINGTON, D.C. 20004**

STACEY D. DUFFEY,
Appellant

v.

Vet. App. #19-4123

ROBERT L. WILKIE
Secretary, of Veterans Affairs,
Appellee

**APPELLANT REPLY IN RESPONSE TO APPELLEE JANUARY
16, 2020 BRIEF PURSUANT TO RULE 28(C)**

Appellant (Stacey D. Duffey) pursuant to Rule of Practice and
Procedures file the following reply in response to Appellee brief dated
January 16, 2020 in accordance with Rule 28 (c).

Appellee [Br. at pg. 4] Summary of the Arguments suggest that the
Court should vacate & remand the Board's decision that denied veteran
entitlement to rating in excess of 10% percent for a right ankle
condition; THEN allege Veteran failed to point to any evidence showing
the requisite right ankle ankyloses (rigidity of joint) and thereby fails to
show Board erred; and failed to show Board erred when it did not

address whether appellant's condition(s) warranted extraschedular consideration; is contrary to the following Appellant stated facts:

U.S. Navy July 25, 1994 evaluation board findings: {**R.at pg. 77-84**} Noted: complete rupture of the lateral ligaments; x-ray of the right ankle compared to the left showed widening of the syndesmosis between the distal fibula and the tibia. Underwent closed reduction of the distal tibiofibular syndesmosis holding it with a cortical screw, and splint; with screw removed on April 11, 1994. Bone scan showed increased uptake of the right ankle, consistent with degenerative changes. Another MB on July 25, 1994 showed soft tissue swelling around the joint. X-rays obtained diagnosed early degenerative joint disease, status post (s/p) fracture of the right ankle that did not exist prior to enlistment.

On February 14, 1995 rating decision [**R.at pg.107-111**] denied entitlement to service connection for: (1) Bilateral knee pain; arthralgia both knees denied as not established; (2) Degenerative joint disease of the right ankle was granted 10% percent rating. **Contrary** to rating examiner note it reviewed the following records in reaching its decision: *Veteran Service medical treatment records from February 1993 through October 1994; and * Veterans Affairs Medical treatment records October 1994 through February, 1995.

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

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

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

On August 26, 2011 VA Houston RO made decision on Veteran claim for increased evaluation received February 5, 2011: [R.at pg.112]

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

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

Right Ankle Strain w/ Degenerative Arthritis & Callosities

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

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

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

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

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

RO February 14, 1995 decision rating specialist conceded VAE
Noted: {range of motion 10 degrees dorsiflexion, and 45 degrees plantar flexion; eversion or external rotation, 0 degrees on the right, and inversion or internal rotation was approximately 25 degrees}; 38 CFR Part 4 section 4.59 Painful motion; *incorrectly applied* provisions found at 38 CFR Part 4 section 4.71a diagnostic code **5270** [Ankle, ankyloses, of] which note warranted 40% percent evaluation rating where VAE range of motion diagnosis above meets definition of Ankle, ankyloses where regulation state:

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

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

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

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

RO Janesville WI., March 25, 2016 rating decision erred in failing to provide credible rationale for assignment of a lesser evaluation rating, and continued denial of higher evaluation rating where RO reasons for decision failed to completely weigh Veteran condition {joint, cartilage, & ligament, damage} noted in Military Service October 13, 1993 examiner diagnosed condition as follow:

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

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

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

“Degenerative joint disease of the right ankle” warranted due to “slight limitation of motion of dorsiflexion;” with range of motion was 10 degrees dorsiflexion, and 45 degrees plantar flexion; eversion or external rotation, was 0 degrees on the right, and inversion or internal rotation was approximately 25 degrees;

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

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

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

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


RO March 25, 2016 decision, and prior rating decision(s) **failed to provide** complete evaluation rating in compliance with {section 4.40} “Functional Loss” due to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidence by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part of which becomes painful on use must be regarded as seriously disabled. It is essential that the examination on which rating is based adequately portray the anatomical damage, and the functional loss, with respect to all these elements; and RO March 25, 2016 rating decision, and prior rating decision(s) - did not.

RO March 25, 2016 decision, and prior rating decision(s) **failed to comply** with regulatory provision found at 38 CFR section 3.309(a) which state: “the following diseases shall be granted service connection although not otherwise established as incurred in service if manifested to a compensable degree within the applicable time limits under section

3.307 following service in a period of war or following peacetime service;" WHERE RO February 14, 1995 decision rating specialist further conceded presumptive ***Diagnosis*** included: "Arthralgia of both knee's;" defined as pain in joint or joints. 38 CFR Part 4 Section 4.45 {Joints} involved, weakened movement, excess fatigability, incoordination, impaired skill movement, painful movement, swelling, deformity, etc.

WHEREFORE while remand is an appropriate consideration, it is not absolutely appropriate, where Appellee argue that same remand issue are inextricably intertwined with Veteran failure to point to any evidence showing the requisite right ankle ankyloses (rigidity of joint) warranted higher evaluation; and thereby fails to show Board erred; and failed to show Board erred when it did not address whether appellant's condition(s) warranted extraschedular consideration; contrary to the following Appellant noted facts on the record.

Respectfully Submitted


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

CERTIFICATE OF SERVICE

I certify that on this 22 day of January 2020 Appellant filed the following Reply in Response to Appellee January 16, 2020 Brief with the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, N.W., Suite 900, Washington, D.C. 20004 with copy to the Office of the General Counsel 810 Vermont Avenue, N.W., Washington, D.C. 20420, sent by certified mail.

Respectfully Submitted


Stacey Duffey

1549 Saddle Tree Road
Frisco, Texas 75034