REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-1581

LUIS G. DE PAZ,

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee

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I. The Secretary misinterprets or misunderstands the record and the law in his attempt to characterize the December 2017 VA examination as adequate, and claim the April 2014, and September 2012 VA examinations did not impact the Board's decision.

a. Contrary to the Secretary's argument, the December 2017 VA examination was inadequate because it violated both Mitchell and Sharp.

The Secretary claims that "[t]he point at which pain 'begins' . . . is irrelevant" and "there is no requirement that an examiner must specify the point pain 'begins' during a range of motion test." Secretary's Br. at 11-12; 14. However, this contradicts the case law which states that "a part which becomes painful *on use* must be regarded as seriously disabled" and "*[i]t is essential* that the [rating] examination . . . adequately portray the . . . functional loss." *DeLuca v. Brown*, 8 Vet.App. 202, 205 (1995) (citing 38 C.F.R. § 4.40 (2019)) (emphases added). Further, merely recording a veteran's range of motion measurements does "not indicate consideration of factors cited in § 4.40, and required by § 4.40 to be considered and portrayed in the rating examination, as to functional loss on use or due to flare-ups." *Id.* at 206.

To that end, in *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011), this Court clarified that it must be clear from the examiner's findings "whether *and at what point* during the range of motion the appellant experienced any limitation of motion that was specifically attributable to pain." (emphasis added); *see* Appellant's Br. at 10-11. These "determinations should, if feasible, be 'portraye[ed]' . . . in terms of . . . degree[s]." *Mitchell*, 25 Vet.App. at 44; Appellant's Br. at 11. The Court further stressed that such information is important "so that the VA rating official can have a clear picture of the nature of the veteran's disability and the

extent to which pain is disabling." *Mitchell*, 25 Vet.App. at 44. "This will allow the Board to ensure that the disabling effects of pain are properly considered when evaluating any functional loss due to pain that is attributable to the veteran's disability." *Id.*

In other words, *Mitchell* requires examiners to specify at what point a Veteran's pain begins during ROM testing because it is necessary to inform the Board on whether pain existed throughout range of motion or only at the end of range of motion. *See Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 205-06; Appellant's Br. at 10-11. This is not to say that a veteran may receive a rating for pain without functional loss, but where a veteran's pain begins is important for the Board to understand so that it can appropriately rate a veteran's functional loss. And without such information, the Board cannot have a clear picture of the veteran's disability and the extent to which pain results in additional functional loss. *See Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 206.

Thus, the Secretary is incorrect in claiming that "Appellant's argument is based upon a narrow reading of dicta in the *Mitchell* decision." Secretary's Br. at 11. The central holding in a case cannot be mere "dicta." *See Mitchell*, 25 Vet.App. at 44; Black's Law Dictionary (11th ed. 2019), dictum ("A statement of opinion or belief considered authoritative because of the dignity of the person making it.").

In addition, the December 2017 VA examination was inadequate, contrary to the Secretary's position, because the examination noted only that the Veteran's range of motion in his left knee had decreased flexion and extension measurements, and experienced "[l]imited motion du[]e to pain" and the "[p]ain noted on [the] exam . . . cause[d] functional loss." R-794-95; Appellant's Br. at 11; Secretary's Br. at 11. The examiner failed to state

where on ROM the Veteran's pain began. R-794-95. This examination, therefore, failed to comply with the requirements laid out in *Mitchell* because it failed to adequately inform the Board as to the full extent of the Veteran's functional loss, including whether and at what point during range of motion the Veteran's pain specifically caused functional loss. *See Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 206; Appellant's Br. at 11.

Further, the Secretary is wrong in claiming that the December 2017 examiner complied with *Sharp v. Shulkin* because he opined, without sufficient explanation, that it would be speculative to offer an opinion as to the impact of repeated use over time on the Veteran's functional loss. R-796; *see* 29 Vet.App. 26, 33 (2017); Secretary's Br. at 12-13. Simply noting that the examination was medically consistent with the Veteran's statements, describing functional loss with both repeated use over time and flare-ups, is insufficient to satisfy what this Court required in *Sharp*. R-796; *see also Sharp*, 29 Vet.App. at 33

When conducting a musculoskeletal examination, an examiner should inquire whether a veteran experienced flare-ups, and if so, should ask the veteran to describe their severity, frequency, and duration; name the factors that precipitate and alleviate the flares; and the examiner should "estimate, 'per [the] veteran,' to what extent, if any, they affect functional impairment." *Sharp,* 29 Vet.App. at 32. The Court in *Sharp* found that where an examiner states that he or she is unable to offer an opinion "without resort[ing] to speculation," the Board still cannot treat an examination as adequate unless the examiner complies with two requirements. 29 Vet.App. at 33 (quoting *Jones v. Shinseki*, 23 Vet.App. 382, 389 (2010). "First, it must be clear that an examiner has 'considered all procurable and assembled data' before stating an opinion cannot be reached." *Id.* (quoting *Jones*, 23

Vet.App. at 390). "Second, the examiner must explain the basis for his or her conclusion that a non-speculative opinion cannot be offered." *Id.* Otherwise, the examination is inadequate because the examiner failed to ascertain adequate information by alternative means. *See id.* at 34-35.

The December 2017 examiner did not obtain the information required by *Sharp* regarding the extent of the functional impairment of flares from the Veteran. *See* Secretary's Br. at 13; R-793-803. Nowhere in the examination does the examiner indicate the frequency or duration of the Veteran's flare-ups for his right knee. *See* R-793-803. Similarly, the examiner fails to indicate factors that alleviate the Veteran's flares. *See id.*

Moreover, almost verbatim to the examiner's inadequate opinion in *Sharp*, the December 2017 examiner stated that he was unable to offer an opinion "w[ithout] mere speculation" on whether pain, weakness, fatigability, or incoordination significantly limited the Veteran's functional ability with repeated use over time. R-796. Further, the December 2017 VA examiner did not provide sufficient information for the Board to accept this speculative opinion per *Sharp*. *See* 29 Vet.App at 33; R-796. Further, it appears that the examiner's explanation for not offering a non-speculative opinion was his "general aversion to offering an opinion on issues not directly observed." *See* R-796; *see also Sharp*, 29 Vet.App. at 33. The December 2017 examiner's claim that he is unable to offer an opinion without mere speculation renders the examination inadequate. *See* R-796.

To that end, the Secretary conceded that the December 2017 examiner's notation—that he was unable to offer an opinion without mere speculation—"suggests that Appellant's functional loss was constant." Secretary's Br. at 13; *See* R-796. This concession suggests that

the Veteran had functional loss at all times and throughout his ROM. *See id.* However, the Veteran's current 10 percent rating under DC 5261 only compensates him for limitation of extension to 10 degrees. 38 C.F.R. § 4.71a (2019). But if the Veteran had functional loss throughout his ROM, he should be entitled to a higher rating under DC 5261. *See id.* At the very least, if the Veteran's functional loss was constant throughout his ROM, the December 2017 examination failed to provide sufficient information to adequately inform the Board of the Veteran's functional loss. *See* R-796.

b. The April 2014 and September 2012 VA examination did impact the Board's decision because the Board relied on them and they did not contain adequate information for the Board to decide the Veteran's claim.

The Secretary does not challenge the Veteran's arguments that both the April 2014 and the September 2012 VA examinations are inadequate. *See* Secretary's Br. at 14-15. Rather, he merely claims that the adequacy of these examinations did not impact the Board's decision. Secretary's Br. at 15. Initially, the Secretary's failure to respond to the Veteran's arguments about the adequacy of these examinations can be interpreted by the Court as a concession that they are, in fact, inadequate. *See id.*; *see also MacWhorter v. Derwkinski*, 2 Vet.App. 133, 135-36 (1992) (finding that the Court is free to assume that the points raised by the Veteran and ignored by the General Counsel are conceded).

That aside, the Secretary is incorrect that the Board did not rely on both the April 2014 and September 2012 VA examinations in its decision. *See* Secretary's Br. at 14-15. The Secretary concedes that the Board referenced both these examinations, but claims that "the Board used these examinations for background and context before relying on the December 2017 examination to reach its conclusion." Secretary's Br. at 14.

However, there is no indication that the September 2012 and April 2014 examinations were merely background information because the Board's treatment of the December 2017, April 2014, and September 2012 VA examinations is exactly the same. *See* R-13-16; R-1557-67; R-1287-301. Specifically, it cited to all three examination's ROM measurements in its decision, R-13-14, and found that "*[t]hroughout the appeals period*, the Veteran has had flexion greater than 60 degrees and *at no point* was there evidence of extension limited to 10 degrees," R-15 (emphases added). This indicates that, contrary to the Secretary's claim, the Board relied on more than just the December 2017 VA examination in its analysis. *See* R-13-16. Specifically, the Board relied on evidence "throughout the appeals period" to include the April 2014 and September 2012 examinations. R-15.

Further, the Secretary's assumption that the Board did not rely on either examination but merely used the examinations as background information is nothing more than a post hoc evaluation of the evidence in lieu of a proper assessment by the Board. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (noting "the general rule that appellate tribunals are not appropriate fora for initial fact finding"); *see also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) (""[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court."). The law is clear that the Board, not the Secretary's counsel, is tasked with making final appellate decisions within the Department. 38 U.S.C. § 7104(a). And the Secretary fails to cite any evidence that indicates the Board's intent in referencing these examinations. *See* Secretary's Br. at 14-15.

Moreover, the Secretary misses the point in arguing that the inadequate examinations may still hold some level of probative weight. *Id.* at 15 (citing *Monzingo v. Shinseki*, 26 Vet.App. 997, 107 (2012)). The problem here is that none of the examinations of record provided the Board with the information it needed to decide the Veteran's claim. *See* R-793-803; R-1287-94; R-1557-67; Appellant's Br. at 10-16; *see also Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (finding that an opinion is adequate when it "describes the disability. . . in sufficient detail" so that the Board's evaluation of the disability will be a fully informed one); *Mitchell*, 25 Vet.App. at 43-44. Specifically, as noted above, neither the September 2012, April 2014 nor December 2017 examination informed the Board as to the impact of repeated use over time on the Veteran's functional loss, the frequency and duration of his flare-ups, or where on ROM his pain began. *See* R-793-803; R-1287-94; R-1557-67; Appellant's Br. at 10-16. Thus, the Board erred in relying on these inadequate examinations, necessitating remand. *See* R-10-16; *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

II. The Secretary is incorrect in claiming that the Board considered all material evidence of record and relied upon more than mere ROM measurements to deny a rating in excess of 10 percent.

a. Contrary to the Secretary's argument, the Board failed to address favorable and material evidence in its decision.

Although the Board referenced the Veteran's issues of pain with difficulty standing, walking, sitting, and lifting, the Board failed to opine on the impact of these limitations in its analysis per 38 C.F.R. §§ 4.40 and 4.45. *See* R-15-16; *but see* Secretary's Br. at 18-20. Rather, the Board merely noted them in its summary of the facts. *See* R-15-16. Yet, this Court "has long held that merely listing evidence before stating a conclusion does not constitute an

adequate statement of reasons or bases." *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007); *see also Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992).

Further, the Board failed to address or even mention favorable evidence that the Veteran's service-connected knee condition caused impediments with "balancing, pushing, . . . crouching and crawling." R-5960. While the Secretary summarily concluded that the Board "does not need to comment upon every piece of evidence contained in the record," he failed to understand the appropriate scope of the Board's review under *Newhouse*. Secretary's Br. at 19 (citing *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007)). *Newhouse* does not excuse the Board's failure to analyze evidence and provide an adequate statement of reasons or bases. *Newhouse*, 47 F.3d at 1302; *but see* Secretary's Br. at 19. And although the Board is presumed to have considered all of the evidence of record, considering evidence is not the same as analyzing the favorable material evidence of record or providing an adequate statement of reasons or bases on how the evidence factored into its decision. 38 U.S.C. § 7104(d)(1); *Newhouse*, 497 F.3d at 1302; *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000). In fact, 38 U.S.C. § 7104 states that "[d]ecisions of the Board shall be based on the *entire record* in the proceeding and *upon consideration of all evidence and material of record* and applicable provisions of law and regulation." (emphasis added). In addition, although this Court has found that a discussion of all evidence is not required, this is only true where "the Board has supported its decision with thorough reasons or bases regarding *relevant evidence*, and further adjudication would not benefit the appellant." *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (emphasis added).

Here, the evidence of the Veteran's impediments with balancing, pushing, crouching and crawling is relevant to his claim because, as discussed *infra*, he is currently compensated under DC 5261 which does not contemplate the Veteran's balance and instability issues. *See* 38 C.F.R. § 4.71a. Rather, DC 5257 specifically mentions "lateral instability" as a factor the RO must consider. *Id.* But the Board did not address the Veteran's instability issues. *See* R-10-16; Appellant's Br. at 17-18. Instead, the only functional effects it actually assessed were his reports of pain, weakness, and limited movement. *Id.* Thus, the Secretary is incorrect and the Board's failure to address or mention this favorable evidence prejudiced the Veteran because these impediments were material to both his increased rating claim and whether a separate rating was warranted. *See* Appellant's Br. at 17-18; 24-26.

b. The Secretary misinterprets Lyles, as the Court's holding in that case does not support the Board's decision here, and he incorrectly claims the Board considered more than merely ROM measurements.

First, the Secretary confused the issues in his response. *See* Secretary's Br. at 15-32. Specifically, the Secretary incorrectly characterizes the Veteran's claim for an increased rating based on his additional functional loss as a claim for a "separate, compensable disability." Secretary's Br. at 20, 22. However, the Veteran's separate rating argument is in the last section of his brief and based on symptoms of instability. Appellant's Br. at 24-28, *but see* Secretary's Br. at 20, 22. Whereas, the Veteran's increased rating claim is based on all his functional loss and contained in the second section of his brief. Appellant's Br. at 17-23.

Second, to the extent the Secretary responded to the Veteran's increased rating claim argument, the Secretary misunderstands *Lyles v. Shulkin*. 29 Vet.App. 107, 117-20 (2019); *see* Secretary's Br. at 21. Specifically, the Secretary claims that, according to *Lyles*, the Board's

finding that all manifestations of the Veteran's right knee condition were adequately compensated by his 10 percent rating precluded compensation for his additional functional loss. Secretary's Br. at 21. However, in *Lyles*, the Court found that the Board was wrong in finding that all manifestations of the veteran's knee disability were compensated by DC 5257 and reversed this finding. *Lyles*, 29 Vet.App at 117. Further, the Court found that "VA raters and Board members should avoid assigning a musculoskeletal evaluation to compensate for factors *not covered in the DC* under which evaluation is made." *See Lyles*, 29 Vet.App. at 117 (emphasis added). Otherwise, "the Board read[s] into the DC nonexistent evaluation criteria that foreclose[s] the possibility of separate evaluation." *Id.* Rather, using 38 C.F.R. §§ 4.40, 4.45, and 4.59 (2019), "an adjudicator may craft . . . a higher musculoskeletal evaluation than would otherwise be supported by mechanical application of a given DC." *Id.* In other words, evidence that a claimant suffers from functional loss due to factors listed in sections 4.40, 4.45 and 4.9 can support a higher rating, even if those factors do not actually decrease the veteran's ROM.

Thus, contrary to the Secretary's claim, the Board erred in determining that the Veteran's assigned 10 percent rating under DC 5261 adequately compensated him for his additional functional loss. R-15-16; Appellant's Br. at 18-23. Specifically, DC 5261 narrowly covers limitation of extension of the leg based on ROM measurements. 38 C.F.R. § 4.71a. But the Veteran experienced locking of his knee, R-5765, pain with weight-bearing, R-802, lack of endurance and fatigability, R-9039, and impediments with balancing, pushing, crouching and crawling, R-5960. And the Veteran's assigned DC, 5261, does not expressly compensate him for these issues. *See* 38 C.F.R. § 4.71a; R-9798. Therefore, in finding this

DC adequately compensated the Veteran for his additional functional loss, the Board read into DC 5261 nonexistent evaluation criteria that foreclosed the possibility of a higher rating. R-15-16; *see Lyles*, 29 Vet.App. at 117. As a result, it failed to address whether the Veteran's symptomatology caused additional functional limitation that would result in a higher rating. R-15-16; Appellant's Br. at 18-23; *see Lyles*, 29 Vet.App. at 119-20. And in using *Lyles* for support, the Secretary essentially concedes that the Board read into DC 5261 nonexistent evaluation criteria and failed to compensate the Veteran for his additional functional loss. *See* R-15-16; Secretary's Br. at 21.

Third, contrary to the Secretary's claim, the Board failed to adequately consider the Veteran's functional loss and relied on a mechanical application of ROM testing results to deny a higher rating. *See* R-15-16; Secretary's Br. at 21-22. Specifically, the RO granted the Veteran's 10 percent rating based on right knee pain alone. R-9798; *see* 38 C.F.R. § 4.71a, DC 5260. Yet the Secretary claimed the Board's reasons or bases were adequate because it found that "his 10% rating accounts for both the range of motion loss and functional loss." Secretary's Br. at 18. In fact, the Secretary conceded that the Veteran's rating did not compensate him for range of motion loss because the Veteran's "range of motion did not even rise to the level of a 10% rating." Secretary's Br. at 18, n. 1; *see* 38 C.F.R. § 4.71a, DC 5261. Thus, because the Veteran was awarded a 10 percent rating for pain alone, his rating did not compensate him for his additional functional loss including locking of his knee, lack of endurance and fatigability, and impediments with balancing, pushing, crouching and crawling. *See* R-802; R-5765; R-5960; R-9039; R-9798. To the extent the Secretary claims

that the Board adequately considered the Veteran's functional loss, this was error. *See* Secretary's Br. at 18.

Further, the Secretary claims that the Board sufficiently considered the Veteran's functional loss because it concluded that his "right knee disability has caused interference with standing or sitting, and pain contributing to additional functional loss." R-15; Secretary's Br. at 21. However, in addition to the foregoing impediments, the Veteran's right knee also caused biomechanical imbalance issues. R-9131; *see* 38 C.F.R. § 4.45. His knee locked up and he had to sleep on his back to avoid putting weight on it. R-5765. He wore a knee brace and had constant chronic knee pain. R-794. And he experienced less movement than normal and limited motion due to pain. R-794-95; *see* 38 C.F.R. § 4.45. Yet, the Board's above conclusion failed to address the Veteran's additional functional impairments and did not explain how his current 10 percent rating adequately compensated him for his impairment. *See* R-15; Appellant's Br. at 18-23.

To that end, the Board mechanically applied ROM measurements to the rating criteria in denying the Veteran a 20 percent rating. *See* R-15-16. Specifically, the Board found the Veteran was not entitled to a 20 percent rating under DC 5261 because he "did not have flexion limited to 30 degrees, nor did he have an extension limited to 15 degrees." *Id.* But this rationale does not address the Veteran's functional impairment beyond ROM. *See id.* This was error because, as noted *supra*, evidence that a claimant suffers from functional loss due to factors listed in sections 4.40, 4.45 and 4.59 can support a higher rating, even if those factors do not actually decrease the veteran's ROM. *See Lyles*, 29 Vet.App. at 117. And the Veteran had additional functional loss due to such factors. *See* R-

794-95; R-5765; R-9131. Thus, the Board failed to adequately consider the Veteran's additional functional loss or explain how the Veteran's additional functional loss factored into its decision, necessitating remand. *See* R-15-16; *Tucker*, 11 Vet.App. at 374.

III. The Secretary misinterpreted and misapplied *Esteban* because the Veteran's functional loss does not overlap with his current rating under DC 5261 and supports a separate rating under DC 5257.

The Veteran cited *Esteban v. Brown*, 6 Vet.App. 259, 261 (1994) in his opening brief to argue that he should be entitled to a separate rating because his current rating under DC 5261 does not contemplate his symptoms of imbalance and instability. *See* Appellant's Br. at 24-26; 38 C.F.R. § 4.71a. Yet, the Secretary argues that *Esteban* is inapplicable here because "Appellant's current 10% rating contemplates both his functional loss *and* his range of motion tests," and "a separate rating . . . would necessarily overlap with the symptomology of his current rating." Secretary's Br. at 25.

However, this is incorrect for two reasons. First, the Veteran's current 10 percent rating under DC 5261 does not contemplate *all* of the Veteran's functional loss. *See* 38 C.F.R. § 4.71a, DC 5261. As noted above, the RO granted the Veteran's 10 percent rating based on right knee pain alone. R-9798. But the Veteran also experienced "biomechanical imbalance issues," R-9131, and his knee had "functional limitation" related to "balancing," R-5960. *See* Appellant's Br. at 25. Yet, the Board conceded that "recurrent subluxation or lateral instability" was not contemplated by the Veteran's 10 percent rating. R-15-16. Rather, the Board only considered instability in its analysis for a 20 percent rating. *Id.* To that end, DC 5261 only mentions the limitation of extension, not instability. 38 C.F.R. § 4.71a. And DC 5257 specifically contemplates knee impairment with "lateral instability" up

to 30 percent based on whether such instability is slight, moderate, or severe. *Id.*; *see English v. Wilkie*, 30 Vet.App. 347, 352-53 (2018). The Secretary fails to recognize both the Board's concession that the Veteran was not compensated for his instability and the fact that instability is different from limitation of extension and thus not contemplated in DC 5261. *See id.*; Secretary's Br. at 25. Regardless, the Secretary's allegation that the Veteran's 10% rating contemplates both his functional loss and range of motion tests is yet another *post hoc* evaluation of the evidence in lieu of a proper assessment by the Board. *See* Secretary's Br. at 25; *but see* R-15-16; *see also Hensley*, 212 F.3d at 1263.

To that end, the *Esteban* decision applies to this case because the Veteran's symptom of instability is distinct and separate from his symptomatology for which he is compensated under 5261. *See Esteban*, 6 Vet.App. at 261; *see also Morgan v. Wilkie*, 31 Vet.App. 162, 168 (2019) ("VA . . . may rate a single disability under multiple diagnostic codes without pyramiding."). In *Esteban*, this Court found that where diagnostic codes do not prohibit separate ratings, the veteran's conditions "*are to be rated separately unless* they constitute the 'same disability' or 'same manifestation' under 38 C.F.R. § 4.14." *Id.* (emphasis added). "The critical element is that *none* of the symptomatology for any of [the veteran's] conditions is *duplicative* or *overlapping* with the symptomatology of [the veteran's other] conditions." *Id.* at 262 (emphases in original). In other words, if a veteran's current diagnostic code does not contemplate *any* of his symptoms, then the veteran is entitled to a rating that does. *See id.*

Here, the Secretary contends that the Veteran's current 10 percent rating under DC 5261 contemplates all his symptomatology and thus, a separate rating is not warranted. Secretary's Br. at 25. However, DC 5261 narrowly applies to "limitation of extension"

between 5 and 45 degrees. 38 C.F.R. § 4.71a. There is no mention in this DC of symptoms beyond range of motion limitations. *See id.* Thus, contrary to the Secretary's allegations, DC 5261 does not contemplate the Veteran's instability symptomatology. *See id.*; R-5960. The Court should, therefore, reject the Secretary's arguments and vacate and remand the Board's denial of entitlement to a rating in excess of 10 percent for a right knee disability, with instructions for the Board to discuss whether entitlement to a separate rating for instability is warranted. *See Tucker*, 11 Vet.App. at 374.

CONCLUSION

The Board erred in relying on the inadequate December 2017, April 2014 and September 2012 VA examinations. The December 2017 examination violated this Court's holdings in *Mitchell* and *Sharp* and the Board relied on the inadequate April 2014 and September 2012 examinations' ROM measurements in its analysis. Further, the Board failed to account for favorable and material evidence of the Veteran's instability and balance issues and did not adequately consider the Veteran's functional loss or explain whether it warranted a higher rating. Finally, the Board failed to conduct a separate rating analysis. Remand is, therefore, necessary for the Board to provide an adequate functional loss analysis, taking the Veteran's rating by analogy into account, and adequately assessing the sufficiency of the examinations, and conduct a separate rating analysis.

Based on the foregoing reasons, as well as the arguments contained in Mr. De Paz's opening brief, this Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the issue of entitlement to an increased rating for his right knee disability.

Respectfully submitted,

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