IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

RICARDO D. STAFFORD,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-4520
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

NOTICE TO THE COURT

The Secretary hereby notifies the Court of a significant development in this case, pursuant to *Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013) ("In all cases before this Court, the parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision."). On March 26, 2020, the Board of Veterans' Appeals issued its decision granting an extraschedular total disability rating due to individual unemployability prior to April 17, 2012. *See* Attachment.

WHEREFORE, the Secretary submits the foregoing for the Court's consideration.

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ATTACHMENT

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
RICARDO D. STAFFORD
Represented by
Robert V. Chisholm, Attorney

[redacted]
Docket No. [redacted]

DATE: March 26, 2020

ORDER

A rating in excess of 10 percent for hypertension is denied.

A rating in excess of 40 percent for a back disability, to include on an extraschedular basis, is denied.

From November 17, 2010, a separate 10 percent rating for a right knee meniscal tear is granted.

Prior to May 23, 2016, an initial rating in excess of 70 percent for posttraumatic stress disorder and major depressive disorder (PTSD) is denied.

From May 23, 2016 to August 22, 2019, an initial total rating for PTSD is granted.

Prior to April 17, 2012, an extraschedular total disability rating due to individual unemployability (TDIU) is granted.

Special monthly compensation (SMC) at the housebound rate is granted.

REMANDED

Entitlement to an increased rating for right knee medial meniscal tear with osteoarthritis (right knee disability) is remanded.

FINDINGS OF FACT

1. At no time during the appeal has the Veteran's hypertension more closely approximated diastolic pressure predominantly 110 or more or systolic pressure predominantly 200 or more.

2. The Rating Schedule is adequate to compensate the Veteran for his back disability; his IVDS does not present an exceptional disability picture.

3. From November 17, 2010, the Veteran's right knee meniscal tear has been symptomatic and manifested by symptoms distinct from limitation of motion, painful motion, and swelling.

4. Prior to May 23, 2016, the Veteran's PTSD symptomatology did not more closely approximate total occupational and social impairment.

5. From May 23, 2016 to August 22, 2019, the Veteran's PTSD symptomatology more closely approximated total occupational and social impairment.

6. Prior to April 17, 2012, the Veteran's service-connected disabilities precluded him from securing or following a substantially gainful occupation.

7. The Veteran has additional service-connected disabilities that are independently ratable at 60 percent, separate and distinct from his total rating for PTSD.

CONCLUSIONS OF LAW

1. The criteria for a rating for hypertension in excess of the protected 10 percent rating are not met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.951, 4.3, 4.7, 4.10, 4.104, Diagnostic Code (DC) 7101.

2. The criteria for a rating in excess of 40 percent for a back disability, to include on an extraschedular basis, are not met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.321, 4.3, 4.7, 4.10, 4.16, 4.71a, DC 5243

3. From November 17, 2010, the criteria for a separate rating of at least 10 percent for a right knee meniscal tear are met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.3, 4.7, 4.10, 4.14, 4.20, 4.40, 4.45, 4.59, 4.71a, DC 5259.

4. Prior to May 23, 2016, the criteria for an initial rating in excess of 70 percent for PTSD are not met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.3, 4.7, 4.10, 4.130, DC 9411.

5. From May 23, 2016 to August 22, 2019, the criteria for an initial total rating for PTSD are met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.3, 4.7, 4.10, 4.130, DC 9411.

6. Prior to April 17, 2012, the criteria for entitlement to an extraschedular TDIU are met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.340, 3.341, 4.3, 4.16(b).

7. The criteria for SMC at the housebound rate are met. 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350, 4.25.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the United States Army from August 1977 to August 1980 and on full-time duty in the Active Guard Reserve from July 1984 to December 1994.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from March 2010, February 2012, and November 2015 rating decisions of an Agency of Original Jurisdiction (AOJ) of the Department of Veterans Affairs (VA). In this regard, new and material evidence was received within one year of the issuance of the March 2010 rating decision. *See, e.g.,* November 2010 Correspondence. Thus, that decision never became final.

In July 2018, the Board denied entitlement to service connection for peripheral neuropathy of the lower extremities and granted entitlement to a schedular TDIU prospectively from April 17, 2012. The Board remanded the issue of entitlement to a TDIU prior to April 17, 2012, to include on an extraschedular basis, for referral

to the Director of Compensation Service (Director). The Board also remanded the issues of entitlement to increased ratings of IVDS, a right knee disability, and hypertension. The Veteran appealed to the United States Court of Appeals for Veterans Claims. That appeal is pending.

In November 2019, the Director denied entitlement to an extraschedular TDIU prior to April 17, 2012. *See* November 2019 VA Memorandum.

The Board has bifurcated the claim for an increased rating for a right knee disability, as the present record supports a partial grant of the benefit sought on appeal. *See Locklear v. Shinseki*, 24 Vet. App. 311 (2011) (bifurcation of a claim generally is within VA's discretion).

1. A rating in excess of 10 percent for hypertension is denied.

The Veteran is in receipt of a 10 percent rating for hypertension under DC 7101. As he has been in receipt of this rating for more than 20 years, it is protected from change, absent extraordinary circumstances not present here. *See* 38 C.F.R. § 3.951. The period on appeal is from November 22, 2010, the date of claim, plus the one-year lookback period.

Under DC 7101, a 10 percent rating is warranted for diastolic pressure predominately 100 or more or systolic pressure predominately 160 or more. A 10 percent rating is also the minimum rating for a veteran with a history of diastolic pressure predominately 100 or more who requires continuous medication for control. A 20 percent rating is warranted for diastolic pressure predominately 110 or more or systolic pressure predominately 200 or more. Higher ratings are warranted for greater diastolic pressure. 38 C.F.R. § 4.104, DC 7101.

The Veteran has required medication for control of his hypertension throughout the appeal. However, his blood pressure readings during the period on appeal do not meet or more closely approximate the criteria for a rating in excess of 10 percent. In this regard, the Veteran's systolic pressure has remained under 160 and his diastolic pressure has remained under 100 throughout the vast majority of the period on appeal, and the rare higher readings observed were at times exceptional circumstances. *See* VA treatment records. For example, in December 2009, the

Veteran's blood pressure was recorded at 159/101, but the clinician specifically accounted for this by noting that the Veteran was sick that day. *See* December 23, 2009 VA Treatment Note. This sort of rare exception would not demonstrate a higher rating, and in any event, his blood pressure readings over the appeal very much more nearly approximate the criteria for a 10 percent rating.

Moreover, while the Veteran has additional symptoms associated with hypertension, such as a history of headaches, the record does not demonstrate a functional impairment related to hypertension during the period on appeal that is not contemplated by the Rating Schedule. *See, e.g.,* December 2010 VA Examination Report (noting BP readings of 148/92, 130/90, and 140/88, with no effects on usual occupation as mail handler).

Thus, as the Veteran has not more closely approximated the criteria for a higher rating for hypertension, a rating in excess of 10 percent is denied.

2. A rating in excess of 40 percent for a back disability, to include on an extraschedular basis, is denied.

Through his attorney, the Veteran concedes that he is in receipt of the highest schedular rating permitted for limitation of motion of the thoracolumbar spine and that he does not meet the criteria for a higher schedular rating. However, he asserts that he could be entitled to a rating in excess of 40 percent for intervertebral disc syndrome (IVDS) on an extraschedular basis. In support of this argument, he asserts that the Rating Schedule for IVDS is inadequate and that the modern practice of medicine does not support weeks of best rest. *See* August 2015 Third Party Correspondence; August 2015 Medical Treatment Note.

Initially, the Board observes that the Veteran has limited his argument to an increased rating on an extraschedular basis. The Board agrees that the record does not support a higher schedular rating, and thus will only address entitlement to an extraschedular rating.

The Rating Schedule includes a formula for rating IVDS based on the frequency and duration of incapacitating episodes requiring bed rest prescribed by a physician. *See* 38 C.F.R. § 4.71a, DC 5243. The Veteran does not meet the criteria

for a higher rating under the IVDS formula based on incapacitating episodes, as the record shows that he does not require weeks of bed rest prescribed by a physician. However, the Rating Schedule includes a powerful tool that adequately compensates the Veteran – a TDIU. *See Morgan v. Wilkie*, 31 Vet. App. 162, 164 (2019). The Board is obliged to consider entitlement to a TDIU prior to the referral for an extraschedular rating. *Id.*

Moreover, VA regulations indicate that the Board must consider entitlement to an extraschedular TDIU before it considers referral for an extraschedular rating. 38 C.F.R. § 4.16(b) states that "all cases" of veterans who do not meet the schedular criteria for a TDIU and are unemployable by reason of service-connected disability should be submitted to the Director, while 38 C.F.R. § 3.321(b) states that referral to the Director for consideration of an extraschedular *rating* is only warranted in "exceptional cases." This difference in regulatory language demonstrates that a referral for an extraschedular rating is meant to be truly exceptional.

As discussed in greater detail below, entitlement to a TDIU is warranted. This award adequately compensates the Veteran for his service-connected disabilities. Thus, the Rating Schedule adequately contemplates the Veteran's service-connected disabilities.

The Board acknowledges that the claim before the Board was filed prior to the Veteran's retirement. Thus, the Board's award of a TDIU may not encompass the entire period on appeal. However, no extraschedular referral is warranted prior to the effective date of a TDIU, as the Veteran's attorney does not argue, and the record does not demonstrate, that the Veteran's back disability is exceptional. *See Morgan*, 31 Vet. App. at 164 (extraschedular referral is meant to be "exceptional"). Rather, the Veteran asserts that the Rating Schedule is flawed and unfairly compensates many similar veterans. The Board cannot entertain a challenge to the Rating Schedule, and in the absence of an exceptional disability picture, referral of the Veteran's claim for extraschedular consideration is not warranted. *See Thun v. Peake*, 22 Vet. App. 111, 115 (2008).

Accordingly, entitlement to a rating in excess of 40 percent for a back disability, to include on an extraschedular basis, must be denied.

3. From November 17, 2010, a separate 10 percent rating for a right knee meniscal tear is granted.

As discussed below, additional development is necessary before the Board can fully adjudicate the appeal seeking an increased rating for a right knee disability. However, the present record supports a partial grant of the benefit sought on appeal. The Board emphasizes that this partial grant is without prejudice to the award of any additional benefit that the post-remand record may support.

Throughout the appeal, the Veteran is in receipt of a 10 percent rating for a right knee medial meniscal tear with osteoarthritis under DC 5260 (limitation of flexion). The period on appeal is from the date of claim, November 22, 2010, plus the one-year lookback period.

The evaluation of the same disability under various diagnoses, known as "pyramiding," is not permitted. 38 C.F.R. § 4.14. However, where a certain manifestation of a disability has not been compensated by an assigned evaluation under a particular DC, and that manifestation is distinct and separate from any compensation manifestation, evaluation of the distinct and separate manifestation under another DC does not constitute pyramiding. *Lyles v. Shulkin*, 29 Vet. App. 107, 118 (2017); *see also Copeland v. McDonald*, 27 Vet. App. 333, 338 (2015) (explaining that where the same injury results in different manifestations, each condition should be rated under an appropriate DC, but a condition listed in the Rating Schedule cannot be rated under another DC).

Here, separate ratings are appropriate for the Veteran's meniscal tear and his arthritis. As discussed below, these are distinct and separate manifestations and the rating criteria do not overlap.

Arthritis established by X-ray findings is rated based on limitation of motion. When the limitation of motion for the joint is noncompensable under the appropriate DCs, a rating of 10 percent is for application for each affected major joint. Limitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion. 38 C.F.R. § 4.71a, DC 5003.

The Rating Schedule does not include a DC for a meniscal tear. Thus, the Board consider closely related DCs. 38 C.F.R. § 4.20. DCs 5258 and 5259 prescribe ratings for other meniscal conditions. Under DC 5259, a 10 percent rating is warranted for symptomatic removal of semilunar cartilage (meniscus). 38 C.F.R. § 4.71a, DC 5259. Under DC 5258, a 20 percent rating is warranted for dislocated semilunar cartilage with frequent episodes of "locking," pain, and effusion into the joint. 38 C.F.R. § 4.71a, DC 5258.

The present record does not show frequent episodes of locking and effusion into the joint. Thus, the Board will rate the meniscal tear under DC 5259.

The December 2010 VA examiner noted noncompensable limitation of right knee flexion with objective evidence of pain on active motion. The examiner also noted additional symptoms other than limitation of motion, such as weakness, giving way, and pain at rest. *See* December 2010 VA Examination Report. The Rating Schedule does not associate these additional symptoms with painful or limited motion. *See* 38 C.F.R. §§ 4.45, 4.59. Indeed, the Rating Schedule indicates that weakness is a manifestation that is distinct from, but as important as, limitation of motion. 38 C.F.R. § 4.40. Thus, assignment of a separate rating of at least 10 percent is warranted for these distinct manifestations is not pyramiding.

Accordingly, the Board will grant a separate 10 percent rating as of November 17, 2010, the Veteran's final day of employment, as his retirement is a factually ascertainable increase in disability.

4. Prior to May 23, 2016, an initial rating in excess of 70 percent for PTSD is denied.

5. From May 23, 2016 to August 22, 2019, an initial total rating for PTSD is granted.

The Veteran is in receipt of an initial 70 percent rating for PTSD prior to August 22, 2019 and an initial total rating thereafter. He is rated under DC 9411, and the period on appeal is from April 17, 2012, the effective date of service connection.

Under DC 9411, a 70 percent rating is assigned where PTSD produces occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a work-like setting); and inability to establish and maintain effective relationships.

A total disability rating is assigned where PTSD is productive of total occupational and social impairment, due to symptoms such as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

The Veteran was first afforded a psychiatric examination in November 2015. The examiner stated that the Veteran's PTSD was productive of occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care, and conversation. He noted that the Veteran took medication but was not seeking a therapist. He indicated that the Veteran frequently thought of death and had symptomatology that the VA rating schedule associates with a rating of 70 percent or less. *See* November 2015 Examination Report.

The Veteran subsequently sought VA mental health treatment. *See* May 23, 2016 VA Treatment Note. His treatment notes generally reveal that he felt "OK" or "fine" with various problems, but do not show any obvious indicators of total occupational and social impairment or increase in disability.

The Veteran presented for a psychiatric examination in August 2019. The examiner stated that his PTSD was productive of occupational and social

impairment due to deficiencies in most areas, such as work, school, family relations, judgment, thinking, and/or mood. The examiner noted multiple symptoms consistent with a 70 percent rating, as well as symptoms consistent with a total rating. Specifically, the examiner indicated that the Veteran would forget the names of his children and grandchildren and that he was having trouble communicating. While the examiner stated that the Veteran was oriented times four on the day of examination, he also indicated that the Veteran's PTSD was productive of spatial disorientation and disorientation to time or place. The examiner specifically indicated that the Veteran's symptoms had increased since the prior examination of record. *See* August 2019 Examination Report.

The November 2015 examiner described symptoms of a frequency, duration and severity consistent with less than a total rating in November 2015. The Veteran does not assert, and the record does not show, that the Veteran's PTSD warranted a total schedular rating in November 2015.

While the August 2019 examiner did not describe every symptom required for a total rating, not every symptom is necessary, and symptoms such as severe memory loss, trouble communicating, and disorientation as to time and place are severe. The examiner gave a concrete and useful example when he stated that the Veteran forgot the names of his children. The August 2019 examination report more closely approximates the criteria for a total rating.

The record indicates that these examination reports are not simply the product of different examiners describing the same disability in different terms at different times, as the August 2019 examiner specifically stated that the Veteran's symptoms had increased since the last examination. While the Veteran's mental health treatment records do not show any definite increase in symptoms, the Board will fix the effective date of increase as of May 23, 2016, the day that he presented for VA mental health treatment. This is a factually ascertainable increase that occurred shortly after the November 2015 examination report and it resolves any reasonable doubt in the Veteran's favor.

Accordingly, an initial rating in excess of 70 percent for PTSD is denied prior to May 23, 2016, and thereafter an initial total rating is granted.

6. Prior to April 17, 2012, an extraschedular TDIU is granted.

The Veteran asserts that prior to April 17, 2012, his service-connected disabilities precluded him from securing and following a substantially gainful occupation. The Board agrees.

A total disability rating may be assigned, where the schedular rating is less than total, when it is found that the disabled person is unable to secure or follow a substantially gainful occupation as the result of service-connected disabilities. *See* 38 U.S.C. § 1155; 38 C.F.R. §§ 3.340, 3.341, 4.16.

Prior to April 17, 2012, the Veteran is in receipt of service connection for IVDS rated 40 percent disabling, hypertension rated 10 percent disabling, a right knee meniscal tear rated 10 percent disabling, and right knee osteoarthritis rated 10 percent disabling. He does not meet the schedular criteria for a TDIU, as his combined disability evaluation is 60 percent and he does not meet any of the criteria listed in 38 C.F.R. § 4.16(a) that would permit his combined disabilities to be treated as a single disability.

If the percentage requirements of 38 C.F.R. § 4.16(a) are not met, a TDIU may still be granted on an extra-schedular basis where a veteran is unable to secure and follow a substantially gainful occupation by reason of service-connected disability. 38 C.F.R. § 4.16(b). As of the date of this decision, the controlling precedent is that the Board lacks the power to award an extraschedular TDIU in the first instance. *Bowling v. Principi*, 15 Vet. App. 1, 10 (2001). Here, the Director has denied entitlement to an extraschedular TDIU. *See* November 2019 VA Memorandum. Thus, the Board has the power to award an extraschedular TDIU.

The determination as to whether a veteran can secure or follow a substantially gainful occupation includes an economic component and a noneconomic component. The economic component means that a veteran must not receive income from employment outside of a protected environment that exceeds the poverty threshold for one person. The noneconomic component requires consideration of a veteran's ability to secure or follow substantially gainful employment, including factors such as the veteran's history of education, skill, and training, as well as his or her ability to perform the physical and mental activities

required by the occupation in question. *See Ray v. Wilkie*, 31 Vet. App. 58, 73 (2019).

Initially, the Board observes that while the July 2018 Board decision determined that the Veteran was entitled to a schedular TDIU, that decision is not dispositive with respect to the present question. In this regard, the July 2018 Board decision premised its award, in part, on the Veteran's service-connected PTSD. The effective date of service connection for PTSD is April 17, 2012, which is also the effective date of the TDIU that the Board awarded. No benefit (including an extraschedular TDIU) may be awarded for a service-connected disability prior to the effective date of service connection. *See Delrio v. Wilkie*, No. 17-4220, 2019 U.S. App. Vet. Claims LEXIS 2233, at *31-2 (Dec. 19, 2019).

Turning to the merits, the evidence shows that the Veteran last worked in November 2010 and that he does not receive income from employment exceeding the federal poverty threshold. This in accord with the economic component of entitlement to an extraschedular TDIU.

Regarding the noneconomic component, the Veteran reported that he has a high school education and that he worked as a mail handler since 1997. *See* May 2012 VA Form 21-8940. His job involved lifting, carrying, inspecting, weighing, unloading, and dumping mail sacks. *See* January 2011 Third Party Correspondence. His employer stated that he retired due to disability, specifically due to service-connected IVDS and nonservice-connected rotator cuff problems. *Id.* However, the Board may only consider the impact of his service-connected disabilities when determining entitlement to a TDIU.

In December 2010, a VA examiner stated that the Veteran's back and right knee disability would preclude him from a physical job such as a mail handler, which requires heavy pulling, pushing, and lifting, but he might be able to sustain a sedentary employment if allowed rest breaks. *See* December 2010 VA Examination Report.

The Veteran submitted a vocational assessment from a private examiner. The examiner specifically acknowledged that the Veteran had nonservice-connected disabilities, which at the time included PTSD, and opined that his service-

connected right knee and back would preclude substantially gainful employment. He noted that the Veteran's back and knee disabilities required the use of a cane, which he held with his dominant right hand, as well as the use of a back brace. The examiner noted that the Veteran had used a great deal of his sick time leading up to his retirement, and that during that time he did not use his cane at work and had to work through the pain to keep his job. *See* November 2015 Third Party Correspondence.

Here, the evidence shows that prior to April 17, 2012, the Veteran's service-connected disabilities alone precluded him from securing or following a substantially gainful occupation. Although the Veteran retired due to service-connected and nonservice-connected disabilities, the evidence shows that he was working through pain up until his retirement. While the December 2010 VA examiner stated that the Veteran "might" be able to work at a sedentary occupation, this speculative statement does not weigh against entitlement to a TDIU. Moreover, the Veteran's work experience is not readily applicable to a sedentary occupation based on the ordinary meaning of the term. *See Withers v. Wilkie*, 30 Vet. App. 139, 148 (2018). Critically, the private examiner is a vocational expert and his favorable opinion is highly probative evidence in favor of the claim. In any event, the ultimate determination as to entitlement to a TDIU is made by VA adjudicators, rather than medical examiners. *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013).

Here, the probative evidence of record weighs in favor of the claim, and thus an extraschedular TDIU prior to April 17, 2012 is warranted. The Board will limit the present decision to the award of an extraschedular TDIU. *See Urban v. Principi*, 18 Vet. App. 143 (2004). In this regard, the period on appeal does not accord with the Veteran's date of retirement, and this approach will avoid any prejudice. *See Bernard v. Brown*, 4 Vet. App. 384 (1993).

7. SMC at the housebound rate is granted.

VA has a well-established duty to maximize a claimant's benefits. *See Morgan v. Wilkie*, 31 Vet. App. 162 (2019). Although the issue of entitlement to SMC at the housebound rate was not claimed, that issue is raised by the record and is part and

parcel of the increased rating claim on appeal. *See Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991).

One of the instances where SMC at the housebound rate is payable is when a veteran has a single service-connected disability rated as 100 percent disabling and has additional service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems. 38 U.S.C. § 1114; 38 C.F.R. § 3.350.

Here, the Veteran is in receipt of a total rating for PTSD, a psychiatric disability, from May 23, 2016. Furthermore, throughout the appeal he has a combined rating of at least 60 percent for his service-connected right knee disability, hypertension, and IVDS, and these physical disabilities are separate and distinct from his PTSD. Accordingly, SMC at the housebound rate is warranted.

The Board observes that prior to May 23, 2016, the Veteran is in receipt of a TDIU and that his PTSD alone meets the schedular criteria for that award. To ensure that the Veteran is not prejudiced, the Board will limit its decision to the issue of entitlement to SMC. *See Bernard*, 4 Vet. App. 384.

REASONS FOR REMAND

8. Entitlement to an increased rating for a right knee disability is remanded.

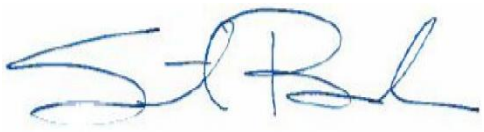
Remand is necessary for additional development. The December 2010 examiner noted that the Veteran experienced "severe" daily right knee flare-ups. On remand, an opinion as to the Veteran's range of motion and functional impairment during flare-ups should be obtained. *See Sharp v. Shulkin*, 29 Vet. App. 26 (2017). Moreover, all necessary testing should be conducted, if possible. *See Correia v. McDonald*, 28 Vet. App. 158 (2016).

The matter is REMANDED for the following action:

> Schedule the Veteran for an examination to determine the nature and severity of his right knee disability since November 2010. The claims file should be made available to and should be reviewed by the examiner. All findings should be reported in detail.
>
> The examiner should conduct all indicated tests and studies, to include range of motion studies. **The joints involved should be tested for pain (1) on active motion, (2) on passive motion, (3) in weight-bearing, (4) in nonweight-bearing, and (5) with the range of the opposite undamaged joint.** Please specify range of motion measurements in all areas outlined above. **For each range of motion study conducted, the examiner must state where in the range of motion the Veteran reports that he begins to experience pain.** If the examiner is unable to conduct the required testing or concludes that the required testing is not necessary in this case, he or she should clearly explain why that is so.
>
> The examiner should opinion describing **functional impairment of the Veteran's right knee disability during a flare-up,** accounting for pain, incoordination, weakened movement, and excess fatigability on use, and, to the extent possible, **report such impairment in terms of additional degrees of limitation of motion.** If the examiner is unable to provide such an opinion without resort to speculation, the examiner must provide a rationale for this conclusion, with specific consideration of the instructions in the VA Clinician's Guide to estimate, "per [the] veteran," what extent, if any, flare-ups affect functional impairment. The examiner should include a discussion of any specific facts that cannot be determined if unable to opine without speculation.

The examiner should indicate how the Veteran's knee disability affects his daily life. The examiner's attention is invited to the December 2010 VA Examination Report, in which indicates that the Veteran's daily flare-ups are "severe."

A complete rationale should be given for all opinions and conclusions expressed. In the event the examiner cannot provide an opinion without resorting to speculation, it is essential that the examiner provide a rationale for this conclusion (e.g. lack of sufficient information/evidence, the limits of medical knowledge, etc.).



S. BUSH
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board D.M. Badaczewski, Associate Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.