

MARVIN ADAMS,)
)
Appellant,)
)
v.) Vet. App. No. 18-2049
)
ROBERT L. WILKIE,)
)
Secretary of Veterans Affairs,)
)
Appellee.)

Appellee’s Response to the Court’s April 3, 2020, Order.....	1
August 4, 2016, Board Decision.....	15
Joint Motion to Remand	33
Application for Increased Compensation	38
April 9, 2018, Board Referral.....	40
June 5, 2018, Rating Decision	43
February 11, 2018, Board Decision.....	48
February 20, 2020, Motion to Vacate	60
March 18, 2020, Letter	65

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

MARVIN ADAMS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-2049
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

SECRETARY’S RESPONSE TO THE COURT’S APRIL 3, 2020, ORDER

Pursuant to the U.S. Court of Appeals for Veterans Claims (Court) Order dated April 3, 2020, the Secretary respectfully submits this response. The Court directed the parties to address whether “given the issuance of a February 11, 2020, Board decision and Mr. Adams’s March 18, 2020, withdrawal of a motion to vacate that decision, the issue currently on appeal has become moot” and, if so, whether “any exceptions to mootness apply here.”

Relevant Procedural History

On August 4, 2016, the Board of Veterans’ Appeals (Board or BVA) issued a decision denying an increased rating for right knee instability. (Exhibit A). The Board found that the issue of a total disability rating based on individual unemployability (TDIU) had not been raised either by Appellant or by the record. *Id.* at 13. Appellant appealed that decision to the Court, and the parties filed a Joint Motion for Remand. (Exhibit B). The parties agreed that a February 2016 examination was not adequate. *Id.* at 2.

In February 2018, Appellant filed an Application for Increased Compensation Based on Unemployability. (Exhibit C).

On April 9, 2018, the Board issued an order remanding the issue of entitlement to a rating in excess of 10% for right knee instability for additional development. (Exhibit D). The Board noted that in September 2017, this Court had vacated the Board's August 2016 decision because it relied on an inadequate medical examination. *Id.* The Board also stated that Appellant

submitted a claim for entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU) in February 2018. As this issue has not yet been adjudicated by the Agency of Original Jurisdiction (AOJ), the Board does not have jurisdiction over it, and it is referred to the AOJ for appropriate action.

Id. at 1 (bold omitted).

Appellant appealed the April 2018 Board referral to the Court, and the Secretary moved to dismiss on the basis that the Court lacked jurisdiction to review the Board's April 2018 referral. Appellant filed a response to the Secretary's motion to dismiss that argued, among other things, that he was harmed by the Board's referral because it could lead to the assignment of an improper effective date. (Appellant's Response to the Secretary's Motion to Dismiss (App. Resp.) at 6). He also argued that he was harmed because the referral "resulted in the issue going to 'the back of the line' and being treated as a separate claim with a new docket number. The issue of TDIU is part and parcel

of his claim for compensation based on the issue of an increased rating for the Veteran's knee." *Id.* at 7-8.

In June 2018, the Department of Veterans Affairs (VA) Regional Office (RO) determined that Appellant is not entitled to a TDIU. (Exhibit E).¹

The Board issued a February 11, 2020, decision denying a rating in excess of 10% for right knee instability. (Exhibit F at 1). In that decision, the Board found that a TDIU "has been reasonably raised by the record." *Id.* at 2. The Board noted that Appellant "has two claims for increased ratings for left knee disabilities in appellate status awaiting Board certification. As he has not yet met the schedular criteria for a TDIU as of the date of this decision, the Board will not take jurisdiction of TDIU at this time and instead await the status of the two remaining rating claims before rendering a decision on the TDIU." *Id.*

Appellant filed a motion to vacate the Board's decision, and then he withdrew the motion. (Exhibits G and H).

The parties filed supplemental memoranda of law in March 2020. Appellant's memorandum argued that "the February 2020 decision does not moot the question of whether the April 2018 order was a 'decision' for this Court's jurisdictional purposes. Unless and until VA grants TDIU for the maximum time

¹ The Court can consider documents post-dating the Board's April 2018 referral only to the extent that they are relevant to the issue of mootness. *Solze v. Shinseki*, 26 Vet.App. 299, 301-02 (2013) (parties are under the duty to notify the Court of events that would moot a case before the Court); see *Kyhn v. Shinseki*, 716 F.3d 572, 575-76 (Fed. Cir. 2013) (the Court's review is limited to the record before the Board).

period allowable, the question of whether the April 2018 order was a ‘decision’ remains a controversy.” (Appellant’s Memorandum of Law in Response to the Court’s February 10, 2020, Order (App. Supp. Mem.) at 14. He continued: “[f]or the same reason, the underlying issue of whether [the] Board erred in refusing jurisdiction over the TDIU component of the increased rating claim remains a live case or controversy.” *Id.*

The Court docketed Appellant’s appeal of the Board’s February 2020 decision in April 2020. *Adams v. Wilkie*, Docket No. 20-2380.

Argument

A. Appellant’s Appeal is Moot Because There is no Case or Controversy

The Court should hold that Appellant’s appeal is moot because the Board’s February 2020 decision and his subsequent appeal of that decision to this Court eliminated any potential case or controversy regarding the Board’s April 2018 referral. Although this Court is not an Article III court, it has adopted the case-or-controversy requirement as a basis for exercising its jurisdiction. *Cardona v. Shinseki*, 26 Vet.App. 472, 474 (2014). The Court has also adopted the requirement that a case is “dismissed when it becomes moot during the course of the appeal.” *Id.* Because Appellant’s appeal is moot, the Court should dismiss it.

Appellant’s appeal is moot because the February 2020 Board decision eliminated any colorable claim that he has an ongoing injury caused by the Board’s April 2018 referral. Although “[s]tanding and mootness may not be coextensive in all cases,” “when the potential for injury has been mooted by

events, the federal courts are deprived of jurisdiction” due to the lack of a case or controversy. *Momenta Pharms., Inc. v. Bristol-Myers Squibb Co.*, 915 F.3d 764, 770 (Fed. Cir. 2019). The personal interest that must be present at the beginning of the litigation (standing) must continue during the entire case (mootness). *Id.* An appellant must prove three elements to demonstrate that he or she has standing. *Rosinski v. Wilkie*, 31 Vet.App. 1, 6 (2019) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, L. Ed. 351 (1992)). The party must have suffered an injury in fact that is concrete and particularized and actual or imminent, not merely conjectural or hypothetical. *Lujan*, 504 U.S. at 560. “[T]here must be a causal connection between the injury and the conduct complained of.” *Id.* And it “must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 561 (internal quotation omitted). “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Id.* “[J]udicial review of agency action remains subject to the constitutional foundation of injury-in-fact, lest the court occupy only an advisory role.” *Momenta Pharms., Inc.*, 915 F.3d at 768. The February 2020 Board decision removed any potential injury that Appellant has alleged that the April 2018 referral caused, so his appeal is moot.

Appellant argues that the Board’s April 2018 TDIU referral injured him in two ways. First, he has alleged that the referral could result in an improper effective date should he one day establish entitlement to a TDIU. (App. Resp. at 6). Second, he has alleged that the referral would delay adjudication of TDIU by

the Board. *Id.* at 7-8; (App. Supp. Mem. at 13-14). To the extent that either allegation was ever accurate, the Board's February 2020 decision has mooted them.

First, Appellant's speculation that the April 2018 referral may cause him to receive an incorrect effective date for a future TDIU award was never a basis for a case or controversy because this is not an allegation of concrete and particularized harm that is actual or imminent rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560. This allegation of harm is hypothetical at this point because Appellant may never establish entitlement to a TDIU. Even if he does establish entitlement to a TDIU, it is mere conjecture to speculate that he will disagree with the assigned effective date or, even if he does, that the April 2018 referral will be the cause of that disagreement. Therefore, to the extent that Appellant asserts that he may be harmed in the future, that speculation is not the type of concrete or imminent injury that can serve as a basis for standing. *Lujan*, 504 U.S. at 560. If the Board does in the future assign a TDIU effective date that Appellant thinks is wrong, he can appeal it to this Court. 38 U.S.C. § 7252(a).

Second, the Board's February 2020 decision puts to rest the argument that the April 2018 referral would delay the Board's ultimate TDIU adjudication. The April 2018 referral states that the Board lacked jurisdiction over Appellant's February 2018 request for a TDIU because the AOJ had not adjudicated the issue. (Exhibit D at 1). Because the AOJ adjudicated TDIU in June 2018, the basis for the Board's April 2018 referral no longer exists. (Exhibit E). To be sure,

the Board in February 2020 did decline to adjudicate TDIU, but it did so for reasons unrelated to the April 2018 referral. (Exhibit F). The Board stated that TDIU “has been reasonably raised by the record.” *Id.* at 2, citing *Rice v. Shinseki*, 22 Vet.App. 447 (2009). This statement is an acknowledgement by the Board that it could have decided the issue of entitlement to a TDIU. *Id.* The Board declined to decide TDIU “at this time” because Appellant has two pending increased rating claims in appellate status, and the Board decided to “await the status of the two remaining rating claims before rendering a decision on the TDIU,” likely to improve the likelihood that Appellant would be eligible for an award. *Id.*

The Board’s determination not to adjudicate TDIU in February 2020 was a prudential decision based on the presence of other pending claims. *Id.* The Board did not state that its April 2018 referral had deprived it of the ability to adjudicate TDIU. *Id.* To the contrary, the Board’s citation to *Rice* shows that it considered the issue to be part and parcel of Appellant’s right knee increased rating claim. *Id.*; *Rice*, 22 Vet.App. at 453-54. The Board’s reason for not adjudicating TDIU in February 2020 had to do with Appellant’s two other increased rating claims and had nothing to do with the April 2018 referral. *Id.*; *Lujan*, 504 U.S. at 560 (“there must be a causal connection between the injury and the conduct complained of”). Because the April 2018 TDIU referral has caused no delay in the Board’s adjudication of the issue of entitlement to a TDIU, the Court should find that there is no concrete injury in fact resulting from the

April 2018 TDIU referral in terms of any delay. *Id.*; see *Momenta Pharms., Inc.*, 915 F.3d at 770 (“when the potential for injury has been mooted by events, the federal courts are deprived of jurisdiction”).

Also, the Board’s February 2020 decision casts substantial doubt on whether it is likely that Appellant’s alleged injury, which is delay in the Board deciding whether he is entitled to a TDIU, will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. Prior to the Board’s February 2020 decision, the Court, assuming without conceding that it had jurisdiction over the Board’s April 2018 referral and found error, could have remanded the matter to the Board with instructions to decide the TDIU issue along with the right knee increased rating claim. But the Board’s February 2020 decision found that it would be proper to delay adjudication of that issue until the status of the “two remaining rating claims” is complete. (Exhibit F at 2). Whether this reasoning is error is a question for the Court to answer in *Adams v. Wilkie*, Docket No. 20-2380, rather than in this appeal. Therefore, the Court should find that Appellant has failed to demonstrate that there is a live case or controversy with respect to the allegation that the April 2018 referral harmed him by delaying a Board decision on the TDIU issue. *Lujan*, 504 U.S. at 560-61.

Appellant’s argument that the only way this appeal can become moot is if “VA grants TDIU for the maximum time period allowable” is mistaken. (App. Supp. Br. at 14). It is true that that if VA were to grant TDIU for the maximum time period allowable then this appeal would be moot. However, this appeal

does not stem from a TDIU denial because VA had never adjudicated TDIU until after the April 2018 referral. (Exhibit E). Rather, the “action” that Appellant appeals is a Board referral of TDIU. (Exhibit D).; see App. Resp. at 1 (arguing that the Board should “correct the Board’s erroneous referral of the TDIU matter”). For that action to be a case or controversy, that “action” must continue to cause an injury. *Momenta Pharms., Inc.*, 915 F.3d at 770. As argued above, Appellant has not shown an ongoing injury from the Board’s referral of TDIU, and the Board’s February 2020 decision shows that the Board’s decision not to adjudicate TDIU at the same time as the individual right knee instability rating was not caused by the April 2018 referral. (Exhibit F). Therefore, the Court should reject Appellant’s argument that the only way the appeal could be moot is through a maximum TDIU grant because the denial of TDIU is not the alleged harm that Appellant sought to remedy when he appealed the April 2018 referral.

The Court should reject Appellant’s argument that the parties’ disagreement about whether the April 2018 referral is a decision within the meaning of 38 U.S.C. § 7252(a) satisfies Article III’s case or controversy requirement. (App. Supp. Mem. at 15-16). The case or controversy inquiry is whether Appellant suffered an injury in fact caused by the April 2018 referral that this Court can remedy by a decision in his favor. *Lujan*, 504 U.S. at 560-61. While it is true that the parties disagree about this Court’s jurisdiction, that disagreement does not satisfy *Lujan*’s case or controversy analysis. *Id.* Without an underlying case or controversy, any decision on whether the Court has

jurisdiction to review the April 2018 Board referral would be an unauthorized advisory opinion. *Barnett v. Wilkie*, 32 Vet.App. 83, 87 (2019) (describing advisory opinions as “unauthorized”); see *Momenta Pharms., Inc.*, 915 F.3d at 768 (“judicial review of agency action remains subject to the constitutional foundation of injury-in-fact, lest the court occupy only an advisory role”).

Lastly, the Court should reject Appellant’s argument that the “underlying issue of whether [the] Board erred in refusing jurisdiction over the TDIU component of the increased rating claim remains a live case or controversy.” (App. Supp. Mem. at 14). As noted above, in April 2018 the Board found that it did not have jurisdiction over the TDIU issue because the AOJ had not yet decided it. (Exhibit D). The AOJ decided the issue of TDIU in June 2018. (Exhibit E). The Board’s February 2020 decision stated that it would delay adjudication of entitlement to a TDIU because Appellant has two other increased rating claims in appellate status. (Exhibit F). Because the Board’s February 2020 decision to delay adjudication of entitlement to a TDIU had nothing to do with its April 2018 referral, the April 2018 referral caused no injury in fact and there is no case or controversy surrounding that referral. *Id.*; *Lujan*, 504 U.S. at 560-61. To the extent that Appellant wants the Court to review whether the Board is required to adjudicate TDIU at the same time as his right knee instability, the only basis for the Board’s continued delay of its adjudication is the basis that it provided in the February 2020 decision, which the Court can review in *Adams v. Wilkie*, Docket No. 20-2380. *Id.* Therefore, the Court should reject

Appellant's argument that there is an ongoing case or controversy stemming from the Board's April 2018 referral because the April 2018 referral did not cause an ongoing injury that the Court can remedy by reviewing the April 2018 referral. *Momenta Pharms., Inc.*, 915 F.3d at 770.

B. The Exceptions to the Mootness Doctrine do not Apply

The Court should hold that the exceptions to mootness doctrine do not apply here. The two exceptions to the mootness doctrine are (1) when the mootness is based on voluntary cessation and (2) when the action is capable of repetition and evading review. *Ebanks v. Shulkin*, 877 F.3d 1037, 1038 (Fed. Cir. 2017); *Cardona*, 26 Vet.App. at 475-76. The voluntary cessation exception to mootness applies "where a wrongdoer voluntarily ceases the unlawful conduct at issue." *Monk v. Wilkie*, 32 Vet.App. 87, 99 (2019) (en banc). The capable of repetition yet evading review exception applies only in exceptional situations where (1) the challenged action has too short of a duration to be litigated prior to ceasing and (2) there is a reasonable expectation that the same party will be subject to the same action again. *Ebanks v. Shulkin*, 877 F.3d 1037, 1038-39 (Fed. Cir. 2017).

The voluntary cessation exception to mootness does not apply here because there was never an ongoing action by VA. This exception applies "where a wrongdoer voluntarily ceases the unlawful conduct at issue. The notion here is that a court should not be deprived of jurisdiction when a wrongdoer is caught with his proverbial hand in the cookie jar, saying: 'Don't worry, I've

stopped and won't do it again.'" *Monk*, 32 Vet.App. at 99. In this case, Appellant appealed a discrete action, which was a one-time Board referral of the issue of TDIU. (Exhibit D). The Board's stated reason for its referral was that the AOJ had not yet adjudicated TDIU, and this reason no longer applies because the AOJ has now denied TDIU. *Id.*; (Exhibit E). To the extent that the issue of the Board's jurisdiction is an ongoing agency action, the Board's February 2020 decision demonstrates that the Board found that it could jurisdictionally decide TDIU at the same time as the right knee rating. (Exhibit F). However, it made the prudential decision to delay a decision or to exercise jurisdiction pending the status of Appellant's left knee rating claims. *Id.* Even though the Board did not decide TDIU in February 2020, it provided different reasons, so the February 2020 Board decision does not represent an ongoing action stemming from the April 2018 referral. *Id.* This shows that "VA is not like a defendant in a civil case who has stopped bad behavior and asks a court to trust it going forward." *Monk*, 32 Vet.App. at 99. Therefore, the Court should hold that the voluntary cessation exception does not apply.

Also, neither element of the capable of repetition yet evading review exception applies. *Ebanks*, 877 F.3d at 1038. Appellant challenges a Board referral, and his appeal has been delayed due to the April 30, 2019, argument before a Court panel and the subsequent submission of the appeal to the *en banc* Court. However, the Court has reviewed Board referrals in the past, so there is no indication that the challenged action is too short in duration to be fully

litigated prior to its cessation. *Id.*; see, e.g., *Manlincon v. West*, 12 Vet.App. 238, 240 (1999) (holding that the Board erred by referring rather than remanding a matter). The Board stated that it was referring TDIU to the AOJ because the AOJ had not yet addressed the issue, and it did so in June 2018. (Exhibit D); (Exhibit E). This means that there is no reasonable expectation that Appellant will be subject to the same action, *i.e.*, referral of TDIU, again. *Ebanks*, 877 F.3d at 1038-39. Finally, to the extent that Appellant argues that the Board is required to decide TDIU at the same time that it decides the appropriate rating for his right knee instability, that issue is squarely before the Court in *Adams v. Wilkie*, Docket No. 20-2380. Consequently, there is no exception to the mootness doctrine that applies, and the Court should dismiss Appellant's appeal because there is no case or controversy. *Ebanks*, 877 F.3d at 1040 (dismissal is appropriate when the exceptions to mootness do not apply).

WHEREFORE, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully responds to the Court's April 3, 2020, Order.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Kenneth A. Walsh

KENNETH A. WALSH
Deputy Chief Counsel

/s/ Brent Bowker

BRENT BOWKER

Senior Appellate Attorney
Office of General Counsel (027C/J)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6909

Attorneys for Appellee
Secretary of Veterans Affairs



Exhibit A
DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20038

AUG 04 2016

In Reply Refer To: (0141 A1)
[REDACTED]

MARVIN ADAMS
328 TAMWOOD CIRCLE
CAYCE, SC 29033

Dear Appellant:

The Board of Veterans' Appeals has made a decision in this case, and a copy is enclosed. The records are being returned to the Department of Veterans Affairs office having jurisdiction over this matter.

The Board of Veterans Appeals has partnered with J.D. Power and Associates to determine how our customers perceive the service we provide as an organization. You may be contacted by telephone from someone at J.D. Power and Associates in the next 30-60 days and asked to provide feedback on your experience with the Board of Veterans Appeals by taking a brief survey. We appreciate your willingness to help us improve our processes and the service we provide for Veterans by participating in this survey. Any comments provided to J.D. Power are 100% anonymous and will not impact the delivery or timing of any future benefits provided by VA.

Thank you in advance for your willingness to participate and share your feedback.

Sincerely yours,

John Z. Jones
Interim Director, Office of Management,
Planning and Analysis

Enclosures (1)

cc: DAV



Exhibit A
BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
MARVIN ADAMS

C [REDACTED]

AUG 04 2016

DOCKET NO. 12-16 644

)
)
)

DATE

On appeal from the
Department of Veterans Affairs Regional Office in Columbia, South Carolina

THE ISSUE

Entitlement to an increased rating for right knee instability associated with degenerative joint disease, right knee, currently rated at 10 percent.

REPRESENTATION

Veteran represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Steven D. Najarian, Associate Counsel

INTRODUCTION

The Veteran served on active duty in the U.S. Marine Corps from June 1963 to June 1969.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from an October 2010 rating decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Columbia, South Carolina.

In December 2014, the Board granted a 20 percent disability rating for the Veteran's right knee degenerative joint disease, based on 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5258, for dislocated semilunar cartilage with frequent episodes of "locking," pain, and effusion into the joint. The Board declined to assign a separate disability rating for right knee instability.

In September 2015, as a result of the Veteran's appeal of the Board's December 2014 decision, the United States Court of Appeals for Veterans Claims (Court) granted a Joint Motion for Partial Remand (Joint Motion) and remanded the part of the Board's September December 2014 decision that had denied entitlement to a separate disability rating under DC 5257 for right knee instability associated with the service-connected degenerative joint disease of the right knee. The Court dismissed the Veteran's appeal as to the issue of entitlement to a disability rating higher than 20 percent for the right knee degenerative joint disease under DC 5258 (cartilage, semilunar, dislocated, with frequent episodes of "locking," pain and effusion into the joint).

In December 2015, the Board granted the Veteran entitlement to a separate 10 percent disability rating for slight lateral instability of the right knee associated with his service-connected right knee degenerative joint disease. The Board remanded the issue of entitlement to a separate disability rating higher than 10 percent for right knee instability. The issue of entitlement to an extraschedular rating was also remanded.

In April 2016, VA's Appeals Management Center issued a supplemental statement of the case and a rating decision which determined that a rating higher than 10 percent was not warranted for the Veteran's right knee instability. The case has been returned to the Board for further appellate proceedings.

The Veteran's record before the VA consists of an electronic record located in Virtual VA and the Veterans Benefits Management System (VBMS).

FINDING OF FACT

During the entire rating period on appeal, the Veteran's right knee instability has been no worse than slight. He has had subjective complaints of instability; however, objective findings show giving way caused by inhibition of the quadriceps muscle without true ligamentous instability, and anterior, posterior, and medial-lateral instability testing, as well as valgus and varus stress testing, has been normal upon examination.

CONCLUSION OF LAW

During the entire rating period on appeal, the criteria for a disability rating greater than 10 percent for right knee instability have not been met or approximated. 38 U.S.C.A. §§ 1155, 5107(b) (West 2014); 38 C.F.R. §§ 4.1, 4.2, 4.3, 4.7, 4.10, 4.27, 4.40, 4.45, 4.59, 4.71a, Diagnostic Code 5257 (2015).

REASONS AND BASES FOR FINDING AND CONCLUSION

Prior Board Remand

The Board errs as a matter of law when it fails to ensure compliance with a remand order. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998). In this case, the Board's remand instructions of December 2015 have been complied with. In January 2016,

the Veteran underwent a VA medical examination for right knee instability, the examiner reviewed the claims file in preparing the examination report, and the claim was readjudicated by a supplemental statement of the case of April 2016.

Duties to Notify and to Assist

The development of the Veteran's claim has been consistent with the Veterans Claims Assistance Act of 2000 (VCAA) and implementing regulation. *See* 38 U.S.C.A. §§ 5103, 5103A (West 2014); 38 C.F.R. § 3.159 (2015). The Veteran was given required VCAA notice by a letter of July 2010.

The VCAA also defines the obligations of VA with respect to a duty to assist a claimant in the development of the claim. *See* 38 U.S.C.A. §§ 5103, 5103A (West 2014). VA must help a claimant to obtain evidence necessary to substantiate a claim unless there is no reasonable possibility that such assistance would aid in substantiating the claim. The required assistance includes providing a medical examination or obtaining a medical opinion when necessary to make a decision on the claim. *See* 38 U.S.C.A. § 5103A (West 2014); 38 C.F.R. § 3.159 (2015). Reasonable efforts have been made to assist the Veteran in obtaining evidence necessary to substantiate his claim, and there is no reasonable possibility that further assistance would aid in substantiating the claim. The evidence of record includes statements of the Veteran and postservice VA treatment records.

The Veteran underwent VA examinations of his right knee in July 2010, July 2012, and January 2016. In its December 2015 order, the Board found the examination of July 2012 to be inadequate to the extent that examiner failed to address the Veteran's contentions as to right-knee instability. The July 2012 examination was also found to be inadequate because the examiner failed to describe the severity of the Veteran's knee instability. The January 2016 examiner reviewed the Veteran's VA claims file, addressed the Veteran's contentions as to right knee stability, and described the severity of any current subluxation or lateral instability of the Veteran's right knee. The July 2016 examination report contains sufficient information to rate the Veteran's disability under the appropriate diagnostic criteria and is adequate for evaluation purposes. *See* 38 C.F.R. § 4.2 (2015); *Barr v.*

Nicholson, 21 Vet. App. 303, 312 (2007) (holding that a VA examination or opinion must be adequate).

Legal criteria

Disability ratings are determined by applying the criteria of diagnostic codes set forth in the VA's Schedule for Rating Disabilities (38 C.F.R. Part 4). Ratings are based on average impairments of earning capacity resulting from particular diseases and injuries and their residuals in civilian occupations. *See* 38 U.S.C.A. § 1155 (West 2014); 38 C.F.R. § 4.1 (2015). The assignment of a particular diagnostic code depends on the facts of the case. *See Butts v. Brown*, 5 Vet. App. 532, 538 (1993). One diagnostic code may be more appropriate than another based on such factors as an individual's relevant medical history, diagnosis, and demonstrated symptomatology. Any change in a diagnostic code by a VA adjudicator must be specifically explained. *See Pernorio v. Derwinski*, 2 Vet. App. 625, 629 (1992).

Where entitlement to compensation for a service-connected disease or injury already has been established and entitlement to an increase in the disability rating is at issue, the present level of disability is of primary importance. *See, e.g., Franciso v. Brown*, 7 Vet. App. 55, 58 (1994). Staged ratings are appropriate for an increased rating claim when the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings. The relevant focus for adjudicating an increased rating claim is on the evidence concerning the state of the disability from the time period one year before the claim was filed until VA makes a final decision on the claim. *See* 38 C.F.R. § 3.400(o)(2) (2015); *Hart v. Mansfield*, 21 Vet. App. 505 (2007).

After the evidence is assembled, the Board must evaluate the entire record. *See* 38 U.S.C.A. § 7104(a) (West 2014); 38 C.F.R. § 4.6 (2015). When there is an approximate balance of evidence regarding an issue material to the determination of a matter, the benefit of the doubt in resolving the issue shall be given to the claimant. *See* 38 U.S.C.A. § 5107 (West 2014); 38 C.F.R. §§ 3.102, 4.3 (2015); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). To deny a claim on the merits, the

preponderance of the evidence must be against the claim. *See Alemany v. Brown*, 9 Vet. App. 518, 519 (1996).

Disability of the musculoskeletal system is primarily the inability, due to damage or infection in the parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance. It is essential that the examination on which ratings are based adequately portray the anatomical damage and the functional loss with respect to all of these elements. In evaluating disabilities of the musculoskeletal system, it is necessary to consider, along with the scheduler criteria, functional loss due to flare-ups of pain, fatigability, incoordination, pain on movement, and weakness. *See DeLuca v. Brown*, 8 Vet. App. 202 (1995).

The functional loss may be due to the absence of part, or all, of the necessary bones, joints and muscles, or associated innervation, or other pathology and evidenced by visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part that becomes painful on use must be regarded as seriously disabled. *See* 38 C.F.R. § 4.40 (2015). Pain on movement, swelling, deformity or atrophy of disuse as well as instability of station, disturbance of locomotion, and interference with sitting, standing and weight-bearing are related considerations. *See* 38 C.F.R. § 4.45 (2015). The intent of the VA Schedule for Rating Disabilities (Rating Schedule) is to recognize "painful motion with joint or periarticular pathology as productive of disability" and (with or without degenerative arthritis) "actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint." *See* 38 C.F.R. § 4.59 (2015); *Burton v. Shinseki*, 25 Vet. App. 1 (2011).

The diagnostic criteria applicable to recurrent subluxation or lateral instability is found at 38 C.F.R. § 4.71a, Diagnostic Code 5257 (2015). Under that code, slight impairment is assigned a 10 percent rating, moderate impairment a 20 percent rating, and severe impairment a 30 percent rating.

The terms "mild," "moderate," and "severe" are not defined in the Schedule. Rather than applying a mechanical formula, the Board must evaluate all of the evidence to

the end that its decisions are "equitable and just." 38 C.F.R. § 4.6. It should also be noted that use of terminology such as "mild" or "moderate" by VA examiners and others, although an element of evidence to be considered by the Board, is not dispositive of an issue. All evidence must be evaluated in arriving at a decision regarding a higher rating. 38 C.F.R. §§ 4.2, 4.6.

Analysis

The Veteran is service-connected for degenerative joint disease of the right knee under DC 5258, with a rating of 20 percent from June 8, 2010 (a rating which remains undisturbed by this decision, as it is no longer on appeal). He has been granted a separate evaluation for right knee instability under DC 5257, with a rating of 10 percent from June 8, 2010. *See* rating decision of April 2016. It is this rating that remains on appeal. The Veteran argues that his right-knee instability "is more disabling than the current evaluation reflects." *See* Veteran's post-remand brief of June 2016. The Veteran filed his claim for an increased rating in June 2010. Accordingly, while the entire claims file has been reviewed, the Board focuses its discussion on evidence relating to instability of the right knee from June 2009, one year prior to the date of the receipt of the increased rating claim. *See* 38 U.S.C.A. § 5110(b)(2) (West 2014); 38 C.F.R. § 3.400(o)(2) (2015).

VA treatment records of April 2010 note the Veteran's report of right knee pain and occasional swelling. He stated that his right knee "pops and grinds as he goes up and down stairs." No collateral laxity or palpable spasm was noted. The Veteran "mounted/dismounted exam table without any problem." The Veteran also reported right knee pain following a weekend in which he had helped his daughter move and had pulled his grandson in a wagon. Following these activities, his right knee was swollen, and he could "hardly walk." The clinician noted the Veteran's slow gait with crutches to aid in ambulation. There was "swelling and effusion right lateral knee – arojm [sic] limited by pain, no loss of strength." *See* April 2010 VA treatment records.

A May 2010 VA treatment record found the strength of the Veteran's right knee to be within normal limits. No deficits were noted. His gait was characterized as

“independent, without assistive device. (+) antalgia on the right.” The assessment of a physical therapist was: “Pt. presents w/ impaired joint mobility and muscle performance associated w/ connective tissue dysfunction of the knees.” It was noted that the Veteran complained of right knee pain that “comes and goes depending on the activity,” knee swelling, and “‘popping’ and buckling at time[s].” See May 2010 VA treatment record.

The Veteran underwent a VA medical examination in July 2010. The medical history portion of the examination report noted the Veteran’s complaint of “intermittent, 4/10 right knee pain aggravated by walking, especially using stairs.” The Veteran experienced locking, instability, and swelling of the knee. He encountered difficulty in going upstairs to his bedroom, in playing golf for recreation, and in walking for exercise. Flare-ups were reported to be “primarily activity related” and varying in severity and duration with the occasional result of “having to stay off of his feet for varying periods of time.” The Veteran reported wearing a knee brace when doing “heavy activity.” On physical examination, there was “no ligamentous laxity in any direction of the right knee.”

A VA treatment record of August 2011 notes: “Bilat knee pain – pops and grinds as he goes up and down stairs. Occ swell. Bilat DJD, R>L; left lateral meniscal tear; bilat small effusion and Bakers cysts.”

In June 2012, the Veteran stated that his knee condition had worsened since the VA examination of July 2010. He requested a more current and thorough exam to evaluate his flexion, extension, and instability. See VA Form 9 of June 2012.

The Veteran underwent a VA examination in July 2012. The examiner noted in the medical history portion of the report that the Veteran had had physical therapy for over six weeks, received corticosteroid injections in his right knee, used a topical gel for pain relief, and wore a brace or ACE wrap for compression. The Veteran reported “frequent flare-ups when he takes a misstep that results in increased pain and swelling.” Upon examination, the Veteran had tenderness or pain to palpation for the right joint line or soft issue of the knee. Muscle strength testing was 5/5 for

right knee flexion and 5/5 for right knee extension. *See* report of VA examination of July 2012.

As for joint stability testing of the right knee, anterior instability (Lachman test) and posterior instability (posterior drawer test) were normal. Medial-lateral instability (applying valgus/varus pressure to knee in extension and 30 degrees of flexion) was also normal. There was no evidence or history of recurrent patellar subluxation or dislocation. *Id.*

A "meniscal tear of the right knee" and the fact that the Veteran has not had a meniscectomy were noted. The examiner noted frequent episodes of joint effusion of the right knee. The Veteran has no surgical or other scars related to the right knee. The Veteran used a brace as an assistive device for locomotion. He stated that he wore the brace on his right knee only occasionally because it is "too awkward to wear." He more frequently wore an ACE wrap on his right knee. The functional impact was found to be "limited from heavy labor jobs [but] able to do light duty or sedentary work." *Id.*

The Veteran's right knee was again examined in January 2016. *See* VA examination report of January 2016 and opinion report of February 2016. The Veteran stated that his symptoms had their onset in 2010 and progressed over the years. He reported limitations in daily activity such as walking. He complained of pain in both knees when ascending and descending stairs and with prolonged sitting. He stated that both knees will stiffen up with prolonged standing. The Veteran stated that he "does not take any meds for the pain." His intermittent steroid injections were noted. *Id.* The report also noted that degenerative arthritis of the right knee was shown by x-rays. *Id.*

The Veteran reported that flare-ups occur generally three or four times per year depending on the activity, such as playing with his grandchildren. He reported difficulty negotiating stairs and in kneeling and bending. He also stated that there is "always a painful sensation." He reported the functional loss of decreased bending, decreased length of walking distances, and an inability to jog, swim, climb, or hike.

The Veteran stated that he last worked as a technician, that his knee pain did not interfere significantly with his job, and that he retired in 2002. *Id.*

Although it was noted that the Veteran reported "giving way" in both knees, with the left being worse than the right, the examiner checked "none" when asked for a history of right or left lateral instability. The examiner determined that the Veteran "does not have true ligamentous instability." Anterior instability (Lachman's test), posterior drawer test, and valgus and varus stress testing were normal in both the left knee and right knee. In the examiner's opinion, it was likely the case that the Veteran experiences "giving way . . . in the absence of ligamentous instability [because] the quadriceps muscle is inhibited as a protective mechanism to the knee."

The Veteran's right-knee instability is currently rated as 10 percent disabling as a consequence of "slight" recurrent subluxation or lateral instability under DC 5257. DC 5257 addresses recurrent subluxation or lateral instability of the knee and provides for a 10 percent rating for slight impairment, a 20 percent rating for moderate impairment, and a 30 percent maximum rating for severe impairment. *See* 38 C.F.R. § 4.71a (2015), DC 5257 (2015). In order to qualify for the next higher rating of 20 percent, the evidence must be at least in equipoise as to whether the recurrent subluxation or lateral instability is "moderate." The terms "moderate," "moderately severe," and "severe" are not defined in the Rating Schedule.

Taking all the evidence into account, the Board finds that a preponderance of the evidence is against finding that the Veteran's symptoms represent more than "slight" impairment under DC 5257. As a layperson, the Veteran is competent to attest to experienced symptoms. *See Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). The Veteran's reports of flare-ups and occasional instability are competent and credible. He reports that his knee buckles at times depending on the activity. He has characterized his right knee pain as "4/10" and aggravated by walking, especially when using stairs. He states that there is frequently pain and swelling when he takes a misstep. In addition, the Veteran has worn a brace on his right knee only occasionally and when doing heavy activity.

In determining whether the Veteran's knee disability has shown moderate or severe subluxation or instability, the Board assigns more weight in this case to the lack of objective evidence of instability. The Veteran's right-knee instability has been characterized by giving way, pain (including pain with weight-bearing), occasional popping and grinding, swelling, locking, difficulty bending and kneeling, and limitations in activities such as walking, jogging, hiking, and swimming. Although noted to be using crutches for ambulation in April 2010 following a weekend flare-up, the Veteran's gait was "independent" in May 2010. The April 2010 VA treatment record found no collateral laxity of the right knee. Joint stability was normal upon examination in July 2012. Furthermore, the findings of the July 2016 VA examination were "normal" for all aspects of stability of the right knee. In particular, anterior, posterior, and medial-lateral instability testing, as well as valgus and varus stress testing, have all been found to be normal. The Board finds that the medical record and evaluations constitute the most probative evidence, as specific testing was used to ascertain whether instability or subluxation manifested for rating and treatment purposes. The July 2016 examiner also offered an explanation for the giving way that the Veteran experiences, namely that the Veteran's "quadriceps muscle is inhibited as a protective mechanism to the knee."

With respect to additional, separate evaluations, the Board notes that the Veteran has been awarded a 20 percent disability rating from June 8, 2010 under DC 5258 for degenerative joint disease, right knee (previously rated under 5010-5261). *See* Board decision of December 2014. The Court's approval of the Joint Motion served to dismiss the Veteran's appeal as to entitlement to a disability rating higher than 20 percent for right knee degenerative joint disease pursuant to DC 5258 (cartilage, semilunar, dislocated, with frequent episodes of "locking," pain and effusion into the joint). *See* CAVC decision of September 2015. The Joint Motion specifically stated that "the parties do not wish to disturb that portion of the Board's decision favorable to the Appellant that granted an increased rating to 20 percent for Appellant's service-connected right knee condition pursuant to DC 5258." *Id.*

Extraschedular rating

The Board does not have authority to grant an extraschedular rating in the first instance but can determine that a claim should be referred to the VA Director of the Compensation and Pension Service for consideration of an extraschedular rating. *See* 38 C.F.R. § 3.321(b)(1) (2015). The governing norm for an extraschedular rating is a finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or necessitated frequent periods of hospitalization so as to render the regular schedular standards impractical. The threshold factor for extraschedular consideration is a finding that the evidence presents such an exceptional disability picture that the available schedular rating for the service-connected disability is inadequate. There must be a comparison between the level of severity and symptomatology of the service-connected disability with the established criteria. If the criteria reasonably describe the Veteran's disability level and symptomatology, the disability picture is contemplated by the Rating Schedule, the assigned schedular evaluation is adequate, and no referral is required. *See Thun v. Peake*, 22 Vet. App. 111 (2008).

The Veteran has been assigned a 10 percent rating for his recurrent subluxation or lateral instability of the right knee. The Board finds that the rating criteria reasonably describe the Veteran's disability level and symptoms pertaining to his service-connected right-knee instability. The Veteran's right knee disability is manifested by giving way, pain (including pain with weight-bearing), swelling, difficulty bending and kneeling, and limitations in activities such as walking, jogging, hiking, and swimming. The Veteran's disability picture is contemplated by the Rating Schedule, and the assigned schedular ratings are adequate. Referral for extraschedular consideration is therefore not required under 38 C.F.R. § 3.321(b)(1).

The Board notes that a claimant may be awarded an extraschedular rating based upon the combined effect of multiple conditions in an exceptional circumstance where the evaluation of the Veteran's conditions fail to capture all the service-connected disabilities experienced. *See Johnson v. McDonald*, 762 F.3d 1362 (2014). In the case at hand, there is no evidence or allegation of additional

symptoms or disabilities that have not been attributed to a specific service-connected condition. The Veteran is currently service-connected for: degenerative joint disease, right knee (previously rated under 5010-5261), rated as 20 percent disabling; left chondromalacia patella, posttraumatic with instability, rating as 10 percent disabling; posttraumatic arthritis, left knee associated with left chondromalacia patella, posttraumatic with instability, rated as 10 percent disability; and right knee instability associated with degenerative joint disease, right knee (previously rated under 5010-5261). The Veteran has not argued during the current appeal that his service-connected instability of the right knee results in further disability when looked at in combination with his other service-connected disabilities.

TDIU

A total disability rating based on individual unemployability due to a service-connected disability (TDIU), when either expressly raised by a veteran or reasonably raised by the record, involves an attempt to obtain an appropriate rating for a disability and is part of a claim for an increased rating. *See Rice v. Shinseki*, 22 Vet. App. 447 (2009). The Board finds that the issue of TDIU has not been raised in this case. The Veteran states that he last worked in 2002 as a technician and that his knee pain did not interfere significantly with his job. In short, the Veteran has not asserted, and the medical evidence does not support, that his right knee disability renders him unable to obtain or maintain a substantially gainful occupation within the meaning of 38 C.F.R. § 416(a).

Conclusion

Under the facts of this case, in which objective physical examination indicates normal right knee stability, and taking into account the Veteran's account of giving way, a constant painful sensation, and flare-ups that occur generally three or four times per year depending on the activity, a preponderance of the evidence is against finding that the Veteran's right knee instability is greater than "slight" within the meaning of DC 5257. The Board finds that the Veteran has not met the criteria for a rating in excess of 10 percent for right knee instability associated with

degenerative joint disease at any time during the claim. *See Hart v. Mansfield*, 21 Vet. App. 505, 509-510 (2007). The benefit-of-the-doubt rule is not for application because there is not an approximate balance of evidence. *See* 38 U.S.C.A. § 5107(b) (West 2014); *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001); *Gilbert v. Derwinski*, 1 Vet. App. 49, 55-57 (1990); 38 C.F.R. § 3.102 (2015).

ORDER

Entitlement to an increased rating for right knee instability associated with degenerative joint disease, right knee, currently rated at 10 percent, is denied.



Bethany L. Buck

Veterans Law Judge, Board of Veterans' Appeals

David P. S. [unclear]



YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or 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. We will return your file to your local VA office to implement the BVA'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. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

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 BVA 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 BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA 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 such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA 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:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Exhibit A

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 BVA to vacate any part of this decision by writing a letter to the BVA 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 above for the Director, Management, Planning and Analysis, 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 above for the Director, Management, Planning and Analysis, 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 BVA, 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: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

**Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420**

The Office of 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 General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

MARVIN ADAMS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 16-3169
)	
DAVID J. SHULKIN, M.D.,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet.App. R. 27 and 45(g), the parties move the Court to vacate and remand the August 4, 2016, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a rating in excess of 10% for right knee instability associated with degenerative joint disease (DJD) of the right knee.

BASIS FOR REMAND

The parties agree that remand is warranted because the Board erred when it did not discuss evidence favorable to Appellant in denying a rating in excess of 10% for instability associated with DJD of the right knee. To provide an adequate statement of reasons or bases, "the Board must analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran." *Allday v. Brown*, 7 Vet. App. 517, 527 (1995).

In the decision on appeal, the Board denied a rating in excess of 10% because medical testing for joint stability was consistently negative, including the February 2016 Compensation and Pension (C&P) examination finding that Appellant did not have true ligamentous instability because his Lachman's test, posterior drawer test, and valgus and varus stress testing were negative. See R. at 12; see also R. at 67 (February 2016 C&P Examiner). Appellant, however, complained during the February 2016 C&P examination that his knees give way, R. at 56, and the examiner noted that, while Appellant does not have true ligamentous instability, giving way may still occur despite the absence of ligamentous instability when the quadriceps muscle is inhibited as a protective mechanism to the knee, R. at 67. The examiner opined that such inhibition of the quadriceps muscle was "likely the case here." *Id.*

The Board noted the C&P examiner's explanation for giving way of Appellant's knee, but it did not explain whether such explanation indicates Appellant does not experience instability or whether the giving way is related to his service-connected DJD. See R. at 12. As this may be evidence relating to the severity of Appellant's lateral instability, remand is warranted for the Board to address whether Appellant's complaint during the February 2016 C&P examination that his right knee gives way and the examiner's explanation for the knee giving way are evidence of lateral instability. See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of

reasons or bases for its determinations, or where the record is otherwise inadequate").

If the Board determines that the foregoing is evidence of lateral instability, the Board should further address whether it warrants a rating in excess of 10% for Appellant's right knee instability associated with his DJD of the right knee. In this regard, the parties note that the February 2016 C&P examiner did not comment on the level of severity of the instability as requested by the Board in its December 2015 remand decision. See R. at 67 (February 2016 C&P Examination); R. at 86 (December 2015 Board Decision) (requesting that the examiner describe the severity, e.g., slight, moderate, or severe, of any lateral instability); see also *Stegall v. West*, 11 Vet.App. 268, 271 (1998) ("[A] remand by [the] Court or the Board imposes upon the Secretary of the Veterans Affairs a concomitant duty to ensure compliance with the terms of the remand . . .").

The parties agree that this joint motion and its language are the product of compromise. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded.

The Board decision should be vacated and the appeal remanded for readjudication consistent with the foregoing. On remand, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is

necessary, and issue a timely, well-supported decision in this case.” *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). Before relying on any additional evidence developed, the Board must ensure that Appellant is given notice thereof and an opportunity to respond thereto. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993). Appellant will be free to submit additional evidence and argument in support of his claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999).

Also, on remand, the Board shall obtain copies of the Court’s order, Appellant’s opening brief, and this motion and shall incorporate them into Appellant’s claims file for appropriate consideration in subsequent decisions on this claim. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record, including all issues reasonably raised by the evidence of record or the Appellant. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board shall provide this claim expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully move the Court to vacate and remand the August 4, 2016, Board decision that denied entitlement to a rating in excess of 10% for instability associated with DJD of the right knee.

Respectfully submitted,

FOR APPELLANT:

Dated: September 20, 2017

/s/ April Donahower

APRIL DONAHOWER

Chisholm, Chisholm & Kilpatrick
One Turks Head Place, Suite 1100
Providence, RI 02903
(401) 331-6300

FOR APPELLEE:

JAMES M. BYRNE

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Kenneth A. Walsh

KENNETH A. WALSH

Deputy Chief Counsel

Dated: September 20, 2017

/s/ Anna Whited

ANNA WHITED

Senior Appellate Attorney
Office of General Counsel (027J)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6819

Department of Veterans Affairs		VETERAN'S APPLICATION FOR INCREASED COMPENSATION BASED ON UNEMPLOYABILITY				
NOTE: This is a claim for compensation benefits based on unemployment. When you complete this form you are claiming total disability because of a service-connected disability(ies) which has/have prevented you from securing or following any substantially gainful occupation. Answer all questions fully and accurately.						
Social Security Benefits: Individuals who have a disability and meet medical criteria may qualify for Social Security of Supplemental Security Income disability benefits. If you would like more information about Social Security benefits, contact your nearest Social Security Administration (SSA) office. You can locate the address of the nearest SSA office in your telephone book blue pages under "United States Government, Social Security Administration" or call 1-800-772-1213 (Hearing impaired TDD line 1-800-325-0778). You may also contact SSA by Internet at http://www.ssa.gov/ .						
1. NAME OF VETERAN (FIRST, MIDDLE INITIAL, LAST)						
Marvin		Adams				
2. VETERAN'S SOCIAL SECURITY NUMBER		3. VA FILE NUMBER		4. DATE OF BIRTH		
[REDACTED]		C [REDACTED]		Month Day Year 04 26 1944		
5. ADDRESS OF VETERAN (No. and street or rural route, city or P.O., State and ZIP Code)						
No. & Street 318 Tamwood Circle						
Apt./Unit Number		City Cayce				
State/Province SC		Country USA		ZIP Code/Postal Code 29033		
6. EMAIL ADDRESS (If applicable)						
SECTION I - DISABILITY AND MEDICAL TREATMENT						
7. WHAT SERVICE-CONNECTED DISABILITY PREVENTS YOU FROM SECURING OR FOLLOWING ANY SUBSTANTIALLY GAINFUL OCCUPATION? <small>Degenerative Joint Disease, Right knee; Left chondromalacia patella, Posttraumatic instability; Posttraumatic arthritis, left knee; Right knee instability assoc. w/ DTD R knee</small>		8. HAVE YOU BEEN UNDER A DOCTOR'S CARE AND/OR HOSPITALIZED WITHIN THE PAST 12 MONTHS? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO Hospitalization: No Doctor's Care: Yes		9. DATE(S) OF TREATMENT BY DOCTOR(S)		
				FROM TO		
				Ongoing Ongoing		
10. NAME AND ADDRESS OF DOCTOR(S)		11. NAME AND ADDRESS OF HOSPITAL		12. DATE(S) OF HOSPITALIZATION		
Columbia, SC VAMC		N/A		FROM TO		
				N/A N/A		
SECTION II - EMPLOYMENT STATEMENT						
13. DATE YOUR DISABILITY AFFECTED FULL-TIME EMPLOYMENT		14. DATE YOU LAST WORKED FULL-TIME		15. DATE YOU BECAME TOO DISABLED TO WORK		
Month Day Year		Month Day Year		Month Day Year		
C . - X X - 2 0 0 3		C . - X X - 2 0 0 3		C . - X X - 2 0 0 9		
16A. WHAT IS THE MOST YOU EVER EARNED IN ONE YEAR?		16B. WHAT YEAR?		16C. OCCUPATION DURING THAT YEAR		
\$ 58,128.00		Year 2 0 0 2		Bulk mail technician		
17. LIST ALL YOUR EMPLOYMENT INCLUDING SELF-EMPLOYMENT FOR THE LAST FIVE YEARS YOU WORKED (Include any military duty including inactive duty for training)						
A. NAME AND ADDRESS OF EMPLOYER (OR UNIT)		B. TYPE OF WORK	C. HOURS PER WEEK	D. DATES OF EMPLOYMENT	E. TIME LOST FROM ILLNESS	F. HIGHEST GROSS EARNINGS PER MONTH
				FROM TO		
University of South Carolina 1600 Hampton St. Columbia, SC 29170		Postal	20	2006 2009	N/A	\$1,000.00
U.S. Airways 3020 Aviation Way Columbia, SC 29170		baggage checker	30	2003 2004	N/A	\$1,100.00
USPS 2001 Dixiana Rd. West Columbia, SC 29172		Bulk mail technician	40	1969 C.2003	N/A	\$4,000.00
G. IF YOU ARE CURRENTLY SERVING IN THE RESERVE OR NATIONAL GUARD, DOES YOUR SERVICE CONNECTED DISABILITY PREVENT YOU FROM PERFORMING YOUR MILITARY DUTIES? <input type="checkbox"/> YES <input type="checkbox"/> NO						
H. INDICATE YOUR TOTAL EARNED INCOME FOR THE PAST 12 MONTHS			I. IF PRESENTLY EMPLOYED, INDICATE YOUR CURRENT MONTHLY EARNED INCOME			
\$ 0			\$ 0			
18. DID YOU LEAVE YOUR LAST JOB/SELF-EMPLOYMENT BECAUSE OF YOUR DISABILITY? (If "Yes," give the facts in Item 25, "Remarks")		19. DO YOU RECEIVE/EXPECT TO RECEIVE DISABILITY RETIREMENT BENEFITS?		20. DO YOU RECEIVE/EXPECT TO RECEIVE WORKERS COMPENSATION BENEFITS?		
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		

VETERAN'S SOCIAL SECURITY NO. [REDACTED]

21. HAVE YOU TRIED TO OBTAIN EMPLOYMENT SINCE YOU BECAME TOO DISABLED TO WORK?

☐ YES ☒ NO (If "Yes," complete Items 21A, 21B, and 21C)

A. NAME AND ADDRESS OF EMPLOYER	B. TYPE OF WORK	C. DATE APPLIED

SECTION III - SCHOOLING AND OTHER TRAINING

22. EDUCATION (Check highest year completed)

GRADE SCHOOL ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 HIGH SCHOOL ☐ 1 ☐ 2 ☐ 3 ☐ 4 COLLEGE ☐ 1 ☒ 2 ☐ 3 ☐ 4

23A. DID YOU HAVE ANY OTHER EDUCATION AND TRAINING BEFORE YOU WERE TOO DISABLED TO WORK?

☐ YES ☒ NO (If "Yes," complete Items 23B, and 23C)

23B. TYPE OF EDUCATION OR TRAINING	23C. DATES OF TRAINING	
	BEGINNING	COMPLETION

24A. HAVE YOU HAD ANY EDUCATION AND TRAINING SINCE YOU BECAME TOO DISABLED TO WORK?

☐ YES ☒ NO (If "Yes," complete Items 24B, and 24C)

24B. TYPE OF EDUCATION OR TRAINING	24C. DATES OF TRAINING	
	BEGINNING	COMPLETION

25. REMARKS


Please note that the submission of this VA Form 21-8940, and request for TDIU, is not a new claim for benefits, but rather part of the Veteran's increased rating claim on appeal. See Rice v. Shinseki, 22 Vet. App. 447 (2009); see also AB v. Brown, 6 Vet. App. 35, 38 (1993); VA Fast Letter 13-13 ("As a result of Rice v. Shinseki (2009), TDIU claims are no longer adjudicated as freestanding claims. A TDIU claim may be expressly claimed in conjunction with an original service-connection claim, or with a claim for increased evaluation.") (F). 13-13 is now incorporated into the M21-1 at Part IV, Subpart ii, Chapter 2, Section F, Topic 4.m). The submission of the VA Form 21-8940, in this case, intends to assist the RO in gathering "relevant and indispensable information regarding a claimant's disabilities, employment history, and educational history," as the issue of TDIU has already been raised as part of the increased rating claim on appeal. M21-1, Part IV, Subpart ii, Chapter 2, Section F, Top 2.b.

SECTION IV - AUTHORIZATION, CERTIFICATION, AND SIGNATURE

AUTHORIZATION FOR RELEASE OF INFORMATION: I authorize the person or entity, including but not limited to any organization, service provider, employer, or Government agency, to give the Department of Veterans Affairs any information about me except protected health information, and I waive any privilege which makes the information confidential.

CERTIFICATION OF STATEMENTS: I CERTIFY THAT as a result of my service-connected disabilities, I am unable to secure or follow any substantially gainful occupation and that the statements in this application are true and complete to the best of my knowledge and belief. I understand that these statements will be considered in determining my eligibility for VA benefits based on unemployability because of service-connected disability.

I UNDERSTAND THAT IF I AM GRANTED SERVICE-CONNECTED TOTAL DISABILITY BENEFITS BASED ON MY UNEMPLOYABILITY, I MUST IMMEDIATELY INFORM VA IF I RETURN TO WORK. I ALSO UNDERSTAND THAT TOTAL DISABILITY BENEFITS PAID TO ME AFTER I BEGIN WORK MAY BE CONSIDERED AN OVERPAYMENT REQUIRING REPAYMENT TO VA.

26. SIGNATURE OF CLAIMANT 	27. DATE SIGNED 11-21-17	28. PREFERRED TELEPHONE NUMBER (Include Area Code) (339) [REDACTED]
--	-----------------------------	--

WITNESS TO SIGNATURE OF CLAIMANT IF MADE "X" MARK NOTE: Signature made by mark must be witnessed by two persons to whom the person making the statement is personally know and the signature and address of such witnesses must be shown below.

29A. SIGNATURE OF WITNESS	29B. ADDRESS OF WITNESS
30A. SIGNATURE OF WITNESS	30B. ADDRESS OF WITNESS

PENALTY: The law provides severe penalties which include fine or imprisonment or both for the willful submission of any statement or evidence of a material fact, knowing it to be false or for the fraudulent acceptance of any payment to which you are not entitled.

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28. Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. Giving us your SSN account information is mandatory. Applicants are required to provide their SSN under Title 38, U.S.C. 5101(e)(1). VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by a Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits provided under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to determine your eligibility for compensation. Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 45 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.



Exhibit D
BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20038

Date: April 9, 2018

C [REDACTED]

MARVIN ADAMS
318 TAMWOOD CIRCLE
CAYCE, SC 29033

Dear Appellant:

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

<i>If your decision contains a</i>	<i>What happens next</i>
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,

Kimberly Osborne
Deputy Vice Chairman

Enclosures (1)
CC: Robert V. Chisholm, Attorney



Exhibit D
BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
MARVIN ADAMS
REPRESENTED BY
Robert V. Chisholm, Attorney

C [REDACTED]
Docket No. 12-16 644

DATE: April 9, 2018
ISSUES DECIDED: 0 ISSUES REMANDED: 1

REMANDED ISSUE

As an initial procedural matter, the Veteran submitted a claim for entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU) in February 2018. As this issue has not yet been adjudicated by the Agency of Original Jurisdiction (AOJ), the Board does not have jurisdiction over it, and it is referred to the AOJ for appropriate action. 38 C.F.R. § 19.9(b) (2017).

Entitlement to a rating in excess of 10 percent for right knee instability associated with degenerative joint disease is remanded for additional development.

The Veteran served on active duty from June 1963 to June 1969. In August 2016, the Board denied an appeal for a higher rating. In September 2017, the Veterans Claims Court vacated the decision.

As the Court found that the August 2016 decision was based upon an inadequate examination, the issue is remanded for another examination.

The matter is REMANDED for the following actions:

1. Schedule the Veteran for an examination to assess the current nature and severity of his right knee instability. The claims file must be made available to the examiner in conjunction with the examination.

IN THE APPEAL OF
MARVIN ADAMS

C [REDACTED]
Docket No. 12-16 644

In order to comply with the Court's remand, the examiner is asked to acknowledge the Veteran's statements pertaining to his knee instability and to comment on the severity of the instability, in terms of slight, moderate, or severe recurrent subluxation or lateral instability.

2. Readjudicate the right knee instability claim. If the benefit sought remains denied, issue a supplemental statement of the case to the Veteran and his representative and provide an appropriate period for response.

A handwritten signature in blue ink, reading "L. Howell", is enclosed in a rectangular box.

L. HOWELL
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

K. Kovarovic, Associate Counsel



**DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office**

Marvin Adams

VA File Number
[REDACTED]

**Represented By:
ROBERT V CHISHOLM
Rating Decision
06/05/2018**

INTRODUCTION

The records reflect that you are a veteran of the Peacetime and Vietnam Era. You served in the Marine Corps from June 21, 1963, to June 20, 1969. You filed a claim for increased evaluation that was received on February 26, 2018. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Evaluation of left chondromalacia patella, posttraumatic with instability, which is currently 10 percent disabling, is continued.
2. Evaluation of posttraumatic arthritis, left knee, which is currently 10 percent disabling, is continued.
3. Entitlement to individual unemployability is denied.

EVIDENCE

Marvin [REDACTED]
[REDACTED]
[REDACTED] of 3

- Copy of your social security statement, received February 26, 2018
- Copies of court documents, received February 26, 2018
- VA Form 21-8940, Veteran's Application For Increased Compensation Based On Unemployability, received February 26, 2018
- Palmer Vocational Consulting Services, LLC vocational employability assessment, dated January 8, 2018, received March 6, 2018
- VA contract examination, knee and lower leg conditions, conducted by LHI, dated March 30, 2018
- VA Form 21-4192, Request For Employment Information in Connection With Claim For Disability Benefits, received April 9, 2018 (University of South Carolina)
- VA Form 21-4192, Request For Employment Information in Connection With Claim For Disability Benefits, received April 14, 2018 (Received response that "we have no records of this person being employed to US Airways")
- Section (§) 5103 Notice, dated April 25, 2018
- VAMC (Veterans Affairs Medical Center) treatment records, Columbia, from December 2000 through May 2018

REASONS FOR DECISION

1. Evaluation of left chondromalacia patella, posttraumatic with instability currently evaluated as 10 percent disabling.

The evaluation of left chondromalacia patella, posttraumatic with instability is continued as 10 percent disabling.

We reviewed the evidence received and determined your service-connected condition hasn't increased in severity sufficiently to warrant a higher evaluation.

We have assigned a 10 percent evaluation for your posttraumatic arthritis, left knee based on:

- Slight instability

Additional symptom(s) include:

- X-ray evidence of traumatic arthritis

A higher evaluation of 20 percent is not warranted for traumatic arthritis unless the evidence shows:

- X-ray evidence of involvement of two or more major joints or two or more minor joint groups, with occasional incapacitating exacerbations.

Additionally, a higher evaluation of 20 percent is not warranted for impairment of the knee unless the evidence shows:

- Moderate instability; or,
- Moderate recurrent subluxation.

2. Evaluation of posttraumatic arthritis, left knee currently evaluated as 10 percent

Marvin [REDACTED]
[REDACTED]
[REDACTED] of 3

disabling.

The evaluation of posttraumatic arthritis, left knee is continued as 10 percent disabling.

We reviewed the evidence received and determined your service-connected condition hasn't increased in severity sufficiently to warrant a higher evaluation.

We have assigned a 10 percent evaluation for your posttraumatic arthritis, left knee based on:

- Painful motion of the knee (38 CFR §4.59 allows consideration of functional loss due to painful motion to be rated to at least the minimum compensable rating for a particular joint. Since you demonstrate painful motion of the knee, the minimum compensable evaluation of 10 percent is assigned)

The provisions of 38 CFR §4.40 and §4.45 concerning functional loss due to pain, fatigue, weakness, or lack of endurance, incoordination, and flare-ups, as cited in *DeLuca v. Brown and Mitchell v. Shinseki*, have been considered and applied under 38 CFR §4.59.

A higher evaluation of 20 percent is not warranted for limitation of flexion of the knee unless the evidence shows:

- Limitation of flexion of 16 to 30 degrees.

3. Entitlement to individual unemployability.

Entitlement to individual unemployability is denied because you have not been found unable to secure or follow a substantially gainful occupation as a result of service connected disabilities. Service connected disabilities currently evaluated as 50 percent do not meet the schedular requirements for entitlement to individual unemployability. 38 CFR 4.16 provides that individual unemployability may be granted where there is one disability evaluated as 60 percent disabling, or two or more disabilities, one of which is 40 percent with a combined evaluation of 70 percent or more. These percentage standards are set aside only when the evidence clearly and factually shows the veteran has been rendered unemployable solely due to service connected disabilities regardless of their individual and combined percentages. Such cases are submitted to the Director of the Compensation and Pension Service for extra-schedular consideration. This case has not been submitted for extra-schedular consideration because the evidence fails to show you are unemployable due to service connected disabilities. (38 CFR 4.16)

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

Exhibit E

Rating Decision	<i>Department of Veterans Affairs Veterans Benefits Administration</i>		Page 1 of 2 06/05/2018	
NAME OF VETERAN Marvin Adams	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY NR [REDACTED]	POA ROBERT V CHISHOLM	COPY TO

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
06/21/1963	06/20/1969	Marine Corps	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		None

JURISDICTION: Claim for Increase Received 02/26/2018

ASSOCIATED CLAIM(s): 020; New/Increase; 02/26/2018

SUBJECT TO COMPENSATION (1.SC)

- 5258 DEGENERATIVE JOINT DISEASE, RIGHT KNEE (PREVIOUSLY RATED UNDER 5010-5261)
Service Connected, Vietnam Era, Incurred
Static Disability
20% from 06/08/2010
- 5257 LEFT CHONDROMALACIA PATELLA, POSTTRAUMATIC WITH INSTABILITY
Service Connected, Vietnam Era, Incurred
Static Disability
10% from 11/23/1970
0% from 03/01/1976
10% from 08/30/1984
- 5010 POSTTRAUMATIC ARTHRITIS, LEFT KNEE ASSOCIATED WITH LEFT CHONDROMALACIA PATELLA, POSTTRAUMATIC WITH INSTABILITY
Service Connected, Vietnam Era, Secondary
Static Disability
10% from 04/16/2001
- 5010-5261 DEGENERATIVE JOINT DISEASE, RIGHT KNEE
Service Connected, Vietnam Era, Incurred
Static Disability
10% from 08/18/2004 to 06/07/2010
- 5257 RIGHT KNEE INSTABILITY ASSOCIATED WITH DEGENERATIVE JOINT DISEASE, RIGHT KNEE (PREVIOUSLY RATED UNDER 5010-5261)
Service Connected, Vietnam Era, Secondary
Static Disability

Exhibit E

Rating Decision	<i>Department of Veterans Affairs Veterans Benefits Administration</i>		Page 2 of 2 06/05/2018	
NAME OF VETERAN Marvin Adams	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY NR [REDACTED]	POA ROBERT V CHISHOLM	COPY TO

10% from 06/08/2010

COMBINED EVALUATION FOR COMPENSATION :

10% from 11/23/1970
 0% from 03/01/1976
 10% from 08/30/1984
 20% from 04/16/2001
 30% from 08/18/2004 (Bilateral factor of 2.7 Percent for diagnostic codes 5257, 5010, 5261)
 20% from 06/07/2010
 50% from 06/08/2010 (Bilateral factor of 4.2 Percent for diagnostic codes 5257, 5010, 5258, 5257)

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSCPeacetime, Vietnam Era)

5237 LOW BACK PAIN
 Not Service Connected, Not Incurred/Caused by Service
 Original Date of Denial: 11/13/2004
 5257 RIGHT KNEE INJURY
 Not Service Connected, Not Incurred/Caused by Service
 Original Date of Denial: 11/13/2004

Individual Unemployability Denied

Right knee is currently under appeal. Therefore, all issues related to the right knee will not be addressed in this rating decision.

eSign: certified by VBASEANAMS, RVSR



Exhibit F
BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON, DC 20038

Date: February 11, 2020

C [REDACTED]

MARVIN ADAMS
318 Tamwood Cir
Cayce, SC 29033
USA

Dear Appellant:

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

<i>If your decision contains a</i>	<i>What happens next</i>
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: ROBERT V CHISHOLM, Attorney



Exhibit F
BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
MARVIN ADAMS
Represented by
Robert V. Chisholm, Attorney

C [REDACTED]
Docket No. 12-16 644
Advanced on the Docket

DATE: February 11, 2020

ORDER

A rating in excess of 10 percent for right knee instability is denied.

FINDINGS OF FACT

1. The Veteran had active service from June 1963 to June 1969, to include service in the Republic of Vietnam.
2. Throughout the entire period on appeal, the Veteran has had subjective complaints of right knee instability; objective findings have shown no instability, but instead perceived instability which has been characterized as no worse than slight, as well as anterior, posterior, and medial-lateral instability testing which have revealed no instability or subluxation.

CONCLUSION OF LAW

Throughout the entire period on appeal, the criteria for a rating in excess of 10 percent for right knee instability have not been met. 38 U.S.C. §§ 1155, 5107(b) (2012); 38 C.F.R. §§ 4.1, 4.2, 4.3, 4.7, 4.10, 4.27, 4.40, 4.45, 4.59, 4.71a, Diagnostic Code (DC) 5257 (2019).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The procedural history of this appeal has been discussed in detail in the August 2016 Board decision and that history, as well as the cited law, is incorporated by reference. Since that time, this appeal was most recently before the Board in April 2018 when it was remanded for additional development in accordance with a September 2017 Veterans Claims Court Joint Motion for Remand (JMR). As substantial compliance was completed in July 2018, the Board will proceed accordingly. *See Stegall v. West*, 11 Vet. App. 268 (1998).

Additionally, a total disability rating based on individual unemployability (TDIU) has been reasonably raised by the record. *Rice v. Shinseki*, 22 Vet. App. 447 (2009). However, the Veteran has two claims for increased ratings for left knee disabilities in appellate status awaiting Board certification. As he has not yet met the schedular criteria for a TDIU as of the date of this decision, the Board will not take jurisdiction of TDIU at this time and instead await the status of the two remaining rating claims before rendering a decision on the TDIU.

Turning to the relevant laws and regulations, disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. 38 C.F.R. § 4.1. Separate diagnostic codes identify the various disabilities. 38 U.S.C. § 1155; 38 C.F.R. Part 4.

Initially, the Veteran is in receipt of two separate ratings for a right knee disability. Specifically, he has been in receipt of a 20 percent rating under DC 5258 for degenerative joint disease (DJD) of his right knee since June 2010. Included in that rating is the criteria for all right knee symptomatology other than instability.

In this regard, the Veteran was awarded a separate 10 percent rating for right knee instability, which also had an effective date of June 2010. As the rating for his right knee disability and all otherwise associated symptomatology is not on appeal, the

Board will specifically focus its analysis only on right knee instability under DC 5257.

Accordingly, the Veteran is rated under DC 5257 for lateral instability or recurrent subluxation. The Board has also considered all potentially relevant diagnostic codes. In order to warrant a higher rating, the evidence must show moderate recurrent subluxation or lateral instability (20% under DC 5257).

The Veteran asserts that his right knee instability is more disabling than contemplated by the currently assigned rating. Specifically, he has reported that he currently experiences pain with any weightbearing, and is unable to tolerate stairs, kneeling or prolonged walking. He also noted stiffness with prolonged sitting and occasional buckling of his knees if he walks on uneven terrain. He reported that his pain is managed by over-the-counter medication and steroid injections from a private orthopedic group.

Turning to the evidence, VA treatment records from April and May 2010 showed that the Veteran had right knee pain and swelling, especially on stairs. The clinician noted that the Veteran utilized crutches to aid him in ambulation following a weekend of moving which exacerbated his symptoms. Swelling and effusion of his right knee were noted, as well as limited range of motion due to pain. However, there was no evidence of loss of strength, instability, or subluxation. The clinicians noted specifically that there were no deficits, and that his gait was otherwise independent without an assistive device after the reinjury.

A July 2010 VA examination showed that the Veteran complained of right knee pain which was aggravated by walking and stairs. He also reported locking, instability and swelling, with flare-ups related largely to increased activity, which he treated by wearing a knee brace whenever he was engaging in any extraneous activity. Finally, he reported that lateral collateral ligament instability was noted on his initial injury examination in 1966.

Upon examination, there was no ligamentous laxity in any direction of the right knee. He had full range of motion with end-of-range pain. There was lateral joint line and patellar compressive tenderness and moderate crepitus, as well as mild

joint effusion. Importantly, no instability or subluxation were noted upon examination.

Effusion was noted again in an August 2011 VA treatment record, with complaints of pain, popping, and grinding on stairs. In July 2012, he underwent another VA examination after complaints of worsening. At that time, the examiner continued a diagnosis of DJD of the right knee. The Veteran reported physical therapy and corticosteroid injections for treatment, as well as a topical gel and wrap for compression. He also noted experiencing flare-ups when he took a mis-step which resulted in increased pain and swelling, with occasional use of braces.

Upon examination, muscle strength testing was found to be intact. The Lachman test showed normal strength without anterior instability; there was also no posterior instability or medial-lateral instability after the posterior drawer test and valgus/varus pressure were applied to test. Additionally, there was no recurrent patellar subluxation or dislocation.

Private treatment notes from October 2015 revealed that the Veteran complained of knee pain and instability. Upon examination, clinician provider noted that the Veteran ambulated normally, but that the right knee had minimal effusion. Range of motion was within normal limits, and no gross ligamentous instability was present. Imaging was conducted which showed intact lateral joint and medial space.

In a January 2016 VA examination with a February 2016 addendum, both right knee osteoarthritis and strain were diagnosed. The Veteran reported a progression of his knee symptomatology inhibiting his daily activity and ambulation and requiring steroid injections. He also reported flare-ups on activity with constant pain. He also noted that he was unable to bend, jog, swim, climb or hike, and a decreased length of walking distances. He noted the occasional use of braces, and occasional use of crutches. Upon examination, muscle strength testing was rated as 5/5 and without any reduction in muscle strength, and no muscle atrophy. There was no history of recurrent subluxation.

The February 2016 report noted that the Veteran complained of pain in his knees on stairs and with prolonged sitting, as well as stiffness with prolonged standing. He also noted that swimming was painful, and that he received helpful injections for treatment. The examiner noted joint aspiration due to swelling and effusion in his right knee. Finally, he complained of “giving way” in both knees, with left worse than right. Once again, muscle strength testing was 5/5. Joint stability testing showed no recurrent subluxation or lateral instability. Specifically, there was no anterior instability, posterior instability, medial instability, or lateral instability.

In this regard, the examiner opined that the Veteran did not have true ligamentous instability, reasoning that Lachman’s test, posterior drawer test, and valgus and varus stress testing were all negative. The examiner noted that giving way may still occur in the absence of ligamentous instability which usually occurred when the quadriceps muscles were inhibited as a protective mechanism to the knee. The examiner noted that that was likely the case here.

In accordance with the JMR, the Veteran underwent a VA examination in April 2018. At that time, he was diagnosed with DJD of the right knee with associated right knee instability. He complained of pain when climbing and going down stairs, as well as pain when sitting for long periods of time, and occasional popping his knees with his right knee giving way at times. He also reported flare-ups when he took a misstep which resulted in pain, swelling and inability to walk. Additionally, he noted he was unable to golf, swim or play with his grandkids like he used to because of constant knee pain, as well as the occasional use of a brace and crutches.

Upon examination, abnormal range of motion was noted but without additional symptoms including instability of station. Muscle strength testing showed a 4/5 in flexion and extension, but without muscle atrophy. The examiner found no recurrent subluxation or history of lateral instability. On conduction of stability testing, there was no anterior, posterior or medial instability. However, there was slight lateral instability, to 1+ with 0-5 millimeters (mm). Notably, the criteria included 1+ (0-5 mm), 2+ (5-10 mm), and 3+ (10-15 mm).

Additionally, there was objective evidence of pain on passive range of motion testing but no objective evidence of pain when the joint was in non-weight bearing. In this regard, the examiner found the Veteran was unable to perform even sedentary work; however, this was not noted to be specifically due to instability of his right knee. As such, there is no indication that his right knee instability was worse than slight in nature.

In a July 2018 VA examination, right knee DJD was noted. The Veteran reported right knee pain with any weight-bearing, as well as an inability to tolerate stairs, kneeling, and prolonged walking. He noted stiffness with prolonged sitting, but no pain, and swelling with weightbearing. Additionally, he reported an occasional buckling of the knee, or instability, if walking on uneven terrain. He stated that he continued treatment with over-the-counter medication and steroid injections and occasional use of a brace.

Upon examination, muscle strength testing was 5/5 on both flexion and extension, without any objective reduction of muscle strength. Muscle atrophy was noted in the right lower extremity. Joint stability testing showed no recurrent subluxation or anterior, posterior, medial or lateral instability. The examiner noted that the Veteran was unable to tolerate prolonged weightbearing, climbing, or kneeling.

Due to the lack of clarity in the January 2016 VA examiner's opinion regarding instability, a clarifying opinion was requested on whether or not the Veteran exhibited right knee instability. In this regard, the July 2018 examiner stated that after examination, the Veteran did not have right knee instability. Instead, the examiner reasoned that he had perceived instability during weightbearing on uneven terrain which was likely due to the atrophy, chronic pain, and arthritis in the right medial quadricep muscle, as this muscle was a major knee stabilizer. The examiner also noted that private treatment notes from the Veteran's treating orthopedic group in July 2018 documented the absence of right knee instability in all planes of motion.

The Veteran's VA and private treatment notes for the relevant appellate period were also reviewed in detail. Importantly, effusion, limited range of motion, and other symptoms related to his right knee were noted. While discussed in some detail

above, all instances were not noted since, as above, the right knee rating as a whole is not on appeal.

Specifically, the symptoms related to right knee rating with DJD, and instability, are not for consideration in this decision. Further, this symptomatology was discussed in greater detail in the 2016 Board decision, and to the extent that any symptomatology is relevant, it is also incorporated by reference. At this juncture, the Board does not have the jurisdiction to consider symptomatology other than right knee instability or subluxation. In this regard, and after considering the totality of the circumstances, the medical evidence does not support a higher rating for right knee instability for any period during the relevant appeal period. In so finding, the Board has focused only on the instability aspect and not the right knee disability as a whole.

While the Veteran has consistently reported feelings of instability, January 2016 and July 2018 VA examiners have noted the possibility of “perceived” instability and provided a rationale for their findings. It is noteworthy that medical testing has revealed objective findings of instability only once and no subluxation. To the extent that perceived instability has been shown which is related to right knee DJD, it has not been shown to be greater than a slight instability.

Specifically, instability has only been shown in a single instance during the April 2018 VA examination. The examiner categorized the instability as “1+,” out of a possible three categorizations, which can be found to indicate slight, moderate or severe instability. As such, even resolving any doubt in the benefit of the Veteran as instability was later found not to be present, only slight instability has been shown. Additionally, the Veteran himself has noted that “giving way,” to be taken as instability, occurs only when on uneven terrains as noted in the July 2018 VA examination. Finally, his own regularly treating private provider found no evidence of instability in July 2018.

The Board has also considered the Veteran’s lay statements that his disability is worse. While he is competent to report symptoms because this requires only personal knowledge as it comes to him through his senses, he is not competent to

identify a specific level of disability of this disorder according to the appropriate diagnostic codes.

Such competent evidence concerning the nature and extent of the Veteran's right knee instability has been provided by the medical personnel who have examined him during the current appeal and who have rendered pertinent opinions in conjunction with the evaluations. The medical findings (as provided in the examination reports and other clinical evidence) directly address the criteria under which this disability is evaluated.

Moreover, as the examiners have the requisite medical expertise to render a medical opinion regarding the degree of impairment caused by the disability and had sufficient facts and data on which to base the conclusion, the Board affords the medical opinion great probative value. As such, these records are more probative than the Veteran's subjective complaints of increased symptomatology. In sum, after a careful review of the evidence of record, the benefit of the doubt rule is not applicable and the appeal is denied.

Finally, the Veteran has not raised any other issues, nor have any other issues been reasonably raised by the record, for the Board's consideration. *See Doucette v. Shulkin*, 28 Vet. App. 366, 369-370 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

A handwritten signature in blue ink that reads "L. Howell". The signature is written in a cursive style with a long horizontal stroke at the end.

L. HOWELL
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

M. Yacoub, Associate Counsel

IN THE APPEAL OF
MARVIN ADAMS

C [REDACTED]
Docket No. 12-16 644
Advanced on the Docket

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.

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**

Exhibit F

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).

CHISHOLM CHISHOLM & KILPATRICK LTD

ATTORNEYS AT LAW



PLEASE UPLOAD AS ONE DOCUMENT

Fax Cover Sheet

DATE: February 20, 2020
FROM: Chisholm Chisholm & Kilpatrick LTD
TO: Board of Veterans' Appeals
FAX: 844-678-8979
RE: [REDACTED]

Number of pages (including cover sheet): 4

MESSAGE: Please see the attached document(s).

CONFIDENTIALITY STATEMENT

This facsimile transmission and the accompanying documents contain legally privileged confidential information. The information is intended only for the use of the recipient named above. If you are not an intended recipient, you are hereby notified that any disclosure, copying, distribution or exploitation of or the taking of any action in reliance on, the contents of this facsimile is strictly prohibited. If you have received this facsimile in error, please notify us immediately by telephone to arrange for return of the original documents to us at our expense.

**IF PROBLEMS ARE ENCOUNTERED IN RECEIVING THIS TRANSMISSION, PLEASE
CALL (401) 331-6300.**

CHISHOLM CHISHOLM & KILPATRICK LTD
ATTORNEYS AT LAW



February 13, 2020

Director, Office of Management,
Planning and Analysis (014)
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Board of Veterans' Appeals
810 Vermont Avenue, NW.
Washington, DC 20420

Re: [REDACTED]

To Whom It May Concern:

MOTION TO VACATE

Pursuant to 38 C.F.R. §20.1000, Mr. Adams' February 11, 2020 Board decision should be vacated. *See* 38 C.F.R. §20.1000 (a) (2019) ("An appellate decision may be vacated by the [Board] at any time upon request of the appellant or his or her representative, or on the Board's own motion" where the Board determines there has been a violation of due process).

In correspondence dated January 30, 2020, our office responded to the January 7, 2020 VA Regional Office letter notifying us Mr. Adams' file was being returned to the Board of Veterans' Appeals, requesting an additional 90 days, through April 28, 2020, to submit additional argument and evidence in support of Mr. Adams' appeal. This was marked as received in VA's Veterans Benefits Management System (VBMS) on January 30, 2020. *See* enclosed VBMS screenshot. Nevertheless, the Board issued its decision on February 11, 2020. *However, our office had until April 28, 2020 to submit additional argument and evidence in support of his appeal.*

At no point did our office receive correspondence that our request for time was denied. Therefore, the Board denied the Veteran's due process rights by not allowing him the full 90-day period to respond before issuing a decision. *See Harms v. Nicholson*, 20 Vet.App. 238, 249 (2006) (Although § 20.904 uses the discretionary term "may" with regard to the ultimate action to be taken, it directs concession of due process error if an appellant before the Board had (1)

Marvin Adams
February 13, 2020
Page | 2

been denied the right to representation through action or inaction of the Secretary or the Board.” (emphasis added). Thus, the February 11, 2020 Board decision should be vacated.

Very truly yours,



Robert V. Chisholm

mld/ms

cc: Marvin Adams

CHISHOLM CHISHOLM & KILPATRICK LTD
ATTORNEYS AT LAW



PLEASE UPLOAD AS ONE DOCUMENT

Fax Cover Sheet

DATE: March 18, 2020
FROM: Chisholm Chisholm & Kilpatrick LTD
TO: Board of Veterans' Appeals
FAX: 844-678-8979
RE: Marvin Adams
[REDACTED]

Number of pages (including cover sheet): 2

MESSAGE: Please see the attached document(s).

CONFIDENTIALITY STATEMENT

This facsimile transmission and the accompanying documents contain legally privileged confidential information. The information is intended only for the use of the recipient named above. If you are not an intended recipient, you are hereby notified that any disclosure, copying, distribution or exploitation of or the taking of any action in reliance on, the contents of this facsimile is strictly prohibited. If you have received this facsimile in error, please notify us immediately by telephone to arrange for return of the original documents to us at our expense.

IF PROBLEMS ARE ENCOUNTERED IN RECEIVING THIS TRANSMISSION, PLEASE
CALL (401) 331-6300.

CHISHOLM CHISHOLM & KILPATRICK LTD
ATTORNEYS AT LAW



March 18, 2020

Director, Office of Management,
Planning and Analysis (014)
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Board of Veterans' Appeals
810 Vermont Avenue, NW.
Washington, DC 20420

Re: [REDACTED]s
[REDACTED]

To Whom It May Concern:

On February 20, 2020 our office submitted a motion to vacate the February 11, 2020 Board of Veterans' Appeals decision. **Our office wishes to withdraw this motion.** Thank you.

Very truly yours,

Robert V. Chisholm

Mld/krl

cc: Marvin Adams