IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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

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Pursuant to U.S. Vet. App. E-Rule 7, the pagination of this PDF file is as follows:

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APPELLANT'S RESPONSE TO COURT'S APRIL 3, 2020 ORDER

Mr. Adams appealed an April 9, 2018 decision where the Board ruled that it did not have jurisdiction over the issue of TDIU, instead improperly referring it to the Agency of Original Jurisdiction. On February 11, 2020, the Board refused to take jurisdiction over the TDIU issue, which the Veteran also appealed. On April 3, 2020, the Court ordered the parties to address: 1) whether the February 2020 decision, and the withdrawal of the motion to vacate that decision, moot the April 2018 appeal and; 2) if the 2018 appeal is moot, whether this case falls into an exception to the mootness doctrine. The issue currently on appeal—whether the Court has jurisdiction to review the Board's improper referral of the TDIU issue—is not moot. That is because the Board still refuses to take jurisdiction and the benefit has not been granted. Further, if the Board's April 2018 refusal to exercise jurisdiction is a final decision over which the Court has jurisdiction, the February 2020 decision does not deprive the Court of that jurisdiction. Alternatively, if the Court finds the issue moot,

since the Board's jurisdictional error is capable of repetition yet evading review, this case falls into an exception to the mootness doctrine.

The issue on appeal is not moot. The legal issue on appeal, whether the Court has jurisdiction to review the Board's improper referral of the TDIU issue in its 2018 decision, is not moot because nothing has changed: the Board has yet to take jurisdiction over the Veteran's entitlement to TDIU in its 2020 decision. *See* Exhibit 1 (2018 Board decision); Exhibit 2 (2020 Board decision). In its 2018 decision, the Board held that it did not have jurisdiction over that issue, and instead referred it because TDIU had "yet been adjudicated by the [AOJ] . . . ." Exhibit 1. In its 2020 decision, the Board refused to "take jurisdiction of TDIU" because the Veteran did not meet the schedular requirements under 38 C.F.R. § 4.16(a) and it wanted to "await the status of the two remaining rating claims before rendering a decision on the TDIU." Exhibit 2. Both jurisdictional decisions are contrary to well-established case law issued over a decade ago. *Rice v. Shinseki*, 22 Vet.App. 447, 455 (2009); *see* Appellant's Memorandum of Law in Response to Court's February 10, 2020 Order. The different rationale the Board offered is irrelevant because the result is the same. The only thing that has changed since the Board's 2018 decision is that over two years have passed without any correction of the Board's jurisdictional error.

Although not an Article III court, this Court has adopted the case-or-controversy requirements for determining its jurisdiction over veteran's law cases, including the requirement that a case be dismissed when it is moot. *See Mokal v.*

Derwinski, 1 Vet.App. 12, 15 (1990); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*)).

A legally cognizable interest in the outcome remains when there is some relief, however small, for a court to grant. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *Intrepid v. Pollock*, 907 F.2d 1125, 1131 (Fed. Cir. 1990) (a case will not be rendered moot by subsequent acts if some of the requested relief remains available.); *accord Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, (1992) (holding that a case is not moot so long as the "court can fashion *some* form of meaningful relief" for the injured party) (emphasis in original); *and Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1372 (Fed. Cir. 2000) (holding that a case is moot "if an intervening event during the pendency of the appeal renders it impossible for [the] court to grant any effectual relief,")

Relief is defined as "[t]he redress or benefit . . . that a party asks of a court." *Relief*, Black's Law Dictionary (11th ed. 2019). The relief, or redress, Mr. Adams seeks from this Court, an order requiring the Board to adjudicate TDIU—an issue on which the Board has twice refused to act—is still completely available. *Thomas v. Brown,* 9 Vet.App. 269, 270 (1996) (per curiam order) (when the full relief sought has been accomplished, the appropriate course of action is for the Court to dismiss the matter

as moot.). Furthermore, the TDIU benefit has certainly not been granted. *See Cardona v. Shinseki*, 26 Vet.App. 472, 474 (2014) (a case is generally moot when benefits on a claim have been paid). The appeal therefore should not be dismissed as moot. The only way this appeal would be moot is if the Board granted TDIU. *See Cardona*, 26 Vet.App. at 474.

A Court order based on the Board's refusal to take jurisdiction over the TDIU issue twice seems to be the only way Mr. Adams will be able to achieve the relief he seeks. The Board's 2020 decision is contrary to even what the Secretary believed would happen when the increased rating for a right knee issue returned to the Board. During the April 13, 2019 oral argument in this case, the Secretary stated: "The right knee rating claim has returned to the Board. The Board could, and because Appellant has submitted evidence of unemployability, *probably should*, determine whether he's entitled to a TDIU as part of the right knee claim." Adams Oral Argument at 22:43-22:58, *available at http://www.uscourts.cavc.gov/documents/Adams18-2049_1.mp3*. (emphasis added).

And Chief Judge Bartley's concern that, based on the action it took in its first decision, the Board would again miss that TDIU was before it, has been realized. Adams Oral Argument, 50:31-50:44 (Chief Judge Bartley: "the fact that [the Board] didn't recognize that TDIU was inherent in the claim for increase the first time around . . . I don't know that that bodes very well for the current adjudication before the Board."). Moreover, the Department has done nothing to correct its own error.

Adams Oral Argument, 44:18-44:25 (Judge Davis: "We would be back to pre-1988 if we left it to the Department [of the VA] to correct an error it seems.") Without this Court, no review of the error is possible. *See* Adams Oral Argument, 25:16-25:27 (Chief Judge Bartley: "[if] we don't have jurisdiction to review a referral instead of remanding from now on you could just refer everything."); 43:25-43:53 (Judge Davis: "in 1988 Congress created this Court . . . this is the only Federal Court in the country that deals with issues coming out of the Department of Veterans Affairs and if we don't have jurisdiction over some of these issues what happens? We're back to 1988. Or before 1988.").

The possibility that Mr. Adams may achieve the same result after an appeal of the February 2020 decision—remand for adjudication of TDIU issue—does not mean his appeal of the 2018 decision is moot. The mere existence of the 2020 decision does not moot the legal question of whether the 2018 order was a final decision the Court may review under 38 U.S.C. § 7252(a). If the April 2018 order is indeed a "decision[] of the Board" under § 7252, the Court already has jurisdiction over the issue of the Board's refusal of jurisdiction of the TDIU, and the Board cannot then divest the Court of its jurisdiction over that issue, short of granting the TDIU benefit in full, which has not occurred. *See Cerullo v. Derwinski*, 1 Vet.App. 195, 201 (1991).

Further, the Veteran's appeal of the February 2020 decision to this Court did not answer the legal question of whether the 2018 order was a decision. *See* Vet.App. No. 20-2380. That question can be reviewed only on appeal from the April 2018

order; the Court would not review or decide it on direct appeal of the 2020 decision. *See* 38 U.S.C. § 7252(a); *Mathews v. McDonald*, 28 Vet.App. 309, 316-17 (2016) (holding that the Board's findings in prior remand orders are not reviewable); Exhibit 2. For these reasons, the Court should find that this case is not moot.

Alternatively, because the jurisdictional issue is capable of repetition yet evading review, it falls within that exception to the mootness doctrine. Two conditions must be satisfied in order to qualify under the "capable of repetition, yet evading review" exception to the mootness doctrine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Rife v. Brown*, 7 Vet.App. 340, 341 (1994) (per curiam order) (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

If the 2020 decision moots the appeal, the challenge of the 2018 decision was too short in duration for the legal issue to be fully addressed, meeting the first element of the test. *Rife*, 7 Vet.App. at 341. Although the Court heard argument in the case before a panel of three judges on April 30, 2019, further en banc consideration was ordered that has yet to be completed and the Board issued a new decision in that time frame.

This case meets the second element of the test because there is a "reasonable expectation" or a "demonstrated probability" that the same controversy—failure to take jurisdiction over TDIU—"will recur involving the same complaining party," Mr.

Adams. *Weinstein*, 423 U.S. at 149; *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*). It is not "a mere physical or theoretical possibility," which is insufficient to meet the test, because the legal error at issue, the Board's improper refusal to take jurisdiction over TDIU, has already recurred. *Murphy*, 455 U.S. at 482; Exhibit 2. Moreover, since the Board has misunderstood its TDIU jurisdiction *twice* already, just as the Court expressed during argument, it does not bode well for when the case returns to the Board for yet a third time. Adams Oral Argument, 50:31-50:44. For these reasons, Mr. Adams falls into an exception to the mootness doctrine as the jurisdictional error is capable of repetition yet evading review.

Respectfully submitted,

/s/ *Christian A. McTarnaghan*
Christian A. McTarnaghan
Chisholm, Chisholm & Kilpatrick
321 S Main St. #200
Providence, RI 02903
(401) 331-6300
Counsel for Appellant

EXHIBIT 1

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: April 9, 2018 [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.

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

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

Sincerely yours,

K. Osb

Kimberly Osborne
Deputy Vice Chairman

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

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

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

Docket No. 12-16 644

DATE: *April 9, 2018*

ISSUES DECIDED: 0 *Pat* **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 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.

L. HOWELL
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD K. Kovarovic, Associate Counsel

EXHIBIT 2

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.

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

ROBERT V CHISHOLM, Attorney
Robert V Chisholm
Chisholm Chisholm & Kilpatrick Ltd.
321 S. Main St. #200
Providence, RI 02903
USA

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:

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Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: ROBERT V CHISHOLM, Attorney

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 quadricep 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).

L. HOWELL
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board M. Yacoub, Associate Counsel

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

YOUR RIGHTS TO APPEAL OUR DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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