

JASON F. COLLETT,
Petitioner,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,
Respondent.

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Secretary of Veterans Affairs,
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This Court has directed that, in all cases before it, the parties are under a duty to notify the Court of developments that could deprive it of jurisdiction or otherwise affect its decision. *Solze v. Shinseki*, 26 Vet. App. 299, 301 (2013). This is a continuing duty. *Id.* at 302.

On March 5, 2021, Mr. Collett notified this Court that, on February 22, 2021, VA had issued a Rating Decision on that Higher-Level Review. The Rating Decision: (1) increased Mr. Collett's rating evaluation of degenerative disc disease, lumbar spine, from 10 percent to 40 percent effective October 1, 2020; (2) continued the rating evaluation of subluxation, left

knee, at 0 percent disabling; and (3) continued the rating evaluation of subluxation, right knee, at 0 percent disabling. *See Solze v. Shinseki* Notice to the Court (Mar. 5, 2021).

Mr. Collett notifies the Court that, on May 5, 2021, VA issued a new Rating Decision. It reinstates, effective October 1, 2020: (1) the 60 percent rating evaluation for degenerative disc disease, lumbar spine; (2) the 10 percent rating evaluation of subluxation, left knee; and (3) the 10 percent rating evaluation of subluxation, right knee.

Mr. Collett is enclosing a copy of the Rating Decision narrative as Exhibit 1.

May 5, 2021

Respectfully submitted,

/s/ John D. Niles, Esq.
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Counsel for Petitioner

EXHIBIT 1



DEPARTMENT OF VETERANS AFFAIRS
Department of Veteran Affairs
Regional Office

JASON COLLETT

VA File Number



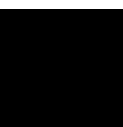
Represented By:
KENNETH M. CARPENTER
Rating Decision
05/05/2021

INTRODUCTION

The records reflect that you are a Veteran of the Gulf War Era. You served in the Army from August 14, 1996 to October 22, 2005. A special review of your file was mandated on October 7, 2020. Based on the review and the evidence listed below, we have made the following decision(s).

DECISION

1. Propriety of the reduction from 60 percent to 40 percent disabling for degenerative disc disease, lumbar spine was improper and a 60 percent evaluation is re-instated effective October 1, 2020.
2. Propriety of the reduction from 10 percent to 0 percent disabling for slight subluxation, left knee was improper and a 10 percent evaluation is re-instated effective October 1, 2020.
3. Propriety of the reduction from 10 percent to 0 percent disabling for slight subluxation, right knee was improper and a 10 percent evaluation is re-instated effective October 1, 2020.



4. Basic eligibility to Dependents' Educational Assistance is established from March 5, 2019.

EVIDENCE

- VA Form 21-4138, Statement in Support of Claim, received March 5, 2019
- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, received March 5, 2019
- Received on March 5, 2019 copy of article "Low Back and Leg Pain is Lumbar Radiculopathy"
- Received on April 15, 2019 copy of Bay Pines VA Medical Center outpatient treatment records dated from March 2018 to March 2019
- VA examination conducted on May 10, 2019 at Bay Pines VA Medical Center
- Rating decision dated May 17, 2019
- Notification letter dated May 17, 2019 regarding unavailability of VA Medical Center outpatient treatment records from Dayton VA Medical Center prior to February 4, 2006
- Notification letter dated May 21, 2019 to Veteran regarding our decision
- Received on April 22, 2020 copy of Dayton VA Medical Center outpatient treatment records dated from September 2014 to May 2018
- Due process dated April 23, 2020 regarding our proposed reductions
- Received on June 19, 2020 Disability Benefits Questionnaire for Back (Thoracolumbar Spine) dated May 21, 2020 completed by private provider
- Received on June 30, 2020 copy of Dayton VA Medical Center outpatient treatment records dated from February 2006 to August 2016
- Rating decision dated June 30, 2020
- Notification letter dated July 2, 2020 to Veteran regarding our decision
- VA Form 20-0996, Decision Review Request - Higher Level Review, received October 7, 2020
- HLR Informal Conference Worksheet, received February 12, 2021
- Rating decision dated February 22, 2021
- Notification letter dated February 23, 2021 to Veteran regarding our decision

REASONS FOR DECISION

1. Propriety of the reduction from 60 percent to 40 percent disabling for degenerative disc disease, lumbar spine.

Propriety of the reduction from 60 percent to 40 percent disabling for degenerative disc disease, lumbar spine was improper and a 60 percent evaluation is re-instated effective October 1, 2020.

Review of the file shows you were granted a 60 percent evaluation based on incapacitating episodes for your degenerative disc disease of the lumbar spine effective October 23, 2005. VA examination conducted on April 28, 2011 noted improvement in your degenerative disc disease without evidence of incapacitating episodes noted on examination. Rating decision dated March 6, 2012 continued the 60 percent evaluation based on no evidence of sustained improvement

shown by the medical evidence. VA examination conducted in January 2014 continued to show improvement of your condition and no evidence of incapacitating episodes. Therefore, rating decision dated October 4, 2014 proposed to reduce the evaluation from 60 percent to 40 percent. You were notified of this on November 7, 2014 and given due process for the proposal to reduce. Rating decision dated September 25, 2015 continued the 60 percent evaluation for the degenerative disc disease noting sustained improvement was not shown by the overall medical evidence. You filed an increase in your degenerative disc disease received on March 5, 2019. VA examination conducted on May 10, 2019 showed improvement in your degenerative disc disease, lumbar spine. Rating decision dated May 17, 2019 proposed to reduce the evaluation of your lumbar spine from 60 percent to 10 percent. Due process was issued on April 23, 2020 regarding our proposal to reduce. On June 19, 2020 we received a private provider Disability Benefits Questionnaire for the lumbar spine. This private provider evidence indicated a 40 percent evaluation was warranted for your lumbar spine based on range of motion of the spine. The examination noted incapacitating episodes of at least 2 weeks but less than 4 weeks in the last 12 months due to your lumbar spine. Rating decision dated June 30, 2020 reduced the evaluation of your degenerative disc disease, lumbar spine from 60 percent to 10 percent effective October 1, 2020. You were notified of this decision on July 2, 2020. On October 7, 2020 you filed a higher level review requesting we re-instate the 60 percent evaluation. Rating decision dated February 22, 2021 granted a 40 percent evaluation for the lumbar spine effective October 1, 2020; however, did not address whether an improvement in the conditions reflected an improvement in the Veteran's ability to function under the ordinary conditions of life and work. Review of the overall medical evidence does not show sustained improvement in the lumbar spine condition during ordinary conditions of life and work; therefore, the 60 percent evaluation is re-instated effective October 1, 2020.

An evaluation of 60 percent is assigned from October 1, 2020. The effective date is the date of the previous reduction from 60 percent to 40 percent.

An evaluation of 60 percent is granted for incapacitating episodes of intervertebral disc syndrome having a total duration of at least 6 weeks during the past 12 months. A higher evaluation of 100 percent is not warranted unless there is unfavorable ankylosis of the entire spine with or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease. (38 CFR 4.71a)

We have assigned a 60 percent evaluation for your degenerative disc disease, lumbar spine based on:

- Incapacitating episodes having a total duration of at least six weeks during the past 12 months

Additional symptom(s) include:

- Combined range of motion of the thoracolumbar spine within normal range
- Forward flexion of the thoracolumbar spine within normal range

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 are not warranted.

A higher evaluation of 100 percent is not warranted for diseases and injuries of the thoracolumbar spine unless the evidence shows:

- Unfavorable ankylosis of the entire spine. (38 CFR 4.71a)

Laws and regulations applicable to this issue:

38 CFR §3.155 How to file a claim.
38 CFR §3.159 Department of Veterans Affairs assistance in developing claims
38 CFR §3.321 General Rating Considerations
38 CFR §3.400 General
38 CFR §3.2500 Review of decisions.
38 CFR §4.1 Essentials of Evaluative Ratings
38 CFR §4.2 Interpretation of Examination Reports
38 CFR §4.3 Resolution of Reasonable Doubt
38 CFR §4.6 Evaluation of Evidence
38 CFR §4.7 Higher of Two Evaluations
38 CFR §4.10 Functional Impairment
38 CFR §4.20 Appropriate Diagnostic Code(s) 38 CFR Part 4 Schedule for Rating Disabilities
Analogous Ratings
38 CFR §4.21 Application of rating schedule.
38 CFR §3.103 Procedural due process and other rights.
38 CFR §3.105 Revision of decisions.
38 CFR §3.500 General.
38 CFR §3.501 Veterans.
38 CFR §4.40 Functional loss.
38 CFR §4.41 History of injury.
38 CFR §4.42 Complete medical examination of injury cases.
38 CFR §4.43 Osteomyelitis.
38 CFR §4.44 The bones.
38 CFR §4.45 The joints.
38 CFR §4.46 Accurate measurement.
38 CFR §4.59 Painful motion.
38 CFR §4.71 Measurement of ankylosis and joint motion.
38 CFR §4.71a Schedule of ratings—musculoskeletal system.
38 CFR §3.2601 Higher-level review.

2. Propriety of the reduction from 10 percent to 0 percent for slight subluxation, left knee.

Propriety of the reduction from 10 percent to 0 percent disabling for slight subluxation, left knee was improper and a 10 percent evaluation is re-instated effective October 1, 2020.

Review of the file shows service connection for slight subluxation, left knee was granted at 10 percent effective April 11, 2011. VA examination conducted on August 25, 2015 noted no evidence of subluxation of the left knee. Rating decision dated September 25, 2015 continued the 10 percent evaluation noting no evidence of sustained improvement was shown by the medical evidence. On March 5, 2019 you filed an increase in your left knee. VA examination conducted on May 10, 2019 continued to show no evidence of subluxation of the left knee. Therefore,

sustained improvement is shown by the medical evidence. Rating decision dated May 17, 2019 proposed to reduce the evaluation of the left knee subluxation from 10 percent to 0 percent. Due process was given for the proposed reduction on April 23, 2020. We did not receive any medical evidence showing current evidence of left knee subluxation. Therefore, rating decision dated June 30, 2020 implemented the proposed reduction based on the evidence which shows sustained improvement in your left knee subluxation. You were notified of this decision on July 2, 2020. We received your higher-level review on October 7, 2020 requesting the 10 percent evaluation for your left knee subluxation be restored. Rating decision dated February 22, 2021 continued the 0 percent evaluation; however, did not discuss whether an improvement in the condition reflected an improvement in the Veteran's ability to function under the ordinary conditions of life and work. Based on the review of the evidence sustained improvement during ordinary conditions of life and work are not shown. Therefore, the 10 percent evaluation is re-instated effective October 1, 2020 the date the previous reduction was made.

The evaluation of slight subluxation, left knee is re-instated as 10 percent disabling.

An evaluation of 10 percent is assigned from October 1, 2020. The effective date is the date of the previous reduction.

An evaluation of 10 percent is granted for recurrent patellar instability without documented anatomic abnormalities, with or without surgical repair. A higher evaluation of 20 percent is not warranted unless evidence shows recurrent patellar instability with one or more documented anatomic abnormalities affecting the meniscus, cartilage, or bone within the knee joint (e.g., "flake" fractures or abnormalities affecting the patella and/or femoral trochlea) without surgical repair; or, persistent grade 3 instability of the knee without operative intervention and a physician prescribes both an assistive device (e.g., cane(s), crutch(es), or a walker) and bracing for ambulation. (38 CFR 4.71a)

We have assigned a 10 percent evaluation for your slight subluxation, left knee based on:

- Slight recurrent subluxation

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

- Moderate lateral instability; or,
- Moderate recurrent subluxation. (Historical 38 CFR 4.71a effective July 6, 1950)

Laws and regulations applicable to this issue:

- 38 CFR §3.155 How to file a claim.
- 38 CFR §3.159 Department of Veterans Affairs assistance in developing claims
- 38 CFR §3.321 General Rating Considerations
- 38 CFR §3.400 General
- 38 CFR §3.2500 Review of decisions.
- 38 CFR §4.1 Essentials of Evaluative Ratings
- 38 CFR §4.2 Interpretation of Examination Reports
- 38 CFR §4.3 Resolution of Reasonable Doubt
- 38 CFR §4.6 Evaluation of Evidence

38 CFR §4.7 Higher of Two Evaluations
38 CFR §4.10 Functional Impairment
38 CFR §4.20 Appropriate Diagnostic Code(s) 38 CFR Part 4 Schedule for Rating Disabilities
Analogous Ratings
38 CFR §4.21 Application of rating schedule.
38 CFR §3.103 Procedural due process and other rights.
38 CFR §3.105 Revision of decisions.
38 CFR §3.500 General.
38 CFR §3.501 Veterans.
38 CFR §3.2601 Higher-level review.

3. Propriety of the reduction from 10 percent to 0 percent disabling for slight subluxation, right knee.

Propriety of the reduction from 10 percent to 0 percent disabling for slight subluxation, right knee was improper and a 10 percent evaluation is re-instated effective October 1, 2020.

Review of the file shows service connection for slight subluxation, right knee was granted at 10 percent effective April 11, 2011. VA examination conducted on August 25, 2015 noted no evidence of subluxation of the right knee. Rating decision dated September 25, 2015 continued the 10 percent evaluation noting no evidence of sustained improvement was shown by the medical evidence. On March 5, 2019 you filed an increase in your right knee. VA examination conducted on May 10, 2019 continued to show no evidence of subluxation of the right knee. Therefore, sustained improvement is shown by the medical evidence. Rating decision dated May 17, 2019 proposed to reduce the evaluation of the right knee subluxation from 10 percent to 0 percent. Due process was given for the proposed reduction on April 23, 2020. We did not receive any medical evidence showing current evidence of right knee subluxation. Therefore, rating decision dated June 30, 2020 implemented the proposed reduction based on the evidence which shows sustained improvement in your right knee subluxation. You were notified of this decision on July 2, 2020. We received your higher-level review on October 7, 2020 requesting the 10 percent evaluation for your right knee subluxation be restored. Rating decision dated February 22, 2021 continued the 0 percent evaluation; however, did not discuss whether an improvement in the condition reflected an improvement in the Veteran's ability to function under the ordinary conditions of life and work. Based on the review of the evidence sustained improvement during ordinary conditions of life and work are not shown. Therefore, the 10 percent evaluation is re-instated effective October 1, 2020 the date the previous reduction was made.

The evaluation of slight subluxation, right knee is re-instated as 10 percent disabling.

An evaluation of 10 percent is assigned from October 1, 2020. The effective date is the date of the previous reduction.

An evaluation of 10 percent is granted for recurrent patellar instability without documented anatomic abnormalities, with or without surgical repair. A higher evaluation of 20 percent is not warranted unless evidence shows recurrent patellar instability with one or more documented anatomic abnormalities affecting the meniscus, cartilage, or bone within the knee joint (e.g.,

"flake" fractures or abnormalities affecting the patella and/or femoral trochlea) without surgical repair; or, persistent grade 3 instability of the knee without operative intervention and a physician prescribes both an assistive device (e.g., cane(s), crutch(es), or a walker) and bracing for ambulation. (38 CFR 4.71a)

We have assigned a 10 percent evaluation for your slight subluxation, right knee based on:

- Slight recurrent subluxation

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

- Moderate lateral instability; or,
- Moderate recurrent subluxation. (Historical 38 CFR 4.71a effective July 6, 1950)

Laws and regulations applicable to this issue:

- 38 CFR §3.155 How to file a claim.
- 38 CFR §3.159 Department of Veterans Affairs assistance in developing claims
- 38 CFR §3.321 General Rating Considerations
- 38 CFR §3.400 General
- 38 CFR §3.2500 Review of decisions.
- 38 CFR §4.1 Essentials of Evaluative Ratings
- 38 CFR §4.2 Interpretation of Examination Reports
- 38 CFR §4.3 Resolution of Reasonable Doubt
- 38 CFR §4.6 Evaluation of Evidence
- 38 CFR §4.7 Higher of Two Evaluations
- 38 CFR §4.10 Functional Impairment
- 38 CFR §4.20 Appropriate Diagnostic Code(s) 38 CFR Part 4 Schedule for Rating Disabilities Analogous Ratings
- 38 CFR §4.21 Application of rating schedule.
- 38 CFR §3.103 Procedural due process and other rights.
- 38 CFR §3.105 Revision of decisions.
- 38 CFR §3.500 General.
- 38 CFR §3.501 Veterans.
- 38 CFR §3.2601 Higher-level review.

4. Eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35.

Basic eligibility to Dependents' Educational Assistance is established from March 5, 2019. The effective date is the date your service connected disabilities are considered permanent and total in nature, the date entitlement arose.

Eligibility to Dependents' Educational Assistance is derived from a Veteran who was discharged under other than dishonorable conditions; and, has a permanent and total service-connected disability(ies); or a permanent and total disability(ies) was/were in existence at the time of death; or the Veteran died as a result of a service-connected disability. Also, eligibility exists for a serviceperson who died in service. Finally, eligibility can be derived from a service member who, as a member of the armed forces on active duty, has been listed for more than 90 days as:

missing in action; captured in line of duty by a hostile force; or forcibly detained or interned in line of duty by a foreign government or power. (38 USC Chapter 35, 38 CFR 3.807, 38 CFR 21.3021)

Basic eligibility for Dependents' Educational Assistance is granted as the evidence shows you currently have a total service-connected disability(ies), permanent in nature. (38 USC Chapter 35, 38 CFR 3.807, 38 CFR 21.3021)

Laws and regulations applicable to this issue:

38 CFR §3.807 Dependents' educational assistance; certification.

38 CFR §3.321 General rating considerations.

38 CFR §3.327 Reexaminations.

38 CFR §3.340 Total and permanent total ratings and unemployability.

38 CFR §4.15 Total disability ratings.

38 CFR §4.16 Total disability ratings for compensation based on unemployability of the individual.

38 USC Chapter 35 Survivors' and Dependents' Educational Assistance

38 USC Chapter 38 Veterans' Benefits

38 CFR §3.2500 Review of decisions.

38 CFR §3.2601 Higher-level review.

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.