



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

NICHOLE L. WHATLEY

Represented by

Veterans of Foreign Wars of the United States

[REDACTED]
Docket No. 13-31 482A

DATE: May 23, 2022

ORDER

Entitlement to a disability rating of 20 percent prior to January 29, 2020, for a right knee disability is granted.

Entitlement to a disability rating of 20 percent prior to January 29, 2020, for a left knee disability is granted.

Entitlement to a disability rating in excess of 20 percent after January 29, 2020, for a right knee disability is denied.


Entitlement to a disability rating in excess of 20 percent after January 29, 2020, for a left knee disability is denied.

FINDINGS OF FACT

1. For the entire appeal period, the Veteran's right knee disability manifests as flexion limited to 30 degrees or extension limited to 15 degrees; the right knee disability did not manifest in flexion limited to 15 degrees or extension limited to 20 degrees, nor was ankylosis present.

2. For the entire appeal period, the Veteran's left knee disability manifests as flexion limited to 30 degrees or extension limited to 15 degrees; the left knee disability did not manifest in flexion limited to 15 degrees or extension limited to 20 degrees, nor was ankylosis present.

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CONCLUSIONS OF LAW

1. Prior to January 29, 2020, the criteria for an evaluation of 20 percent for a right knee disability have been met. 38 U.S.C. §§ 1155, 5103, 5103A, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1, 4.2, 4.3, 4.7, 4.10, and 4.71a, Diagnostic Codes 5010, and 5256-5263.
2. Prior to January 29, 2020, the criteria for an evaluation of 20 percent for a left knee disability have been met. 38 U.S.C. §§ 1155, 5103, 5103A, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1, 4.2, 4.3, 4.7, 4.10, and 4.71a, Diagnostic Codes 5010, and 5256-5263.
3. After January 29, 2020, the criteria for an evaluation in excess of 20 percent for a left knee disability have not been met. 38 U.S.C. §§ 1155, 5103, 5103A, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1, 4.2, 4.3, 4.7, 4.10, and 4.71a, Diagnostic Codes 5010, and 5256-5263.
4. After January 29, 2020, the criteria for an evaluation in excess of 20 percent for a right knee disability have not been met. 38 U.S.C. §§ 1155, 5103, 5103A, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1, 4.2, 4.3, 4.7, 4.10, and 4.71a, Diagnostic Codes 5010, and 5256-5263.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from April 2003 to October 2010.

This matter is on appeal from a May 2012 rating decision. The Board remanded this appeal in May 2019, February 2021, and December 2021 for additional development. Such development will be discussed below.

Increased Ratings

Disability ratings are determined by applying the criteria set forth in VA's Schedule for Rating Disabilities, which is based on the average impairment of earning capacity. Individual disabilities are assigned separate diagnostic codes. 38 U.S.C.

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§ 1155; 38 C.F.R. Part 4. If two evaluations are potentially applicable, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. When reasonable doubt arises as to the degree of disability, such doubt will be resolved in the Veteran's favor. 38 C.F.R. § 4.3.

Pertinent regulations do not require that all cases show all findings specified by the Rating Schedule, but that findings sufficiently characteristic to identify the disease and the resulting disability and above all, coordination of rating with impairment of function will be expected in all cases. 38 C.F.R. § 4.21. Therefore, the Board has considered the potential application of various other provisions of the regulations governing VA benefits, whether they were raised by the veteran, as well as the entire history of the veteran's disability in reaching its decision. *Schafrath v. Derwinski*, 1 Vet. App. 589, 595 (1991).

When evaluating disabilities of the musculoskeletal system, 38 C.F.R. § 4.40 allows for consideration of functional loss due to pain and weakness causing additional disability beyond that reflected on range of motion measurements. *See DeLuca v. Brown*, 8 Vet. App. 202 (1995). Further, 38 C.F.R. § 4.45 provides that consideration also be given to weakened movement, excess fatigability, and incoordination. Where arthritis results in painful motion of the joint, the rating criteria allow for at least the minimum compensable evaluation for the joint. 38 C.F.R. § 4.59. The intent of the rating schedule is to recognize painful motion with joint or particular pathology as productive of disability. It is the intention to recognize painful, unstable, or misaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. *Id.*

The evaluation of the same disability under various diagnoses, known as pyramiding, is generally to be avoided. 38 C.F.R. § 4.14. The critical element in permitting the assignment of several ratings under various diagnostic codes is that none of the symptomatology for any one of the disabilities is duplicative or overlapping with the symptomatology of the other disability. *See Esteban v. Brown*, 6 Vet. App. 259, 261-62 (1994).

Moreover, when evaluating musculoskeletal disabilities, VA may, in addition to applying the schedular criteria, assign a higher disability rating when the evidence

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demonstrates functional loss due to limited or excessive movement, pain, weakness, excessive fatigability, or incoordination, to include during flare-ups and with repeated use, if those factors are not considered in the rating criteria. *See* 38 C.F.R. §§ 4.40, 4.45, 4.59; *see also DeLuca v. Brown*, 8 Vet. App. 202 (1995).

Nonetheless, a rating higher than the minimum compensable rating is not assignable under any diagnostic code (relating to range of motion) where pain does not cause a compensable functional loss. The “pain must affect some aspect of ‘the normal working movements of the body’ such as ‘excursion, strength, speed, coordination, and endurance,’” as defined in 38 C.F.R. § 4.40, before a higher rating may be assigned. This is because “pain alone does not constitute a functional loss under the VA regulations that evaluate disability based upon range-of-motion loss.” *Mitchell v. Shinseki*, 25 Vet. App. 32, 33, 43 (2011).

Section 4.59 does not require objective evidence of painful motion. The regulation does not speak to the type of evidence required when assessing painful motion and therefore certainly does not, by its own terms, restrict evidence to “objective” evidence. *Petitti v. McDonald*, 27 Vet. App. 415, 427 (2015). If credible, lay testimony may consist of a veteran’s own statements to the extent that the statements describe symptoms capable of lay observation. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007).

In deciding this appeal, the Board has considered whether separate ratings for different periods of time, based on the facts found, are warranted, a practice of assigning ratings referred to as “staging the ratings.” *See Fenderson v. West*, 12 Vet. App. 119 (1999); *Hart v. Mansfield*, 21 Vet. App. 505 (2008).

VA amended the criteria for rating knee disabilities effective February 7, 2021. These new regulations apply to all applications for benefits received by VA or that are pending before the agency of original jurisdiction on or after February 7, 2021. Claims pending prior to the effective date will be considered under both old and new rating criteria, and whatever criteria is more favorable to the veteran will be applied. The Board may not apply a current regulation prior to its effective date, unless the regulation explicitly provides otherwise. *Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003). However, the Board is not precluded from applying prior versions of the applicable regulation to the period on or after the effective dates of

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the new regulation if the prior version was in effect during the pendency of the appeal.

For both the prior and the current diagnostic criteria, Diagnostic Codes 5256 through 5263 set forth the relevant provisions regarding evaluating knee disabilities. However, in this case, the evidence does not demonstrate ankylosis of the knee (Diagnostic Code 5256), recurrent subluxation or lateral instability (Diagnostic Code 5257), symptomatic dislocation of semilunar cartilage with frequent episodes of locking, pain, and effusion (Diagnostic Code 5258), removal of semilunar cartilage that is symptomatic (Diagnostic Code 5259), or impairment of the tibia and fibula (Diagnostic Code 5262); thus, the Diagnostic Codes pertaining to such impairments are not applicable.

Diagnostic Code 5260 addresses limitation of flexion of the knee. Under it, a 30 percent rating is for application where flexion is limited to 15 degrees; a 20 percent rating is for application where flexion is limited to 30 degrees; a 10 percent rating is for application where flexion is limited to 45 degrees; a 0 percent rating is for application where flexion limited to 60 degrees. 38 C.F.R. § 4.71a, Diagnostic Code 5260.

Diagnostic Code 5261 addresses limitation of extension of the knee. Under it, limitation of extension of the knee to 5 degrees warrants a noncompensable evaluation, limitation of extension of the knee to 10 degrees warrants a 10 percent evaluation, limitation of extension to 15 degrees warrants a 20 percent evaluation, and limitation of extension to 20 degrees warrants a 30 percent evaluation. Limitation of extension of the knee to 30 degrees warrants a 40 percent evaluation and limitation of extension of the knee to 45 degrees warrants a 50 percent evaluation, the highest schedular evaluation under this Diagnostic Code. 38 C.F.R. § 4.71a, Diagnostic Code 5261.

Normal range of motion of the knee is to zero degrees extension and to 140 degrees flexion. *See* 38 C.F.R. § 4.71a, Plate II.

A March 2011 VA examiner indicated that the Veteran's bilateral knee condition flares every 2 to 3 weeks from unknown precipitating factors, with pain lasting 1 to 2 days. The examiner also indicated that the Veteran has knee stiffness and

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instability “at times.” Initial range of motion was left knee flexion to 140 degrees, left knee extension to 0 degrees, right knee flexion to 140 degrees, and right knee extension to 0 degrees.


A May 2019 Board decision remanded the claims for a new VA examination on the basis that the March 2011 VA examination was eight years old and failed to determine whether there was pain on passive motion and in weightbearing and to estimate the extent of loss of additional range of motion during a flare. *Correia v. McDonald*, 28 Vet. App. 158, 168 (2016); *Sharp v. Shulkin*, 29 Vet. App. 26, 34-36 (2017).

At a January 2020 VA examination, the Veteran reported that her knee pain was “getting worse and more frequent.” She claimed that her pain is aggravated by climbing stairs, prolonged sitting, physical activity, running, and prolonged standing; she did not report flare-ups. Initial range of motion was right knee flexion to 120 degrees, right knee extension to 15 degrees, left knee flexion to 120 degrees, and left knee extension to 10 degrees. Pain on weightbearing, disturbance of locomotion, interference with standing, and interference with sitting were noted.

In February 2021 the Board again remanded the claim to estimate the loss of range of motion during a flare per *Sharp*. At a March 2021 VA examination, the examiner denied estimating the loss of range of motion during a flare up as the Veteran was not examined during a flare-up and the examiner found a lack of supportive objective documentation to provide a more specific response after review.

A December 2021 Board decision remanded the claims once again for clarification. At a January 2022 VA examination, the examiner stated that the Veteran’s March 2011 and January 2020 VA examinations, to include the reported flare-ups occurring every 2 to 3 weeks with unknown precipitating factors, were “consistent” with the findings from this examination. The January 2022 VA examiner indicated that the Veteran has difficulty with tasks requiring prolonged sitting, standing or use of stairs. Flare-ups of the right and left knee occur daily, are severe, and last 3 to 4 days. Initial range of motion testing was right and left knee flexion to 80 degrees and right and left knee extension to 0 degrees. During a flare, the Veteran’s right and left knee flexion was limited to 60 degrees and right and left knee extension was limited to 0 degrees.

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For the entire appeal period, the Board finds that the Veteran's symptoms are consistent with a 20 percent rating under Diagnostic Code 5261. Here, the Veteran's right and left knee extension was limited to 15 degrees per the January 2020 VA examination. The Board notes that the January 2022 VA examiner found that his 2022 examination was "consistent with" all other examinations. As such, and resolving all doubt in her favor, the Board will take the recorded 15-degree limitation of extension per the January 2020 VA examination and apply it for the entire appeal period.

To warrant a higher 30 percent rating, the Veteran would need to show flexion limited to 10 degrees or extension limited to 20 degrees. As recorded in the medical records mentioned above, the Veteran, at worst, has flexion 60 degrees and extension to 15 degrees, to include during flare-ups, and therefore does not meet the criteria for a 30 percent rating based on limited range of either flexion or extension. There is simply no objective medical evidence which shows that the Veteran satisfies these criteria.

In sum, the Board finds that the Veteran's right and left knee disability is appropriately rated at 20 percent for the entire appeal period under Diagnostic Code 5261. The benefit-of-the-doubt doctrine has been applied. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).



Caroline B. Fleming
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

Finelli, Christopher

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.cave.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).