

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

|                                |   |                       |
|--------------------------------|---|-----------------------|
| <b>DAVID R. PAYNE,</b>         | ) |                       |
|                                | ) |                       |
| Appellant,                     | ) |                       |
|                                | ) |                       |
| v.                             | ) | Vet. App. No. 22-6022 |
|                                | ) |                       |
| <b>DENIS MCDONOUGH,</b>        | ) |                       |
| Secretary of Veterans Affairs, | ) |                       |
|                                | ) |                       |
| Appellee.                      | ) |                       |

**JOINT MOTION FOR REMAND**

Under U.S. Vet. App. R. 27 and 45(g)(2), Appellant, David R. Payne, and Appellee, Denis McDonough, Secretary of Veterans Affairs, by and through their attorneys, respectfully move the Court to vacate the August 26, 2022, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for a bilateral knee disability. See Record Before the Agency (R.) at 4-37.

**BASIS FOR REMAND**

The parties agree that remand is warranted because the Board failed to sufficiently address an argument raised by Appellant. The Board is required to consider any arguments raised expressly by a claimant or reasonably by the record. See *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008). In this case, the Board failed to sufficiently address an argument that Appellant raised below.

In particular, the Board did not sufficiently address Appellant's argument about proper consideration of submitted evidence and regulatory section 20.1305. In August 2022, Appellant submitted a brief to the Board in which he stated that, in accordance with 38 C.F.R. § 20.1305(c), he was waiving "initial consideration by the Agency of Original Jurisdiction (AOJ) of the pertinent evidence should the Board find that it can grant service connection for the claimed disabilities," but "should the Board find that service connection cannot be granted based upon the record," he requested, "his claims be remanded for AOJ consideration of the attached pertinent evidence." R. at 65 (65-70, Appellant's August 2, 2022, Brief); *see also* 38 C.F.R. § 20.1305(c). This evidence consisted of an additional lay statement from a Mr. Mark Benton regarding the injury the veteran suffered in service, a paper by the National Institute of Health entitled "Incidental Meniscal Findings on Knee MRI in Middle-Aged and Elderly Persons," and another paper entitled "Osteoarthritis of the knee after injury to the anterior cruciate ligament or meniscus: the influence of time and age." R. at 62; 38-53; 54-60. In its decision, the Board found that referral to the AOJ is not warranted for two reasons: (1) the records are duplicative; and (2) the records are not relevant because they relate to a finger disability, not the bilateral knee disability on appeal. R. at 7. But as reflected here, the evidence, to include the lay statement and papers, relate to a knee disability, not a finger disability. Additionally, the

statement provided by Mr. Benton provided additional evidence regarding the veteran's injury in service not discussed in prior lay statements. Accordingly, remand is warranted for the Board to properly address Appellant's argument and to properly review the submitted evidence.

The parties agree that this joint motion and its language are the product of the parties' negotiations. 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 except the parties' right to appeal the Court's order implementing this joint motion. Pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal the Court's order on this joint motion and respectfully ask that the Court enter mandate upon the granting of this joint motion.

Upon 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). Appellant shall be free to submit additional evidence and/or arguments in support of his claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record.

## CONCLUSION

**WHEREFORE**, the parties respectfully request that the Court vacate the August 26, 2022, Board Decision that denied entitlement to service connection for a bilateral knee disability, and remand the matters for further proceedings consistent with the foregoing.

Respectfully submitted,

### FOR APPELLANT:

**KEENAN L. DANEHEY**  
Goodman Allen Donnelly  
123 E. Main Street, 7th Floor  
Charlottesville, VA 22902  
(434) 817-2191

### FOR APPELLEE:

**RICHARD J. HIPOLIT**  
Deputy General Counsel  
for Veterans Programs

**MARY ANN FLYNN**  
Chief Counsel

/s/ Sarah W. Fusina  
**SARAH W. FUSINA**  
Deputy Chief Counsel

/s/ Omar Yousaf  
**OMAR YOUSAF**  
Senior Appellate Attorney  
Office of General Counsel (027H)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-8395