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

IN THE APPEAL OF [redacted]
DANIEL G. SAVAGE

DOCKET NO. 10-39 303) DATE *February 28, 2014*
) *TDV*
)

On appeal from the
Department of Veterans Affairs Regional Office in Newark, New Jersey

THE ISSUES

1. Whether new and material evidence has been submitted to reopen a claim for service connection for a right knee condition.

2. Entitlement to service connection for a low back condition, to include as secondary to a right knee condition.

3. Entitlement to service connection for a right foot condition, to include as secondary to a right knee condition.

4. Entitlement to an increased compensable evaluation for postoperative residuals of tenorrhapy and neurorrhapy of the right hand.

REPRESENTATION

Appellant represented by: National Association of County Veterans Service Officers

IN THE APPEAL OF [redacted]
DANIEL G. SAVAGE

WITNESS AT HEARING ON APPEAL

Veteran

ATTORNEY FOR THE BOARD

R. Dodd, Associate Counsel

INTRODUCTION

The appellant is a Veteran who served on active duty from June 1967 to March 1971.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a January 2010 rating decision by the Newark, New Jersey Regional Office (RO) of the Department of Veterans Affairs (VA). The Veteran filed a notice of disagreement (NOD) in March 2010. He was provided with a statement of the case (SOC) on September 2010 and perfected his appeal with the timely submission of a VA Form 9 in September 2010. A supplemental statement of the case (SSOC) was provided with regard to the issue of the hand condition on January 2011.

The Veteran was afforded a Travel Board hearing before the undersigned Veterans Law Judge in June 2011. A copy of the transcript has been associated with the claims file.

A review of the Virtual VA paperless claims processing system revealed nothing further pertinent to the present appeal.

In *Rice v. Shinseki*, 22 Vet. App. 447 (2009), the United States Court of Appeals for Veterans Claims (Court) held that a total rating based on individual unemployability

(TDIU) claim is part of an increased rating claim when such claim is raised by the record. As of this writing, this issue has neither been raised by the Veteran or the record and, as such, no further discussion shall ensue.

FINDINGS OF FACT

1. A rating decision in April 1989 denied service connection for a right knee condition; the Veteran was notified of the denial and submitted a NOD in May 1989, but did not perfect an appeal or submit material evidence within the appeal period.

2. Evidence received since April 1989 is cumulative or redundant of the evidence previously of record and does not relate to an unestablished fact necessary to substantiate the claims for service connection for a right knee condition.

3. A low back condition, is not shown to have been present during service and is not related to any incident of service or to a service-connected disability.

4. A right foot condition, is not shown to have been present during service and is not related to any incident of service or to a service-connected disability.

5. The Veteran's postoperative residuals of tenorrhapy and neurorrhapy of the right hand, although showing evidence of limitation of motion for the third digit only, showed no evidence of ankylosis, combined ankylosis with any other finger on the right hand, or arthritis during any time period pertinent to the present appeal. The range of motion for the third digit did not reveal a gap of less than one inch (2.5 cm.) between the fingertip and the proximal transverse crease of the palm, with the finger flexed to the extent possible, or; extension limited by no more than 30 degrees.

CONCLUSIONS OF LAW

1. The criteria to reopen a previously-denied claim of service connection for a right knee condition are not met. 38 U.S.C.A. § 5108 (West 2002 & Supp. 2013); 38 C.F.R. § 3.156(c) (2013).

2. A low back condition, was not incurred in or aggravated by service, and is not proximately due to or the result of a service-connected disease or injury. 38 U.S.C.A. §§ 1101, 1110, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.310 (2013).

3. A right foot condition, was not incurred in or aggravated by service, and is not proximately due to or the result of a service-connected disease or injury. 38 U.S.C.A. §§ 1101, 1110, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.310 (2013).

4. The criteria for a compensable disability rating for service-connected postoperative residuals of tenorrhapy and neurorrhapy of the right hand are not met. 38 U.S.C.A. § 1155, 5103(a), 5103A, 5107(b) (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.102, 3.159, 4.40, 4.45, 4.59, 4.71a, Diagnostic Codes 5229 and 5230 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

VCAA

Under the Veterans Claims Assistance Act of 2000 (VCAA), VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107 (West 2002 & Supp. 2010); 38 C.F.R. §§ 3.102, 3.159, 3.326(a) (2013).

Proper notice from VA must inform the claimant of any information and medical or lay evidence not of record (1) that is necessary to substantiate the claim; (2) that VA

will seek to provide; and (3) that the claimant is expected to provide. 38 U.S.C.A. § 5103(a); *Quartuccio v. Principi*, 16 Vet. App. 183, 186-87 (2002). This notice must be provided prior to an initial RO decision on a claim. *Mayfield v. Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006); *Pelegrini v. Principi*, 18 Vet. App. 112, 119 (2004). VCAA notice requirements apply to all five elements of a service connection claim, including: (1) veteran status; (2) existence of a disability; (3) a connection between the veteran's service and the disability; (4) degree of disability; and (5) effective date of the disability. *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473, 486 (2006).

Additionally, in a claim for an increased evaluation, as is the case with the claim for an increase the hand disability, the VCAA requirement is generic notice: the type of evidence needed to substantiate the claim, which consists of evidence demonstrating a worsening or increase in severity of the disability and the effect that worsening has on employment, as well as general notice regarding how disability ratings and effective dates are assigned. *Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009).

Defective timing or content of VCAA notice is not prejudicial to a claimant if the error does not affect the essential fairness of the adjudication, such as where (1) the claimant demonstrates actual knowledge of the content of the required notice; (2) a reasonable person could be expected to understand from the notice what was needed; or (3) a benefit could not have been awarded as a matter of law. *Sanders v. Nicholson*, 487 F.3d 881, 889 (Fed. Cir. 2007), *rev'd on other grounds, Shinseki v. Sanders/Simmons*, 556 U.S. (2009). Defective timing may be cured by a fully compliant notice letter followed by a readjudication of the claim. *Prickett v. Nicholson*, 20 Vet. App. 370, 376 (2006).

By letters dated in October 2009 and September 2010, the RO advised the Veteran of the evidence needed for claim substantiation and explained what evidence VA would obtain or assist in obtaining and what information or evidence the claimant was responsible for providing. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b). The letters apprised the Veteran of the downstream disability rating and effective date elements for claims, as required under *Dingess v. Nicholson*, 19 Vet. App. 473

(2006). The letters also advised the Veteran of elements required to reopen a previously-denied claim and the specific reasons why his previous claims of service connection for a right knee condition had been denied. *See Kent v. Nicholson*, 20 Vet. App. 1 (2006). The claim was readjudicated in a September 2010 SOC and January 2011 SSOC. The Board finds that VA's duty to notify has been met.

VA's duty to assist the Veteran has also been satisfied. 38 U.S.C.A. § 5103A (b), (c); 38 C.F.R. § 3.159(c)(1)-(3). The Veteran's service treatment records, private treatment records, and VA outpatient treatment records have been obtained and associated with the claims file. The duty to assist also includes making as many requests as are necessary to obtain relevant records from a Federal department or agency, including, but not limited to, VA medical records and relevant Social Security Administration (SSA) records. 38 C.F.R. § 3.159(c)(2); *Golz v. Shinseki*, 590 F.3d 1317, 1321-23 (Fed. Cir. 2010). There is no indication in the claims file that the Veteran is in receipt of SSA or that any other relevant federal records have not been associated with the claims file.

VA provided the Veteran with an adequate medical examination for his hand disability in November 2009 and October 2010. The examinations were adequate because they each contained a history obtained from the Veteran and thorough examinations relevant to the applicable rating criteria. They also addressed the functional effects caused by the Veteran's disability.

The Board finds that it was not improper to not provide medical examinations for the claimed conditions of a low back condition or a right foot condition because the low threshold requirements of *McLendon v. Nicholson*, 20 Vet. App. 79, 83-86 (2006) were not met. Such development is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but (1) contains competent evidence of a diagnosed disability or symptoms of disability, (2) establishes that the veteran suffered an event, injury or disease in service, or has a presumptive disease during the pertinent presumptive period, and (3) indicates that the claimed disability may be associated with the in-service event, injury, or disease, or with another service-connected disability. 38 C.F.R. § 3.159(c)(4); *McLendon*, 20 Vet. App. at 83-86 (noting that the third

element establishes a low threshold and requires only that the evidence 'indicates' that there 'may' be a nexus between the current disability or symptoms and active service, including equivocal or non-specific medical evidence or credible lay evidence of continuity of symptomatology). As the Veteran has claimed and testified at his June 2011 Board hearing as well shown by the medical evidence of record that his conditions had onset after service and are related to a non service-connected condition, the second element is not met and the low standard of the third element does not even materialize.

There is no indication in the record that additional evidence relevant to the issue decided herein is available and not part of the claims file. *See Pelegrini*, 18 Vet. App. at 121-22. The Board finds that the duty to assist has been met.

The Veteran has been afforded a hearing before the Board. In *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the Court held that 38 C.F.R. § 3.103(c)(2) requires the hearing officer who chairs a hearing to explain the issues and suggest the submission of evidence that may have been overlooked. Here, the presiding Veterans Law Judge identified the issues to the Veteran and asked specific questions directed at identifying whether the Veteran had submitted new and material evidence to reopen his claim, as well as evidence in support of service connection and an increased evaluation, and the Veteran volunteered his subjective symptoms, history of trauma, and theories of service connection. Neither the Veteran nor his representative has asserted that VA failed to comply with 38 C.F.R. § 3.103(c)(2), nor have they identified any prejudice in the conduct of the Board hearing. The hearing focused on the elements necessary to substantiate the claim on appeal, and the Veteran provided testimony relevant to those elements. As such, the Board finds that there is no prejudice in deciding the claim at this time and no further action pursuant to *Bryant* is necessary.

Legal Criteria

Service Connection

Under the laws administered by VA, service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active service. *See* 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303(a). Generally, the evidence must show: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. 38 C.F.R. § 3.303(a); *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004).

Service connection may be granted for chronic disabilities, such as arthritis, if such are shown to have been manifested to a compensable degree within one year after the Veteran was separated from service. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309. As an alternative to the nexus requirement, service connection for these chronic disabilities may be established through a showing of continuity of symptomatology since service. 38 C.F.R. § 3.303(b). The option of establishing service connection through a demonstration of continuity of symptomatology rather than through a finding of nexus is specifically limited to the chronic disabilities listed in 38 C.F.R. § 3.309(a). *See Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

Service connection may also be granted for any disease diagnosed after discharge from service when all the evidence, including that pertinent to service, establishes that the disease was incurred during service. 38 C.F.R. § 3.303(d).

Additionally, service connection may be established for a disability which is proximately due to or the result of a service-connected disability. 38 C.F.R. § 3.310(a). To establish service connection on a secondary basis, three elements must be met: (1) current disability; (2) service-connected disability; and (3) nexus between current disability and service-connected disability. *Wallin v. West*, 11 Vet. App. 509 (1998).

In each case where a veteran is seeking service connection for any disability, due consideration shall be given to the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's treatment records, and all pertinent medical and lay evidence. *See* 38 U.S.C.A. § 1154(a).

New and Material

Generally, a claim that has been denied in an unappealed RO decision may not thereafter be reopened and allowed. 38 U.S.C.A. § 7105(c). The exception to this rule is 38 U.S.C.A. § 5108, which provides that if new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.

New evidence is defined as existing evidence not previously submitted to agency decisionmakers. Material evidence means evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence previously of record, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a).

The language of 38 C.F.R. § 3.156(a) creates a low threshold, and the phrase "raises a reasonable possibility of substantiating the claim" is "enabling rather than precluding reopening." The regulation is designed to be consistent with 38 C.F.R. § 3.159(c)(4), which "does not require new and material evidence as to each previously unproven element of a claim." *Shade v. Shinseki*, 24 Vet. App. 110 (2010). *See also Evans v. Brown*, 9 Vet. App. 273, 284 (1996) (the newly presented evidence need not be probative of all the elements required to award the claim, but only need to be probative in regard to an element that was a specified basis for the last disallowance).

For the purpose of establishing whether new and material evidence has been submitted, the credibility of evidence is presumed unless the evidence is inherently

incredible or consists of statements that are beyond the competence of the person or persons making them. *See Justus v. Principi*, 3 Vet. App. 510, 513 (1992); *Meyer v. Brown*, 9 Vet. App. 425, 429 (1996); *King v. Brown*, 5 Vet. App. 19, 21 (1993).

Increased Evaluation

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities (Schedule), found in 38 C.F.R. Part 4 (2013). The Schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The ratings are intended to compensate, as far as can practicably be determined, the average impairment of earning capacity resulting from such diseases and injuries and their residual conditions in civilian occupations. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1 (2013). In resolving this factual issue, only the specific factors as enumerated in the applicable rating criteria may be considered. *See Massey v. Brown*, 7 Vet. App. 204, 208 (1994); *Pernorio v. Derwinski*, 2 Vet. App. 625, 628 (1992).

In considering the severity of a disability, it is essential to trace the medical history of the veteran. 38 C.F.R. §§ 4.1, 4.2, 4.41(2013). Consideration of the whole-recorded history is necessary so that a rating may accurately reflect the elements of any disability present. 38 C.F.R. § 4.2; *Peyton v. Derwinski*, 1 Vet. App. 282 (1991). Although the regulations do not give past medical reports precedence over current findings, the Board is to consider the veteran's medical history in determining the applicability of a higher rating for the entire period in which the appeal has been pending. *Powell v. West*, 13 Vet. App. 31, 34 (1999).

Where entitlement to compensation has already been established and an increase in the disability rating is at issue, the present level of disability is of primary concern. *Francisco v. Brown*, 7 Vet. App. 55 (1994).

The Veteran’s postoperative residuals of tenorrhapy and neurorrhapy of the right hand is currently evaluated at 0 percent under the Limitation of Motion of Individual Digits. 38 C.F.R. § 4.71a, Diagnostic Code 5229. A 0 percent evaluation is warranted for a limitation of motion of the index or long finger with a

gap of less than one inch (2.5 cm.) between the fingertip and the proximal transverse crease of the palm, with the finger flexed to the extent possible, and; extension is limited by no more than 30 degrees. *Id.* A 10 percent evaluation is warranted for a limitation of motion of the index or long finger with a gap of one inch (2.5 cm.) or more between the fingertip and the proximal transverse crease of the palm, with the finger flexed to the extent possible, or; with extension limited by more than 30 degrees. *Id.*

Alternatively, a 0 percent evaluation is granted for any limitation of motion in the ring or little finger. 38 C.F.R. § 4.71a, Diagnostic Code 5230.

Also, a 10 percent evaluation is granted for ankylosis that is shown to be favorable or unfavorable for the index and longer fingers, while a 0 percent evaluation is granted for ankylosis that is shown to be favorable or unfavorable for the ring and little fingers. 38 C.F.R. § 4.71a, Diagnostic Codes 5225-5227. Higher compensable evaluations can be granted for multiple favorable or unfavorable ankylosed digits when combined. 38 C.F.R. § 4.71a, Diagnostic Codes 5216-5223.

Additionally, degenerative arthritis with X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups or painful motion is warranted an evaluation of 10 percent. 38 C.F.R. § 4.71a, Diagnostic Code 5003. A 20 percent evaluation is warranted for X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups, with occasional incapacitating exacerbations. *Id.*

Rating factors for a disability of the musculoskeletal system include functional loss due to pain supported by adequate pathology and evidenced by visible behavior of the claimant undertaking the motion, weakness, excess fatigability, incoordination, pain on movement, swelling, or atrophy. 38 C.F.R. §§ 4.40, 4.45; *DeLuca v. Brown*, 8 Vet. App. 202 (1995).

In evaluating musculoskeletal disabilities, the VA must determine whether pain could significantly limit functional ability during flare-ups, or when the joints are used repeatedly over a period of time. *See DeLuca*, 8 Vet. App. at 206.

Under 38 C.F.R. § 4.59, painful motion is a factor to be considered with any form of arthritis; however 38 C.F.R. § 4.59 is not limited to disabilities involving arthritis. *See Burton v. Shinseki*, 25 Vet. App. 1 (2011). The Court also has recently held, that "pain itself does not rise to the level of functional loss as contemplated by VA regulations applicable to the musculoskeletal system." *Mitchell v. Shinseki*, 25 Vet. App. 32, 38 (2011). Rather, pain, may result in functional loss, but only if it limits the ability "to perform the normal working movements of the body with normal excursion, strength, speed, coordination [, or] endurance." *Id*., *quoting* 38 C.F.R. § 4.40.

Standard of Review

The claimant bears the burden of presenting and supporting his (or her) claim for benefits. 38 U.S.C.A. § 5107(a). *See Fagan v. Shinseki*, 573 F.3d 1282 (Fed. Cir. 2009). In its evaluation, the Board shall consider all information and lay and medical evidence of record. 38 U.S.C.A. § 5107(b). When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Board shall give the benefit of the doubt to the claimant. *Id; Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); 38 C.F.R. § 3.102.

The Board has thoroughly reviewed all the evidence in the Veteran's claims file. Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, the evidence submitted by the Veteran or on her behalf. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (the Board must review the entire record, but does not have to discuss each piece of evidence). The analysis below focuses on the most salient and relevant evidence and on what this evidence shows, or fails to show, on the claims. The Veteran must not assume that the Board has overlooked pieces of evidence that are not explicitly discussed herein. *See Timberlake v. Gober*, 14 Vet. App. 122 (2000) (the law requires only that the Board address its reasons for rejecting evidence favorable to the appellant).

Background

Right Knee Condition

The Veteran contends and testified at his June 2011 Board hearing that he injured his right knee during training exercises in the Navy. In one instance, the Veteran contends that he was made to stay in a sustained crouched position in a "hot box" that initially injured his knee. Subsequent to that incident, the Veteran stated that he twisted his knee while stepping off of a boat and that he was unable to flex or extend his knee as a result. He further stated that he received surgery for his right knee while in service and was hospitalized for about a month. The Veteran contends that, while his knee healed post-surgery, he continued to suffer pain from that time until present. The Veteran also related that, despite service treatment records showing the contrary, he did not have a preexisting right knee condition before service. The Veteran has submitted no further evidence to support this assertion.

Low Back Condition

The Veteran contends that his low back condition is related to his right knee condition. To this effect, the Veteran testified at his June 2011 Board hearing that his back condition began in 1990s. The Veteran reported that he complained of aching back pain. He stated that doctors told him it could be due to involvement from his right knee condition.

Private treatment records show that the Veteran has been diagnosed with a herniated disc L4/L5 left side, foraminal stenosis, and spinal stenosis with degenerative disc disease. The Veteran had a successful back surgery in September 2007. These records do not discuss a relationship of this condition to the Veteran's military service or any service-connected disabilities.

Right Foot Condition

The Veteran contends that his right foot condition is related to his right knee condition. To this effect, the Veteran testified at his June 2011 Board hearing that his right foot condition began in 1990s. The Veteran reported that he complained of

increasing loss of balance. He stated that doctors told him it could be due to involvement from his right knee condition.

Private treatment records show that the Veteran was diagnosed in November 2009 with a calcaneal varus and pain in the metatarsal region, lateral heel, sinus tarsi region in the subtalor joint, and the forefoot. It was also noted that he has a semi-reducibal foot deformity. The examiner recommended foot realignment surgery and stated that such may increase the lifespan of his right knee. These records do not discuss a relationship of this condition to the Veteran's military service or any service-connected disabilities.

Right Hand Condition

The Veteran contends that his postoperative residuals of tenorrhapy and neurorrhapy of the right hand is worse than shown by his current noncompensable evaluation.

The Veteran's VA outpatient treatment records and private treatment records were negative for any discussion of the Veteran's postoperative residuals of tenorrhapy and neurorrhapy of the right hand during the pertinent appeals period.

The Veteran was provided with a VA examination in November 2009. It was noted that the Veteran is left hand dominant. The Veteran complained of decreased motion for the third digit on the right hand since service, with some decreased motion for the fourth digit on the right hand as well. There were no sensation changes, incapacitating episodes, flare-ups, problems with repetitive use, or interference with job reported. The Veteran related that he does lose grip strength which interferes with daily activities. Range of motion testing on the third digit revealed the ability to flex the proximal interphalangeal (PIP) and metacarpal (MCP) 90 degrees and extend 0 degrees. He could only flex the distal interaphalangeal (DIP) to 10 degrees. Sensation was grossly intact. Range of motion testing on the fourth digit revealed the ability to flex the PIP, DIP, and MCP 90 degrees and extend 0 degrees. Range of motion testing on the second digit revealed the ability to flex the PIP, DIP, and MCP 90 degrees and extend 0 degrees.

For all range of motion testing, there was no additional pain or loss of motion after repetition. Pinch and grip strength between the thumb and fingers was 5/5. The Veteran was assessed with status post laceration to digits 3 and 4 on the right hand with some scar formation.

The Veteran was provided with a VA examination in October 2010. It was noted that the Veteran is left hand dominant. The Veteran complained of pain and soreness that has worsened for digits 3 and 4 on his right hand since service. He also complained of decreased sensation and decreased motion for digit 3 on the right hand. The Veteran indicated that it interferes with his daily activities as the condition affects grip strength. There were no incapacitating episodes, flare-ups, problems with repetitive use, or interference with job reported. Range of motion testing on the third digit revealed the ability to flex the proximal interphalangeal (PIP) and metacarpal (MCP) 90 degrees and extend 0 degrees. He could only flex the distal interaphalangeal (DIP) to 15 degrees. Sensation was grossly intact, but decreased over the finger tip of the third digit. Range of motion testing on the fourth digit revealed the ability to flex the PIP, DIP, and MCP 90 degrees and extend 0 degrees. Range of motion testing on the second digit revealed the ability to flex the PIP, DIP, and MCP 90 degrees and extend 0 degrees. For all range of motion testing, there was no additional pain or loss of motion after repetition. Pinch and grip strength between the thumb and fingers was 5/5. The Veteran was assessed with status post laceration to digits 2, 3, 4, and 5 on the right hand with some scar formation on digits 3 and 4. There was some sensation loss on digit 3, but no change in examination when compared with the prior examination.

Analysis

Right Knee Condition

A rating decision in April 1989 denied service connection for a right knee condition. The Veteran filed a NOD in May 1989 and was provided with a SOC in July 1989. However, he did not perfect his appeal of this decision within the applicable time period. The April 1989 rating decision is now final. 38 C.F.R. § 20.302.

The April 1989 rating decision specifically denied service connection for a right knee condition because the Veteran's service treatment records showed that his condition preexisted military service and there was no evidence of aggravation, as the Veteran had an ameliorative meniscectomy performed during that time period.

The evidence of record at the time of the April 1989 rating decision consisted of the following: (1) service treatment records; (2) VA outpatient treatment records; (3) private treatment records showing treatment post-service; and (4) lay statements from the Veteran regarding the onset of his condition as occurring during military service.

Evidence received since the April 1989 rating decision includes VA outpatient treatment records and private treatment records showing that the Veteran has a diagnosed right knee condition that has been treated with surgeries and therapy since 1980. However, these records indicate that the Veteran's condition resulted from injuries working as a police officer in the 1980's and do not make reference to the Veteran's military service as onset. The Veteran has also provided additional statements and testimony at his June 2011 Board hearing that he did not have a preexisting knee condition prior to service and that the onset of his right knee disability was while serving in the Navy.

The new evidence received since April 1989 is not "material" in that it does not address the specific reason the claim was previously denied (i.e., there was no showing of aggravation of the Veteran's preexisting right knee condition). Although the Veteran's testimony regarding not having a preexisting right knee condition contradicts the medical evidence of record shown in the service treatment records and could potentially challenge the issue of aggravation, the Board finds that this assertion was already made in the Veteran's original December 1988 claim, in which he indicated that onset was in service and did not raise a theory of aggravation. Therefore, the Veteran's assertions that were raised at the June 2011 Board hearing of not having a preexisting right knee condition were already considered and rejected by the RO in the April 1989 rating decision. The Board finds that, as such, no new and material evidence has been presented. Accordingly,

reopening of the claim for service connection for a right knee condition is not warranted.

As the Veteran has not fulfilled his threshold burden of submitting new and material evidence to reopen this finally disallowed claim, the benefit-of-the-doubt doctrine is not applicable. *See Annoni v. Brown*, 5 Vet. App. 463, 467 (1993).

Low Back Condition

As will be discussed in detail below, the Board finds that the preponderance of evidence is against the Veteran's claim of entitlement to service connection for a low back condition, as secondary to a right knee condition, so the appeal must be denied.

Concerning the issues of both primary service connection and secondary service connection, the record evidence does show that the Veteran has a current diagnosis of a herniated disc L4/L5 left side, foraminal stenosis, and spinal stenosis with degenerative disc disease, as evidenced by the 2007 private treatment records. However, service treatment records were absent for any showing of diagnoses or complaints of back problems. Furthermore the Veteran has claimed and testified that this condition is related to his right knee disability and did not begin until the 1990s, decades after military service. The Board finds that the Veteran has provided competent and credible testimony regarding his back injury and its potential relationship to his right knee. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed.Cir.2006) (noting that the Board must determine whether lay evidence is credible due to possible bias, conflicting statements, and the lack of contemporaneous medical evidence, although that alone may not bar a claim for service connection); *Layno v. Brown*, 6 Vet. App. 465, 469-70 (1994) (holding that a lay witness is competent to testify to that which the witness has actually observed and is within the realm of his personal knowledge). The Veteran is also competent to testify about the onset and continuation of pain associated with his back injury, as pain is an observable symptom within the realm of his personal knowledge. Furthermore, he is found credible because his assertions of back problems with

onset in the 1990s and having a relationship to his right knee condition are supported by his private treatment records.

As such, absent a showing of an in-service event or injury or a service-connected right knee disability, the issue nexus does not materialize. *See* 38 C.F.R. § 3.303(a); *Shedden*, 381 F.3d at 1166-67; *Wallin*, 11 Vet. App. at 509.

In regard to the issue of continuity of symptomology, the Veteran's condition has been associated with arthritis and would be subject to consideration in accordance with *Walker*, 708 F.3d at 1331. However, the Board finds that such analysis is rendered moot due to the absence of the establishment of a chronic disability from an event or injury in service, as both the Veteran and the medical record have established that his back condition had its onset in the 1990s. As such, no further discussion will follow.

In sum, medical evidence of record does not support that a back condition was related to military service and his non service-connected right knee disability cannot serve as a basis for secondary service connection. Accordingly, the preponderance of the evidence does not support a finding of service connection. Thus, service connection for a low back condition, to include as secondary to a right knee condition is not warranted.

Right Foot Condition

As will be discussed in detail below, the Board finds that the preponderance of evidence is against the Veteran's claim of entitlement to service connection for a right foot condition, as secondary to a right knee condition, so the appeal must be denied.

Concerning the issues of both primary service connection and secondary service connection, the record evidence does show that the Veteran has a current diagnosis of a calcaneal varus and pain in the metatarsal region, lateral heel, sinus tarsi region in the subtalor joint, and the forefoot, as evidenced by the 2009 private treatment records. However, service treatment records were absent for any showing of

diagnoses or complaints of foot problems. Furthermore the Veteran has claimed and testified that this condition is related to his right knee disability and did not begin until the 1990s, decades after military service. The Board finds that the Veteran has provided competent and credible testimony regarding his foot injury and its potential relationship to his right knee. *See Buchanan*, 451 F.3d at 1337 (noting that the Board must determine whether lay evidence is credible due to possible bias, conflicting statements, and the lack of contemporaneous medical evidence, although that alone may not bar a claim for service connection); *Layno*, 6 Vet. App. at 469-70 (holding that a lay witness is competent to testify to that which the witness has actually observed and is within the realm of his personal knowledge). The Veteran is also competent to testify about the onset and continuation of pain associated with his foot injury, as pain is an observable symptom within the realm of his personal knowledge. Furthermore, he is found credible because his assertions of foot problems with onset in the 1990s and having a relationship to his right knee condition are supported by his private treatment records.

As such, absent a showing of an in-service event or injury or a service-connected right knee disability, the issue nexus does not materialize. See 38 C.F.R. § 3.303(a); *Shedden*, 381 F.3d at 1166-67; *Wallin*, 11 Vet. App. at 509.

The Veteran's condition has not been associated arthritis or any other chronic condition contemplated by the holding in *Walker*, nor has the Veteran alleged that his disability began in military service, therefore no further discussion of continuity of symptomology shall ensue.

In sum, medical evidence of record does not support that a right foot condition was related to military service and his non service-connected right knee disability cannot serve as a basis for secondary service connection. Accordingly, the preponderance of the evidence does not support a finding of service connection. Thus, service connection for a right foot condition, to include as secondary to a right knee condition is not warranted.

Right Hand Condition

Based on the above, the Board finds that the Veteran's postoperative residuals of tenorrhapy and neurorrhapy of the right hand only meets the criteria for a zero percent evaluation. In order to warrant the next higher evaluation, the evidence must show evidence of a limitation of motion for the Veteran's second or third digits with a gap of one inch (2.5 cm.) or more between the fingertip and the proximal transverse crease of the palm, with the finger flexed to the extent possible, or; with extension limited by more than 30 degrees, ankylosis, a combination with other ankylosed fingers, or arthritis. As an aside, the Board notes that, in regard to the Veteran's fourth or fifth digits of the right hand, even if the evidence had shown any limitation of motion, there is no such compensable rating for that finger in accordance with Diagnostic Code 5230. Further, although the intent of 38 C.F.R. § 4.59 is to recognize painful motion, the Board notes that the medical evidence of record did not reveal any showing of painful motion. Therefore a minimum evaluation of 10 percent is not warranted. Because the medical evidence of record has not at any time during the pertinent appeals period shown the presence of such a limitation of motion as discussed above, ankylosis in any fingers of the right hand, or arthritis, the Board finds that the Veteran is not entitled to an evaluation in excess of zero percent for his postoperative residuals of tenorrhapy and neurorrhapy of the right hand.

Consideration has been given regarding whether the schedular evaluations are inadequate, requiring that the RO refer a claim to the Chief Benefits Director or the Director, Compensation and Pension Service, for consideration of 'an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. 38 C.F.R. § 3.321(b)(1) (2012); *Barringer*, 22 Vet. App. at 243-44 (noting that referral for extra-schedular consideration must be addressed when raised by the veteran or reasonably raised by the record); *Martinak*, 21 Vet. App. at 447 (noting that functional effects of hearing loss must be considered in an extraschedular determination). An extra-schedular evaluation is for consideration where a service-connected disability presents an exceptional or unusual disability picture with marked interference with employment or frequent periods of hospitalization that

render impractical the application of the regular schedular standards. *Floyd,* 9 Vet. App. at 94. An exceptional or unusual disability picture occurs where the diagnostic criteria do not reasonably describe or contemplate the severity and symptomatology of a veteran's service-connected disability. *Thun*, 22 Vet. App. at 115. If there is an exceptional or unusual disability picture, then the Board must consider whether the disability picture exhibits other factors such as marked interference with employment and frequent periods of hospitalization. *Thun*, 22 Vet. App. at 115-116. When those two elements are met, the appeal must be referred for consideration of the assignment of an extraschedular rating. Otherwise, the schedular evaluation is adequate, and referral is not required. 38 C.F.R. § 3.321(b)(1); *Thun*, 22 Vet. App. at 116.

In this regard, the schedular evaluation in this case is not inadequate. Ratings are provided for hand disabilities that are more severe than the Veteran's disability. Additionally, the diagnostic criteria adequately assess the severity and symptomatology of the Veteran's disability, as the criteria assess the pain and its limitations as its effects were recognized during the time period in question. There is no indication of frequent hospitalizations related to the Veteran's condition, nor any discussion of an inability to be employed. Consideration of an extraschedular rating is thus not warranted.

In reaching this decision the Board considered the doctrine of reasonable doubt, however, as the preponderance of the evidence is against the Veteran's claim for any higher evaluations, the doctrine is not for application. *Gilbert*, 1 Vet. App. at 49.

The evidence of record does not warrant ratings in excess of those assigned for the Veteran's right little finger condition at any time during the period pertinent to this appeal. 38 U.S.C.A. § 5110 (West 2002 & Supp. 2013).

(CONTINUED ON NEXT PAGE)

ORDER

New and material evidence having not been received, the request to reopen a claim of service connection for a right knee condition is denied.

Entitlement to service connection for a low back condition, to include as secondary to a right knee condition is denied.

Entitlement to service connection for a right foot condition, to include as secondary to a right knee condition is denied.

Entitlement to an increased compensable evaluation for postoperative residuals of tenorrhapy and neurorrhapy of the right hand is denied.

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DEBORAH W. SINGLETON
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

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

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

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

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

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

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the Court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.*

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

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

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

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

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

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

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

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

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

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

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

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at: http://www.uscourts.cavc.gov.

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

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

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

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

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

The Office of 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).