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Dept. Of Veterans Affairs
Board of Veterans Appeals
Litigation and Support Group
P.O. Box 27063
Washington, DC 20038

February 10, 2024

Re: [redacted]
In Reference to: Rating Decision of 1/05/2024

Extra Pages to Accompany VA Form 10182 (Appellant's Brief)

Appellant, through counsel, now files his Notice of Disagreement (NOD) with the Rating Decision (RD) promulgated on January 5, 2024, under the direct venue. More specifically, he contends he is entitled to service connection for a moderate left knee condition under §4.71a Diagnostic Code 5261 at 20% based on the VA Schedule of Rating Disabilities (VASRD) in effect on November 20, 2003, the date of the original claim. Or, in the alternative, he argues for the same 20% benefit under DC 5257, depending on which diagnostic is the most favorable as the pendency of the claim/appeal now spans several revisions of The Secretary's VA Schedule of Rating Disabilities (VASRD). In addition, were this claim to be granted, ancillary entitlement to Special Monthly Compensation (SMC) at the (s) rate would be for consideration as well.

The original claims stream has been adjudicated uninterrupted for over twenty years now. In order to comprehend the complex legal history of the claim and appeals during the intercurrent period, Appellant wishes to provide the Trier of Fact with a detailed history to dispel the confusion that has ensued in the intercurrent years. All dates listed below are Receipt Date as listed in the VBMS. The date of the CAVC Joint Motion for Partial Remand (JPMR) corresponds with the Court Clerk's order as listed in the VBMS.

History of the Left Knee Condition

11/20/2003—Veteran files original claim for, inter alia, "left Dislocated Knee Condition" (page 6/14).

10/21/2004—RD denies, inter alia, a left knee condition under §4.71a Diagnostic Code 5261 as secondary to a left ankle condition.

12/01/2014—Veteran files 526 to reopen original 2003 claim for, inter alia, a left knee condition secondary to left ankle condition.

4/17/2015—Veteran files a VAF 21-0958 NOD out of time prior to adjudication of left knee condition.

10/08/2015—RD defers entitlement to SC for left knee condition.

3/04/2016—RD denies SC for a left knee condition under both §4.71a DC 5260 (flexion) and 5261 (extension) under both a direct and secondary basis to a left ankle disability.

2/03/2018—**BVA Decision** Docket No. 16-45-563 grants compensable service connection for, inter alia, left ankle fracture residuals (left ankle disability) with effective date of 11/20/2003 based on the rebuttal of the presumption of regularity of the mail.

2/18/2020—DBQ in-person examination by [redacted], P.A., notes on page 2 of 14 pages a 12/03/2012 diagnosis of a left knee meniscal tear by [redacted], MD. Nurse [redacted] offered a negative conclusory opinion with no supportive rationale and nothing more than generalized data and conclusions as to service connection.

2/20/2020—Statement of the Case (SOC) confirms and continues denial of entitlement to conceded diagnosed left knee meniscal tear with osteoarthritis and recurrent patellar dislocation as residuals.

3/02/2018—RD grants entitlement to an ankle condition s/p fracture at 10% under DC 5271 with effective date of 11/20/2003.

6/28/2018—Veteran timely files VAF 21-0958 NOD with denial of SC for left knee under DCs 5260 and 5261 secondary to SC left ankle condition.

2/21/2020—Statement of the Case (SOC) issued stating: " Service connection for **left knee meniscal tear** with osteoarthritis and patellar dislocation (claimed as left knee condition secondary to service connected left ankle fracture)." In the **Reasons and Bases:** section on page 16 of 19 pages, in findings #1, paragraph 3, the VA examiner held: "Based off your assertion a VA exam was requested. Results from your exam document that you were **diagnosed with a left knee meniscal tear** with osteoarthritis and patellar dislocation."

2/24/2020—In answer to the SOC, Veteran files VA 9 to complete substantive appeal.

10/29/2020—Appellant submits his private IMO from subject matter expert.

2/08/2021—**BVA Decision** Docket No. 20-08 864 grants entitlement to, inter alia, service connection for (*in haec verba*) "**left knee meniscal tear residuals**, **osteoarthritis and recurrent patellar dislocations** as secondary to left ankle fracture residuals."

2/10/2021—RD grants service connection for, *in haec verba*, "**left knee meniscal tear, osteoarthritis and recurrent patellar dislocations**" at 0% from 11/20/2003 and 20% from 1/30/2020.

1/19/2022—Veteran timely files his supplemental claim with the 2/10/2021 RD awarding a noncompensable rating from 11/20/2003 for a left knee condition with new and relevant evidence in the form of an addendum IMO opinion.

1/29/2022—RD fails to recognize this is a continuously pursued claim of the 2003 claims stream and mistakenly contends the 1/20/2020 date of claim is the earliest date of entitlement to a 20% rating for the left knee condition.

2/04/2022—Veteran files his VA Form 10182 NOD for direct review before the BVA for an earlier effective for entitlement to a 20% rating utilizing VA's choice of DC 5010-5257.

6/15/2022—**BVA AMA decision** Docket No. 220204-218270 grants, inter alia, no more than 10% for instability of the left knee meniscal tear from November 20, 2003.

6/16/2022—RD effectuates 6/15/2022 BVA Decision awarding 10% and no more for a left knee condition using DC 5010-5257 (2022).

6/27/2022—Notice of Appeal filed with the Court of Appeals for Veterans Claims (CAVC).

1/12/2023—**CAVC** Docket No. 2022-3833 Clerk's order shows a Joint Motion for Partial Remand wherein the parties request the Court vacate the 6/15/2022 Board decision as it failed to define the terms used in the 2003 VASRD (slight, moderate, severe) and to remand those matters to the Board for further proceedings consistent with the JPMR motion.

3/01/2023—**BVA AMA Decision** Docket No. 220204-218270 is remanded for new medical opinion to determine "the onset of the Veteran's left knee meniscal tear as diagnosed by the January 2020 examiner. If the examiner determines the Veteran does not have a meniscal tear, the examiner should identify all left knee conditions or diagnoses present since November 20, 2003."

4/28/2023—VA completes Acceptable Clinical Evidence (ACE) Review of Veteran's left knee condition requesting opinion as to onset of left knee meniscal tear as diagnosed by the January 2020 examiner. VA clinician Lucas Bader M.D., ignoring Appellant's lay testimony of record, opines there is no evidence *whatsoever* of a left knee meniscal tear and that the 12/03/2021 MRI report was commenting on the Veteran's right knee only. Dr. Bader further opined that the documentation of a left knee meniscal tear was a clear and unmistakable error (CUE) made by the January 2020 VA examiner. Makes no mention of the 2004 MRI and changes left knee diagnosis retroactively to patellar instability and knee arthritis only since 2003.

5/08/2023—RD denies earlier effective date based on no left knee meniscal tear. Code Sheet states, in haec verba, [DC] "5010-5257 **Left knee meniscal tear**, osteoarthritis, and recurrent patellar dislocations associated with

s/p left ankle fracture." RD fails to define "slight", "moderate" or "severe" per the Court's JMPR instructions.

9/12/2023—Veteran files supplemental claim continuing uninterrupted pursuit of 11/20/2003 claim by submitting new private IMO diagnosing at least as likely as not existence of meniscal tear as early as 11/20/2003.

10/26/2023—VA obtains yet another ACE Review of Veteran's claim, again from VA clinician Bader, denying any evidence of existence of a left knee meniscal tear. Dr. Bader "revises" his previous 4/23/2023 diagnosis based on "my personal review of veterans's documented medical history and imaging studies."

11/17/2023—RD confirms and continues 20% rating from January 2020 and no earlier.

12/29/2023—Veteran files supplemental claim with a new and relevant private IMO from subject matter expert to rebut VA clinician Bader's retrospective finding of no evidence whatsoever to support a finding of fact that the Veteran had a meniscal tear in the left knee.

1/05/2024—RD confirms and continues the 20% rating for **left knee meniscal tear** with osteoarthritis and patellar dislocations using current VASRD DC of 5010-5257 (2023). Again, no definitive definition of the terms 'slight', 'moderate' or 'severe' are provided as agreed to in the CAVC JMPR.

This appeal ensues.

The Legal Landscape

The Board is required to assess the credibility, probative value, and persuasiveness of the evidence and to provide reasons for rejecting material evidence that is favorable to the claimant. ***Bankhead v. Shulkin***, 29 Vet.App. 10, 19 (2017).

The Board is limited by law to review an appeal based on the facts found. Undoubtedly, further medical inquiry can be undertaken with a view towards further developing the claim. However, in this regard, the Court has cautioned

VA against seeking an additional medical opinion where favorable evidence in the record is unrefuted, and indicated that it would not be permissible to undertake further development if the sole purpose was to obtain evidence against an appellant's claim. See ***Mariano v. Principi***, 17 Vet. App. 305, 312 (2003). See also ***Kahana v. Shinseki***, 24 Vet. App. 428 (2011);

White v. Illinois, 502 U.S. 346, 355-56 (1992) (statements made for medical diagnosis or treatment has been deemed by the Court to be exceptionally trustworthy because the declarant has a strong motive to tell the truth to receive a proper diagnosis or treatment).

"Although "[t]here is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file" to render an adequate opinion, a medical examination report or opinion must "sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." ***Monzingo v. Shinseki,*** 26 Vet.App. 97, 105 (2012).

"It should now be obvious that a review of the claims file cannot compensate for lack of the reasoned analysis required in a medical opinion. It is the factually accurate, fully articulated, sound reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion." ***Nieves-Rodriguez v. Peake***, 22 Vet.App. 295 (2008); In other words, the examiner must provide "not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." Id. at 301.

Saunders v. Wilkie, 886 F.3d 1356, 1362–63 (Fed. Cir. 2018) "We have recognized that the word "disability" refers to a "functional impairment, rather than the underlying cause of the impairment."

"Symptoms, not treatment, are the essence of any evidence of continuity of symptomatology." ***Savage v Gober***, 10 Vet. App. at 496 (citing ***Wilson v. Derwinski,*** 2 Vet. App. 16, 19 (1991)).

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. ***Martinez-Bodon v. Wilkie***, 32 Vet.App. 393, 397 (2020) ***Romanowsky v. Shinseki*** ,26 Vet.App.289,293 (2013).

Clemons v. Shinseki, 23 Vet. App. 1, 5 (2009) A claimant "[does] not file a claim to receive benefits only for a particular diagnosis, but for the affliction his . . . condition, whatever that is, causes him." Consequently, VA "should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim," taking into consideration "the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." ***Id.*** VA commits error "when it fail[s] to weigh and assess the nature of the current condition the appellant suffer[s] when determining the breadth of the claim before it." ***Id***. at 6.

The credibility and weight to be attached to medical opinions is within the providence of the Board as adjudicators. ***Guerrieri v. Brown,*** 4 Vet. App. 467, 470-71 (1993). Greater weight may be placed on one physician's opinion over another depending on factors such as reasoning employed by the physicians and the extent to which they reviewed prior clinical records and other evidence. ***Gabrielson v. Brown***, 7 Vet. App. 36, 40 (1994).

When the issue involves medical diagnosis or etiology, competent medical evidence is required. See ***Lathan v. Brown***, 7 Vet.App. 359, 365 (1995) (citing ***Grottveit v. Brown***, 5 Vet.App. 91, 93 (1993)).

Dennis v. Nicholson, 21 Vet.App.18, 22 (2007) (citing ***Abernathy v. Principi,*** 3 Vet.App.461, 465 (1992) ("The Court has long held that merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons and bases."));

Atilano v. McDonough (Atilano II), 12 F.4th 1375,. Page 2. 2. 1381-82 (Fed. Cir. 2021) held "When readjudicating a remanded case, a lower court is foreclosed from reconsidering "issues implicitly or explicitly decided on appeal" by a higher court. ***TecSec, Inc. v. IBM***, 731 F.3d 1336, 1341-42 (Fed. Cir. 2013). Known as the "mandate rule," id. at 1342, this serves as a corollary to a broader principle known as the "law of the case doctrine," which establishes that, once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case. See ***Arizona v. California***, 460 U.S. 605, 618 (1983). And as relevant here, the mandate rule establishes that, when interpreting the Federal Circuit's decision, "'both the letter and the spirit of the mandate must be considered."' ***TecSec, Inc***., 731 F.3d at 1342 (emphasis added) (quoting ***Engel Indus., Inc. v. Lockformer Co***., 166 F.3d 1379, 1383 (Fed. Cir. 1999)). The Federal Circuit has consistently returned to this last point over the years. See, e.g., ***Omega Patents, LLC v. CalAmp Corp***., 13 F.4th 1361, 1374 (Fed. Cir. 2021); ***Banks v. United States***, 741 F.3d 1268, 1279 (Fed. Cir. 2014).

See ***Browder v. Brown***, 5 Vet. App. 268, 270 (1993) ("Under the doctrine of 'law of the case,' questions settled on a former appeal of the same case are no longer open for review.").

It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."' (quoting ***Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.***, 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))); ***Evans v. Shinseki,*** 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal).

See ***Ingram v. Nicholson***, 21 Vet. App. 232, 256-57 (2007) ("It is the pro se claimant who knows that symptoms he is experiencing and that are causing him disability... [and] it is the Secretary who know the provisions of title 38 and can evaluate whether there is a potential under the law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission.").

See ***Christopher v. Smith Kline Beecham Corp***., 132 S.Ct. 2156, 2166 (2012)(explaining that "deference is ... unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," such as "when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a convenient litigating position, or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack" (internal quotations and alterations omitted)); see also ***Correia v. McDonald,*** 28 Vet. App. 158, 168-70 (2016).

Because appellant is proceeding pro se, he is entitled to both a sympathetic reading of his informal brief and a liberal construction of his arguments. See ***Calma v. Brown***, 9 Vet.App. 11,15 (1996***); De Perez v. Derwinski***, 2 Vet.App. 85, 86 (1992). Although aides from veterans' service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans' adjudicatory system, they are "not generally trained or licensed in the practice of law." ***Cook v. Brown***, 68 F.3d 447, 451 (Fed.Cir.1995).

As the Court stated in ***Hayre v. West***, 188 F.3d 1327 (Fed. Cir. 1999), "[j]urisdiction may not be 'assumed,' 'conceded,' or 'implied,' and cannot be bestowed on a court by the court itself, or any other court." A tribunal may only be divested of jurisdiction by a superior tribunal, see ***Cerullo v. Derwinski***, 1 Vet. App. 195, 197 (1991), or by other circumstances not present here. Jurisdiction, however, cannot be divested by the action of an inferior tribunal. See ***Smith v. Pollin***, 194 F.2d 349, 350 (D.C. Cir. 1952).

§ 3.104(c) Binding nature of decisions states:

"**(c) *Favorable findings.*** Any finding favorable to the claimant made by either a VA adjudicator, as described in § 3.103(f)(4), or by the Board of Veterans' Appeals, as described in § 20.801(a) of this chapter, is binding on all subsequent agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding. For purposes of this section, a finding means a conclusion either on a question of fact or on an application of law to facts made by an adjudicator concerning the issue(s) under review.

The Court has held that where a law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version more favorable to the veteran will apply. ***Karnas v. Derwinski***, 1 Vet. App. 308, 313 (1991); (overruled by ***Kuzma v. Principi,*** No. 03-7032 (Fed. Cir., August 25, 2003) on other grounds.

Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record." 38 U.S.C. § 7104(d)(1). This statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that VA decisionmakers do not exercise "naked and arbitrary power" in deciding entitlement to disability benefits. See ***Yick Wo v. Hopkins***, 118 U.S. 356, 366 (1886) (Matthews, J.)

Discussion

Appellant's 2003 claims were resurrected in 2018 by the holding ***in Rios v. Mansfield,*** 21 Vet. App. 481, 482 (2007). Quite simply, VA mailed the homeless Appellant's ratings decisions to the wrong address(es) even though he had provided the Secretary with a forwarding address. The resulting BVA decision granted the earlier effective date of the original claim (November 20, 2003)

returning the Appellant to the same place he occupied when the claim was filed.

Upon being granted the earlier effective date, three months later, Appellant timey filed his VAF 21-0958 NOD disagreeing with, inter alia, the October 21, 2004, denial of his left knee condition under DCs 5260 and 5261(as denied in the October 2004 RD).

A Statement of the Case (SOC) was issued on February 21, 2020, confirming and continuing the denial of the Appellant's now VA-diagnosed Left knee meniscal tear with osteoarthritis and patellar dislocations. Appellant, through counsel, timely filed his VA Form 9 checking the box endorsing he wished to appeal all the issues listed in the SOC. The substantive appeal was completed with the issuance of a VA Form 8 certifying the appeal on May 13, 2020. Appellant declined a hearing but noted in Box 9 he would be submitting §3.156(b) evidence in the form of a private medical opinion as soon as it was obtained.

On September 23, 2020, as promised, Appellant submitted two (2) VA Form 21-4138 Statement in Support of Claim, a private IMO by a subject matter expert and a four-page legal brief providing a snapshot of the claims stream in support of the appeal.

The February 2021 BVA Decision

On February 8, 2021, Veterans Law Judge (VLJ) Laura E. Collins ordered, in BVA Docket No. 20-08 864, *in haec verba*:

"Entitlement to service connection for **left knee meniscal tear residuals**, osteoarthritis and recurrent patellar dislocations as secondary to left ankle fracture residuals is granted." (emphasis added to original).

The VLJ's decision incorporated this into an official finding of fact and conclusion of law. The Board, like the DRO, reviews RO decisions *de novo* but cannot revise favorable findings in a prior decision without finding clear and unmistakable error. 38 C.F.R. §§3.104(c); 20.801(a). VLJ Collins found no CUE in her BVA decision and to date, the Secretary has not alleged otherwise.

§ 20.801(a) states:

"**(a) *General.*** Decisions of the Board will be based on a de novo review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal, and any additional evidence submitted pursuant to Rules 302 and 303 (§§ 20.302 and 20.303). Any findings favorable to the claimant as identified by the agency of original jurisdiction in notification of a decision or in a prior Board decision on an issue on appeal are binding on all agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding. For purposes of this section, findings means conclusions on questions of fact and application of law to facts made by an adjudicator concerning the issue under review."

Appellant now points out the significance of citing to ***Cerullo*** *supra* above in the Legal Landscape section to reinforce the notion that, absent a Motion to Revise (CUE), the presumption of regularity attaches to VLJ Collins' favorable finding of fact that Appellant indeed suffered a left knee meniscal tear with residuals of osteoarthritis and ***moderate*** recurrent patellar dislocations. In addition, the Law of the Case as evoked in ***Atilano II*** *supra* confers *res judicata* on VLJ Collins' February 2021 decision. See also ***Medrano v. Nicholson***, 21 Vet. App. 165, 170 (2007) (The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board. (aff'd in part, dismissed in part *sub nom.* ***Medrano v. Shinseki****,* 332 F. App'x 625 (Fed. Cir. 2009).

Following the BVA decision, the AOJ rating authority assigned a 0% rating for, inter alia, left knee meniscal tear on February 10, 2021. Appellant, now in the

new AMA, timely filed a VA Form 20-0995 Supplemental claim on January 19, 2022, continuing to pursue an increase in the rating percentage of his ***original*** November 2003 claim with a new private medical opinion addendum now under a new, different diagnostic code of DC 5010-5257 assigned by the AOJ in the February 2021 RD.

Ten days later, on January 29, 2022, without having reviewed the new and relevant evidence contained in the private IMO, the Secretary denied the claim erroneously based on §3.400 and ignoring the continuously prosecuted original 2003 claim stream. This was error and the decision can only be viewed as void ab initio.

On February 4, 2022, Appellant filed his new VAF 10182 NOD objecting to the error date of entitlement arose. On June 15, 2022, in Docket No. 220204-218270, VLJ R. Erdheim granted increased entitlement from 0% to 10% for the Veteran's diagnosed **left knee meniscal tear**, osteoarthritis and recurrent patellar dislocations associated with status-post left ankle fracture with pain, from November 20, 2003. However, the Appellant, by virtue of the sure knowledge of a diagnosed meniscal tear, sought a higher rating commensurate with the degree of injury as listed in the Secretary's VA Schedule of Rating Disabilities (VASRD). After all, Nurse [redacted] had opined by records that the moderate recurrent patellar dislocations were present in 2012.

The BVA decision was followed a day later with the issuance of a RD acknowledging the 10% increase for the left knee condition and citing in the evidence section the private medical opinion by [redacted], MD, MPH. Reasonable minds can only concur that VLJ Erdheim was also cognizant of this IMO evidence and used it in formulating his decision as well. Thus, the BVA decision again confirmed that the Appellant had a diagnosed left knee meniscal tear with residual disabilities. Absent a finding of error on the BVA's part, which has never yet been alleged, VLJ Erdheim's decision is correct in all respects and the award of increase was legitimately conferred.

The Appellant, dissatisfied with the BVA decision, filed a Notice of Appeal to the Federal Circuit (CAVC 2022-3883) disagreeing with the ratings percentage of 10% for the left knee meniscal tear with residuals. At the Rule 33 conference, OGC counsel for the Secretary conceded error and proposed a Joint Motion for Partial Remand (JMPR) because the Board erred in failing to define the medical meaning of 'slight', 'moderate' and 'severe' in the former version of §4.71a DC 5257 (2003) which was more favorable to Appellant. ***Karnas*** *supra.*

Subsequent to the JMPR, the Board member, VLJ Keith Parakkal, remanded the vacated matter to the AOJ for clarification of December 2012 medical records purporting to discuss a meniscal tear of the **right** knee. As noted above, it had been previously alleged (but not proven in a Court of law) by a reviewing VA clinician that on February 18, 2020, VA clinician [redacted], P.A., had erroneously opined on an in-person c&p exam on the condition of the bilateral knees and somehow confused the VA's December 2012 MRI record which allegedly was referring to the right knee. ***Butler, Rizzo*** *both supra*. Inexplicably, VLJ Parakkal did not follow the dictates of the JMPR asking for a medical definition of 'slight', 'moderate' or 'severe' and a determination of which rating percentage was applicable in the instant case. This frustrates judicial review.

Nurse [redacted]'s actual DBQ in VBMS dated February 18, 2020, records an **in-person c&p examination** showing abnormal range of motion of **both** the left and the right knees. On page 2 of 14 pages, Nurse [redacted] endorsed left knee meniscal tear, left knee joint osteoarthritis, and a 1999 diagnosis of recurrent patellar dislocation. These were positive findings of fact favorable to the Veteran. On page 3 of 14, the clinician recorded initial range of motion of both knees as "abnormal or outside of normal range". On page 4 of 14, Nurse [redacted] recorded that due to the abnormal range of motion itself, it (decreased flexion) of the left knee contributed to functional loss. To be clear, Nurse [redacted] diagnosed ***bilateral*** knee disabilities and ***moderate*** recurrent patellar dislocation based not on an ACE records review but on a hands-on, in-person examination. The presumption of regularity attaches to the Nurse's medical proficiency.

The presumption of regularity of VA medical doctors is discussed in great length in ***Sickels v. Shinseki,*** 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011) (holding that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without "demonstrating why the medical examiners' reports were competent and sufficiently informed"). The presumption arose in VA law first in ***Ashley v. Derwinski***, 2 Vet.App. 307, 308 (1992) quoting ***United States v. Chem. Found., Inc***., 272 U.S. 1 (1926))-i.e., "[t]here is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties."

The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties. ***Butler v. Principi***, 244 F.3d 1337, 1339 (Fed. Cir. 2001). Further, in ***Rizzo v. Shinseki***, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009), it was held: "what appears regular is regular and what appears irregular is irregular- the burden of proof of irregularity falling on the appellant to rebut." Moreover, there is a presumption of regularity under which it must be assumed that the RO would have associated the medical records with the claims file and acted on them in some manner if received. See ***Fithian v. Shinseki,*** 24 Vet. App. 146, 151 (2010).

On April 28, 2023, VA clinician Lucas Bader, MD, under the Court-ordered JMPR, was asked to provide a medical opinion. He opinied the December 3, 2012, MRI report was a medical record specifically and exclusively discussing the right knee only. Appellant is in complete agreement with the Secretary and freely concedes as much. Unfortunately, Dr. Bader went further than VLJ Parakkal's remand instructions and made a legal finding of fact when he averred the BVA decision of February 2021 was in error concerning the left knee. §§20.801; 20.1403.

In answer, on September 12, 2023, Appellant again timely filed a supplemental claim continuing the same original claims stream with a new subject matter expert IMO by Dr. [redacted] Dr. [redacted] noted a contemporary 2004 MRI of the left knee that revealed a cystic structure adjacent to the lateral

anterior horn of the meniscus. It was determined to be a meniscal cyst. On page 12 of 16 pages of the IMO, Dr. [redacted] points to Appellant's lay testimony that his "VA orthopedist advised the Veteran that the presence of a meniscal cyst of his left knee by MRI convinced him (the orthopedic specialist) that there was a meniscal tear of Mr. [redacted]'s left knee". While the Court does not give undue deference to the treating physician rule, per se, they are allowed to take judicial note of this fact when making a decision on weighing the significance to attach to the evidence. See ***White v. Principi,*** 243 F.3d 1378 (Fed. Cir. 2001); ***Van Slack v. Brown***, 5 Vet. App. 499, 502 (1993). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held in ***Buchanan v. Nicholson***, 451 F.3d 1331, 1337, 1335 (Fed. Cir. 2006), that "the Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence," and that "competent lay evidence can be sufficient in and of itself" to support a finding of service connection. Indeed, lay testimony regarding what a medical professional tells a lay person is specifically given as one of the examples of competent lay testimony.

Prior to issuance of a RD, on October 26, 2023, the same VA clinician mentioned above (Dr. Bader), again opined on the probity of whether a left knee meniscal tear existed in 2003-2004. This time Dr. Bader baldly revised his prior April 2023 opinion. His revised rationale to support his decision devolved into whose diagnosis was the most probative based on medical experience. His *ad hominem* attack was not probative or productive as to the existence of a meniscal tear and worse, impugned the Appellant's lay testimony with absolutely no support in the medical record in a decidedly adversarial manner. In point of fact, Appellant's probative lay testimony was not even discussed or considered in his opinion. ***Mariano, Buchanan****, both supra.*

On November 17, 2023, the Secretary promulgated a new RD confirming and continuing the denial of an earlier effective date for award of a 20% rating for left knee meniscal tear residuals with moderate recurrent patellar dislocations. The RD is essentially a repudiation of established precedence-i.e., ***Kahana v. Shinseki***, 24 Vet. App. 428 (2011). See ***McLendon v. Nicholson***, 20 Vet.App. 79, 85 (2006); see also ***Forshey v. Principi,*** 284 F.3d 1335, 1363 (Fed. Cir. 2002) (en banc) (Mayer, C.J., dissenting) (distinguishing between the existence

of negative evidence and the absence of actual evidence and noting that "[t]he absence of actual evidence is not substantive 'negative evidence'").

Nowhere in the four corners of this twenty year old claims stream can there be found evidence the Veteran's testimony has ever been found to incredible or compromised by personal interest. ***White*** *supra*. Nor can there be found evidence that the Appellant is not competent to opine on that which comes to him via his five senses. ***Jandreau*** *supra*.

So, once again, on December 29, 2023, in an attempt to prove his entitlement, Appellant timely filed yet a new supplemental claim with a new addendum opinion by Dr. [redacted] rebutting Dr. Bader's rationale. The twenty three page opinion was well-supported by numerous peer-reviewed cites and offered her professional, independent medical opinion as to why a 20% rating awarded in 2020 was for application in 2003 based on the history of the injury and its chronic presentation for several decades. Dr. [redacted] pointed out that the Appellant only need prove it was at least as likely as not that a meniscal tear existed. In any event, the doctor carefully steered clear of any findings based on the legal sufficiency in her opinion. See ***Sizemore v. Principi,*** 18 Vet.App. 264, 275 (2004) (faulting VA examiner for "expressing an opinion on whether the appellant's claimed in-service stressors have been substantiated, [which] is a matter for determination by the Board and not a medical matter"); see also ***Moore v. Nicholson***, 21 Vet. App. 211, 218 (2007) contrasting the roles of medical examiners and VA adjudicators).

On January 5, 2024, a new RD was promulgated confirming and continuing a rating of 20% for left knee meniscal tear with osteoarthritis and recurrent patellar dislocations. Interestingly, the RD makes no mention of Dr. [redacted]'s highly probative IMO other than to mention it in the Evidence reviewed, but also failed to obtain any medical opinion to rebut her rationale and peer-reviewed cites.

It would seem the Secretary contends that absent a diagnosed meniscal tear, there can be no favorable finding supporting a 20% rating in 2003. Following this to its inevitable conclusion, by operation of law, absent that favorable finding there can be no entitlement and hence, no compensable rating. Nevertheless, the Appellant's Ratings Code Sheet continues to aver he is service connected for that which the Secretary contends he does not have. See ***Russell v. Derwinski,*** 3 Vet.App. 310, 313 (1992) ("In view of this standard, the "benefit of the doubt" rule of 38 U.S.C. §5107(b) could never be applicable; an error either undebatably exists or there was no error within the meaning of §3.105(a).") Put more bluntly, either the Appellant had a left knee meniscal tear in November 2003 when he filed his original claim as decided by the February 2021 decision… or he did not. Both VLJ Collins and Erdheim have previously averred he did. The Secretary simply cannot have his meniscal tear "cake" and eat it too.

§ 20.801(a) provides for this eventuality of error by stating, inter alia, "unless rebutted by evidence that identifies a *clear and unmistakable error* in the favorable finding." Clear and unmistakable error is a very high bar to surmount in law.

The Board's regulation,§20.1403 deals with what constitutes clear and unmistakable error and, by extension, what does not. Subsection (d) gives examples of what are **not** clear and unmistakable error-

(1) Changed diagnosis. A new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision;

(3) Evaluation of evidence. A disagreement as to how the facts were weighed or evaluated.

In the same vein, §3.105(a)(1)(v) Revision of decisions. specifically prohibits Dr. Bader's and the Secretary's concomitant RD action by the AOJ unilaterally as the Board has spoken to it previously.

The BVA is a superior tribunal. ***Cerullo, Hayre*** *both supra.* In addition, the Law of the Case is on point. ***Atilano*** *supra*. The U.S.S. Meniscal Tear 'ship' set sail on February 8, 2021 with the BVA decision by VLJ Collins. The Secretary's VA clinician is free to postulate subjectively on the possibility of a 2012 transcription error or typographical misprint but these only amount to a reweighing of the evidence and/or attempting to change the diagnosis of the nonservice-connected right knee only. In any event, neither one of the hypotheses rise to the level of legal error sufficient to revise any prior determination as to the existence (or absence) of a diagnosis of a left knee meniscal tear and the subsequent level of residual disability. ***Saunders v. Wilkie***, 886 F.3d 1356, 1362–63 (Fed. Cir. 2018) "We have recognized that the word "disability" refers to a "functional impairment, rather than the underlying cause of the impairment." The Court vacated Appellant's BVA decision at the Secretary's behest because the 2003 VASRD regulation (§4.71a) didn't define the difference medically between 'slight', 'moderate' and 'severe'. The JMPR certainly did not give license to go far and wide on safari in search of error below. Last, and certainly not least, the Secretary fails to illuminate whether the purported error misdiagnosing a meniscal tear in 2012 manifestly changed the outcome of the prior 2021 BVA conclusion of law.

By operation of law, if the Secretary wishes to propose a Motion to Revise VLJ Collins 2021 decision, it will have to be the Board itself who proposes such an action. Absent revision, the award of left knee meniscal tear, granted effective November 20, 2003, is still for application. Ergo, the determination of which medical opinion is more probative becomes the primary (and only) concern before the Board as mutually agreed to by the parties in the JPMR.

VA's very own, [redacted] has opined that a left knee meniscal tear existed at some undetermined time in the past. While her opinion is negative with respect to service connection, it does contain some probative value inasmuch as she confirmed a meniscal tear existed at some point. ***Sickels*** *supra.*

Dr. [redacted] March 5, 2021, addendum medical opinion is supported in its rationale by not one, but two peer- reviewed cites. It was also

based on the BVA conclusion of law and entitlement to the presumption of a left knee meniscal cyst was consistent with a tear in 2003. Dr. O'Brien is mindful of the VA regulation in play and is competent to opine on the level of disability vis-à-vis the Secretary's Schedule of Rating Disabilities (VASRD). In keeping with ***Monzingo*** *supra*, he cogently presented accepted research dealing with lateral dislocation of the knee *only* and its correlation and outcome among the makeup of the cohorts studied.

In contrast, Nurse [redacted]'s February 2020 DBQ and concurrent medical opinion supplied data and conclusions not only on Appellant's *diagnosed lateral patellar dislocations*, but also on superior, medial, intra-articular, inferior, and vertical forms of patellar dislocations-none of which he suffered. The medical opinion consists of data on how lateral patellar dislocation happens but provides no medical proof pro or con of studies in a setting of s/p ankle fracture. As such, it is speculative, conclusory and devoid of any probative value other than a medical conclusion that it was more likely than not that the Appellant had a left knee meniscal tear at some time in the past. ***Sickels, Butler*** *supra.*

The remaining points of law left to argue boil down to Hickson, Nieves-Rodriquez IMO probity and the Statutory Veterans cannon embodied in Henderson benefit of the doubt.

The Trier of Fact is presented with a blizzard of possible medical opinions-only one of which answers the remanded Court JMPR vacate and remand order of the medical definition of 'slight', 'moderate' and 'severe' in a setting of recurrent patellar dislocation under DC 5257. VA's clinician, Dr. Bader, posits, and the Secretary concurs, that the absence of evidence of a diagnosed left knee meniscal tear in 2003 is conclusive, negative evidence of no meniscal tear whatsoever. Ergo, the Appellant is not entitled to a rating higher than 10% under §4.71a DC 5257, or possibly DC 5260 or 5261 depending on which Code Sheet is cited to contemporaneously. But the Secretary fails to explain the incongruity of why or how a 10% rating can be for application versus a 20% rating in the absence of no left knee meniscal tear at any time during the pendency of the claim. This, too, frustrates judicial review.

Dr. Bader's October 2023 medical opinion attempting to change the 2012 and 2020 diagnoses failed to reveal whether he interviewed the other VA clinicians mentioned to unequivocally confirm the truth of his unproved allegations. Reasonable minds can only concur that this "Hail Mary" attempt to revise the evidence of record fails to suffice as to proof of a clear and unmistakable error. ***Mariano, Correia,*** *both supra.*

The Appellant is currently diagnosed and rated at 10% for a moderate recurrent patellar dislocation regardless of the presence or absence of a diagnosed meniscal tear specifically for the left knee in the intercurrent period from November 2003 to February 2020. At that time (2021), his disability was increased to 20%.

Conclusion

Appellant maintains his September and December 2023 IMOs remain the most probative because Dr. R[redacted] has addressed the actual factual inquiry. The Secretary, on the other hand, offers nothing more than to confirm and continue the present rating 'as is' in his January 2024 RD. See ***McWhorter v. Derwinski***, 2 Vet.App. 133, 136 (1991) holding "Yet,[w]here [an] appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by [the] appellant, and ignored by [VA], to be conceded."

Appellant would also point to the history of the claim. Appellant has prevailed on his effective date and now only seeks the highest and best rating available as promised in §3.103(a) that the Secretary render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. Under Hickson, Shedden and its progeny, he has presented clear and convincing evidence of a broken ankle in service, a current disability secondary to the index injury, and multiple, probative independent IMOs as prescribed by law in support of his entitlement. The statutory canon of Veterans law ensures that when the evidence is in equipoise under §3.102, the Veteran

prevails. For some reason unbeknownst to the Appellant, it appears the benefit of the doubt has been rescinded or a higher level of proof is now required.

The Secretary has repeatedly denied Appellant at every turn all the way to the Federal Circuit and back. Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome. See ***Foman v. Davis***, 371 U.S. 178, 181-82 (1962). See ***Evans v. Shinseki,*** 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal).

The Secretary's rationale for denial of benefits over the last twenty years has run the gamut from ***Rios*** *supra* to ***Cerullo*** *supra.* Appellant has now appealed to the Board three times and even up to the CAVC. This marks the fourth appearance at the Board. Oddly, this time the Secretary offers no rebuttal whatsoever to Appellant's most recent highly probative IMO. ***McWhorter*** *supra.*

Appellant feels the appeal is in equipoise as to the evidence for, or against, that it is at least as likely as not that the evidence of record shows he has suffered, and continues to suffer, a recurrent patellar dislocation disorder of moderate proportions as envisioned in DC 5257 (2003) such that he is entitled to a 20% rating from the original date of filing of November 20, 2003.

The pro-Veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit. See, e.g., ***King v. St. Vincent's Hosp.,*** 502 U.S. 215, 220 (1991).

The Supreme Court first articulated this canon in ***Boone v. Lightner*** to reflect the sound policy that we must "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575 (1943). This same policy underlies the entire veterans benefit scheme.

In ***Fishgold vs. Sullivan Drydock & Repair Corp.,*** 328 U.S. 275, 66 S. Ct. 1105 (1946) the Supreme Court declared that veterans laws are "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need," and the Court showed us how to do so—"construe the separate provisions of the [law]as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." The slipping stems from two words in an oft cited pro-veteran canon case, ***Brown v.Gardner***: "interpretive doubt."

I certify under oath that the above legal brief is free of any artificial intelligence used to produce it and is entirely of my own construction.

Respectfully submitted,

_____

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