APPELLEE'S BRIEF

2010-7073

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PERRY R. ALEXCE,
Claimant-Appellant,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,
Respondent-Appellee,

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, CASE NO. 06-3559, JUDGE DAVIS

BRIEF FOR RESPONDENT-APPELLEE AND APPENDIX

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Pursuant to Rule 47.5, respondent-appellee's counsel states that she is not aware of any appeal from this action that previously was before this Court. Respondent-appellee's counsel also states that she is not aware of any other case that directly will affect or directly will be affected by this Court's decision in this appeal.

BRIEF FOR RESPONDENT-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-7073

PERRY R. ALEXCE,

Claimant-Appellant,

v.

ERIC K. SHINSEKI,

Secretary of Veterans Affairs,

Respondent-Appellee.

STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction to address Mr. Alexce's challenge to the finding of the United States Court of Appeals for Veterans Claims ("Veterans Court") that the actions of the Department of Veterans Affairs ("VA") did not constitute spoliation warranting an adverse inference.

2. Whether Mr. Alexce waived his due process argument on appeal when the basis for the alleged violation occurred during administrative processing before VA and Mr. Alexce first raised it in a motion for reconsideration at the Veterans

Court.

3. Whether the Veterans Court correctly concluded that Mr. Alexce was not entitled to an adverse inference because VA's alleged spoliation of evidence involved a legitimate destruction of duplicate copies of documents already in the record and Mr. Alexce has not demonstrated that VA acted with culpable intent.

4. Whether Mr. Alexce fails to demonstrate any due process violation, given that he was given timely and meaningful notice of the evidence that VA would consider and was provided a reasonable opportunity to respond if he believed the evidence identified by VA did not include copies of the evidence he submitted.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The appellant, Perry R. Alexce, seeks review of the Veterans Court's decision in *Perry R. Alexce v. Eric K. Shinseki, Secretary of Veterans Affairs*, No. 06-3559 (Vet. App. Sept. 22, 2009), which affirmed a decision of the Board of Veterans' Appeals ("Board") denying an increased disability rating for his service-connected knee condition. A2-3.[1] While his claim was pending before VA, Mr. Alexce submitted a written statement transmitting copies of medical treatment

[1] "A___" refers to pages in our Appendix.

records that VA determined were duplicate copies of documents already in his claims file. A37. Pursuant to VA policy against maintaining duplicate records in claims files, VA destroyed the duplicates and annotated Mr. Alexce's written statement to indicate that the submitted records were destroyed because they were duplicate copies of existing evidence. *Id.* Before the Veterans Court, Mr. Alexce asserted that VA's actions constituted spoliation of evidence and entitled him to an inference that the records would have substantiated his claim. A2. The Veterans Court rejected that argument, finding that the presumption of regularity applied to establish that VA properly discharged its duties in determining that the submitted documents were duplicative and shredded them in accordance with a VA procedural manual. A2-3. On appeal to this Court, Mr. Alexce reiterates his spoliation claim and raises the additional claim that VA's destruction of the duplicate records violated his constitutional due process rights.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW

Mr. Alexce served honorably on active duty from May 23, 1963, to May 21, 1965. A8. In December 2001, Mr. Alexce filed a claim for service-connected disability compensation for a leg injury, stating that he had suffered a leg injury requiring surgery during service, but that he had received no treatment for that condition since his separation from service. A13. The New Orleans VA Regional

Office ("RO") found his disability to be service-connected and initially assigned a zero percent rating. A14. Subsequently, Mr. Alexce received treatment for his disability at the New Orleans VA Medical Center ("VAMC") between May and November 2002. The RO obtained records of that treatment and in December 2002 increased his disability rating to 10 percent. *Id.* Mr. Alexce appealed this December 2002 decision, seeking a higher disability rating. In 2004, the Board remanded his claim for further development. The Board noted that, at a personal hearing, Mr. Alexce reported having received additional treatment at the New Orleans VAMC after November 2002. A21. The Board directed the RO on remand to ask Mr. Alexce to identify all VA and non-VA treatment received for his leg condition from December 2000 onward and further directed the RO to seek to obtain records of any such treatment, including treatment at the New Orleans VAMC after November 2002. A23.

On October 27, 2004, the RO sent Mr. Alexce a letter asking him to provide the names and addresses of physicians who had treated his disability since December 2000. A29. On November 18, 2004, Mr. Alexce responded by identifying the New Orleans VAMC as the only facility where he had received treatment. A35. By the time it received his response, the RO had already requested and received Mr. Alexce's treatment records from the New Orleans VAMC,

reflecting treatment between November 2002 and September 2004. A39.

On January 7, 2005, Mr. Alexce's attorney[2] submitted copies of medical records, under cover of a VA "Statement in Support of Claim" form on which the attorney requested that the "additional medical information" be associated with Mr. Alexce's file. A37. A VA rating officer determined that the submitted records were duplicate copies of treatment records already contained in Mr. Alexce's file. The rating officer placed the "Statement in Support of Claim" form in his file with the annotation "Duplicate VA tx [treatment] records destroyed," and dated his/her comment February 17, 2005. *Id.*

Also on February 17, 2005, the VA rating officer issued a "supplemental Statement of the Case" ("SSOC") summarizing the additional development on remand. The SSOC stated that VA had obtained treatment records from the New Orleans VAMC and that Mr. Alexce had indicated that the New Orleans VAMC was the only place he had received treatment for his condition. A39. On February 22, 2005, the RO sent the SSOC to Mr. Alexce and advised him that he had 60 days to provide any comments he wished to make, after which his case would be returned to the Board. A38.

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[2] Mr. Alexce was represented before VA by the same attorney representing him in the present appeal.

On May 11, 2006, the Board found that Mr. Alexce was not entitled to a rating higher than 10 percent for his leg disability. A60. With respect to the evidentiary development:

> The Board observes that VA has also satisfied its duty to assist the veteran. The veteran has been provided with every opportunity to submit evidence and argument in support of his claims, and to respond to VA notices. Specifically, VA has associated with his claims folder the veteran's service medical records, VA treatment records, as well as recent VA examination reports. The veteran has not identified any additional evidence pertinent to his claims, not already of record and there are no additional records to obtain.

A54.

On appeal to the Veterans Court, Mr. Alexce raised a single argument; he asserted that VA's destruction of the medical records he submitted in January 2005 constituted spoliation and that he was entitled to an adverse presumption that the records would have substantiated his entitlement to a disability rating higher than 10 percent. A2. The Veterans Court rejected that argument and affirmed the Board's decision. The Veterans Court noted that VA had found the documents to be duplicate copies of medical records already in the claims file and the destruction of those copies was standard procedure under VA Adjudication Procedure Manual

and Manual Rewrite, M21-1MR, pt. III, subpt. ii, ch 4, Sec G, para. 23(d).[3] A2. Under the presumption of regularity, the Veterans Court would presume that VA properly discharged its duties in determining that the records Mr. Alexce submitted were duplicate copies of treatment records already in his file. A3. Citing *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009), the Veterans Court stated that, "if it could be shown that documents were destroyed that were both nonduplicative and relevant, such developments could have substantially different implications." A3.

In October 2009, Mr. Alexce moved for reconsideration and/or panel review of the Veterans Court's decision. A4. Mr. Alexce asserted, for the first time, that "the unilateral removal of relevant documents from Appellant's claims file, without prior notice to Appellant, was a violation of Appellant's due process right to a fair hearing and determination of his case." A4. In support of his motion, he contended that "his case indeed falls within the purview of . . . *Cushman*" because the medical records he submitted "were relevant to his claim" and "he believed [they] substantiated essential elements of his claim." A6. He did not, however, identify the nature or source of the records he submitted, nor did he address VA's finding that they were duplicate copies of documents already in his file. On

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[3] The cited Manual provision directs VA personnel to "[r]emove duplicate copies of documents *unless* they contain notations of record value." A63.

February 2, 2010, the Veterans Court denied reconsideration and panel review, without discussing his due process claim. A7. This appeal followed.

SUMMARY OF THE ARGUMENT

Mr. Alexce's claim of entitlement to an adverse inference based upon VA's alleged spoliation of evidence presents no issue within this Court's jurisdiction. His challenge to the Veterans Court's decision rests upon his disagreement with the factual premise of that decision – that the records he submitted to VA were duplicate copies of documents already in his VA claims file. Based upon that factual determination, which is not reviewable in this Court, the decision of the Veterans Court could not have been altered by adopting any position Mr. Alexce seeks to raise in this appeal.

This Court should decline to entertain Mr. Alexce's constitutional due process argument. That argument was not raised in Mr. Alexce's principal brief to the Veterans Court and, accordingly, was not addressed in the Veterans Court's decision. Although Mr. Alexce raised that argument in his motion for reconsideration before the Veterans Court, the Veterans Court properly treated the argument as waived and did not address it.

If this Court possesses jurisdiction to entertain Mr. Alexce's spoliation claim, we respectfully request that it affirm the Veterans Court's decision. The

Veterans Court reasonably concluded that VA may be presumed to have properly found that the documents Mr. Alexce submitted were mere duplicate copies of documents already in the record and destruction of those duplicates was consistent with VA procedures designed to prevent unnecessary expansion of often-voluminous claims files. Under this Court's precedents in *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007), and *Cromer v. Nicholson*, 455 F.3d 1346, 1350-51 (Fed. Cir. 2006), an adverse presumption is not warranted in the absence of a showing that records were destroyed or suppressed with culpable intent. Mr. Alexce has not alleged, much less demonstrated, that VA acted with culpable intent or that the records in question were anything other than duplicate copies of documents that were, and are, part of his VA claims file.

In the event this Court addresses Mr. Alexce's due process argument, it should reject that argument because Mr. Alexce has not shown any violation of his due process rights. Shortly after he submitted the records that VA found to be duplicate copies of record evidence, VA provided him an SSOC detailing the evidence VA had obtained and considered on remand and provided him an opportunity to comment upon any matters in that SSOC. Mr. Alexce thus had ample notice and opportunity to object if he believed that copies of the evidence he submitted were not among the evidence considered by VA. To the extent

Mr. Alexce argues that VA's destruction of the records he submitted deprived him of a fundamentally fair adjudication, his argument is without any support in the record. In contrast to *Cushman v. Shinseki*, 576 F.3d at 1300, upon which he relies, the record in this case is devoid of evidence that VA altered the evidentiary record in any way that would affect the outcome of Mr. Alexce's claim. To the contrary, the record shows that VA destroyed certain documents because they were duplicate copies of documents already in the record. Accordingly, the contents of those documents were considered in VA's adjudication of his claim.

For these reasons, this Court should dismiss this appeal or, alternatively, affirm the decision of the Veterans Court.

ARGUMENT

I. Jurisdiction And Standard of Review

Pursuant to 38 U.S.C. § 7292(a), this Court's review of decisions by the Veterans Court is limited to "the validity of a decision of the [c]ourt on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on" by the Veterans Court. Pursuant to 38 U.S.C. § 7292(d)(1), this Court may set aside any regulation or interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that it finds to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

The Court possesses jurisdiction to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). However, absent a constitutional issue, the Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). This Court consistently has applied section 7292 strictly to bar fact-based appeals of Veterans Court decisions. *See, e.g., Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) (Federal Circuit reviews only questions of law and cannot review any application of law to fact); *see also Madden v. Gober*, 125 F.3d 1477, 1480 (Fed. Cir. 1997); *Andre v. Principi*, 301 F.3d 1354, 1363 (Fed. Cir. 2002). The Court reviews questions of statutory and regulatory interpretation de novo. *Howard v. Gober*, 220 F.3d 1341, 1343 (Fed. Cir. 2000).

II. Mr. Alexce's Spoliation Claim Presents No Issue Within This Court's Jurisdiction

A. Federal Circuit Law On Spoliation

This Court's recent decisions in *Micron Technology, Inc. v. Rambus Inc.*, 2011 WL 18159785 (May 13, 2011, Fed. Cir.), and *Hynix Semiconductor Inc. v. Rambus, Inc.*, 2011 WL 1815978 (May 13, 2011, Fed. Cir.), provide, by analogy, guidance here with respect to the jurisdictional issue. In both cases, the spoliation issues involved factual issues - the time at which a party could reasonably have anticipated litigation such that the party was subject to a duty to preserve documents and also whether document destruction was for illicit purposes or was merely routine business practice. The Court in *Micron* established that its standard of review of the district court's factual findings on the applicable date is the "clear error" standard. *Micron*, 2011 WL 18159785 at *6-8, 12-14. Similarly, here, the issue involving whether the VA engaged in spoliation by destroying a duplicate copy of a medical record is a fact-based issue, and as such, beyond this Court's limited jurisdiction pursuant to 38 U.S.C. §§ 7292(d)(1), 7292(d)(2).

Thus, this Court lacks jurisdiction over Mr. Alexce's claim that he was entitled to an adverse inference due to alleged spoliation by VA because the issue

is one of fact. The Veterans Court's determination that Mr. Alexce's spoliation claim lacked merit was based upon its application of law to the facts of this case. The Veterans Court noted that VA had found the evidence Mr. Alexce submitted in January 2005 to be mere duplicate copies of documents already in the record and therefore determined that the additional copies were not required to be added to the record. A2. The court noted that VA's action was consistent with provisions in its procedural manual advising VA personnel not to include duplicate copies of documents in the claims file. *Id.* The court applied the presumption of regularity and presumed that VA properly determined that the documents submitted by Mr. Alexce were duplicate copies of documents of record evidence. A3.

B. Mr. Alexce's Arguments Are Fact-Based

Mr. Alexce's arguments on appeal regarding this issue are cursory and vague. Nevertheless, it is apparent that his disagreement is primarily with the factual premise of the Veterans Court's decision – *i.e.*, the records he submitted were merely duplicate copies of records already in his claims file – rather than with any legal standard applicable to the issue in this case. Although he argues that he was entitled to an adverse inference as a result of VA's destruction of the documents he submitted (*see* Appellant's brief at 10-11), that assertion necessarily rests on the premise that those documents were not merely duplicate copies of

existing evidence, but provided additional relevant evidence that could have substantiated his claim. That premise is entirely factual in nature and inconsistent with the basis of the Veterans Court's decision. That he seeks to dispute the Veterans Court's findings regarding the nature of his submissions is apparent from his assertions that "he believed" that the records he submitted "substantiated his claim for entitlement to VA benefits" and that those records were "relevant and material to his claim." Appellant's brief at 6, 8. Pursuant to 38 U.S.C. § 7292(d)(2), this Court possesses no jurisdiction to resolve Mr. Alexce's disagreement with the factual premise of the Veterans Court's decision.

In *Cromer v. Nicholson*, 455 F.3d 1346 (Fed. Cir. 2006), this Court found that it possessed jurisdiction over a claim that the destruction of a veteran's service records by fire at a Government facility warranted an adverse presumption. The Court explained that it "has interpreted its jurisdictional grant to permit review of 'a decision of the Court of Appeals for Veterans Claims on a rule of law,' even where that rule of law was not 'relied on . . . by the Court of Appeals for Veterans Claims in making its decision,' so long as 'the decision below regarding a governing rule of law would have been altered by adopting the position being urged.'" *Id.* at 1348-489 (*quoting Morgan v. Principi*, 327 F.3d 1357, 1361, 1363

(Fed. Cir. 2003)). In that case, there was no apparent dispute regarding the operative facts of the case. Rather, the appeal centered upon the appellant's articulation of a governing legal standard that, if adopted, would alter the outcome of the case. Specifically, the appellant asserted that, when documents in the Government's possession are destroyed by fire, the Government should be presumed to have been negligent and that such presumed negligence is sufficient to warrant an adverse inference. *Cromer*, 455 F.3d at 1350.

This case is distinguishable from *Cromer* because Mr. Alexce seeks to dispute the central operative fact underlying the Veterans Court's decision. Although Mr. Alexce arguably articulates a legal standard governing adverse inferences (*see* Appellant's brief at 10), application of that standard could alter the Veterans Court's decision **only** if it were established that the documents Mr. Alexce submitted were something other than duplicate copies of evidence already in the record – a factual premise that the Veterans Court has rejected and which this Court cannot revisit. This Court's "case" jurisdiction in challenges to Veterans Court decisions based upon a rule of law does not in any way alter the prohibition in § 7292(d)(2) on review of factual determinations or the application of law to the facts of a case. *See Lamour v. Peake*, 544 F.3d 1317, 1320 (Fed. Cir. 2008).

Accordingly, this Court should dismiss Mr. Alexce's fact-based challenge to the Veterans Court's determination that he is not entitled to an adverse inference under the circumstances of this case.

III. Mr. Alexce's Due Process Argument is Not Properly Before This Court.

This Court should decline to address Mr. Alexce's due process argument because that argument was not properly raised to the Veterans Court and was not addressed by that Court. Under 38 U.S.C. § 7292(a), this Court may review "the validity of a decision of the [Veterans] Court on a rule of law" or the validity of any statute or regulation or interpretation thereof "that was relied on by the Court in making the decision." In this case, the Veterans Court did not rule upon any constitutional matter, nor did it interpret or rely upon the Constitution.

Under 38 U.S.C. § 7292(c), this Court may decide constitutional issues "to the extent presented and necessary to a decision." In this case, Mr. Alexce failed to properly present and preserve his due process argument before the Veterans Court and that issue therefore is not properly presented in this appeal. Mr. Alexce could have raised his due process claim to the Veterans Court but did not do so until his motion for reconsideration. As this Court has explained, when an issue is not properly raised in a party's principal brief to the Veterans Court as required by that court's rules, that issue "need not be considered and, in fact, ordinarily should not

be considered." *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999). Because that issue was not properly raised to or decided by the Veterans Court, it is not properly presented for review in this Court. *See Norton v. Principi*, 376 F.3d 1336, 1339 (Fed. Cir. 2004) (declining to reach due process claim not properly raised below); *Smith v. West*, 214 F.3d 1331, 1334 (Fed. Cir. 2000) (same).

Before the Veterans Court, Mr. Alexce argued only that, because of VA's alleged spoliation of evidence, he was entitled to a presumption that the destroyed evidence was sufficient to prove his claim. A2. In his motion for reconsideration, he raised the distinct claim that VA's destruction of records, without prior notice to him, violated his due process "right to a fair hearing." A4. The Veterans Court properly declined to address that late-raised argument. *See Carbino*, 168 F.3d at 34; *Bluebird Savings Bank, F.S.B. v. United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006) ("an argument made for the first time in a motion for reconsideration comes too late, and is ordinarily deemed waived and not preserved for appeal").

Accordingly, this Court should decline to entertain Mr. Alexce's due process claim.

IV. The Veterans Court Properly Found That Mr. Alexce Was Not Entitled To An Adverse Inference Under Principles of Spoliation

A. VA's Policy And Legitimate Business Interest To Eliminate Unnecessary Documents

If the Court were to reach the merits, the Court's recent decisions in *Micron* and *Hynix* also provide guidance. The Court noted that where a party has a long-standing policy of destruction of documents on a regular schedule, with its policy motivated by general business needs, destruction that occurs in line with the policy is "relatively unlikely" to be seen as spoliation. *Micron*, 2011 WL 18159785 *8 (innocent purpose of limiting volume of party's files). The Court in *Hynix* noted specifically that there is a legitimate business interest of eliminating unnecessary documents and data. *Hynix*, 2011 WL 1815978 at *5. Here, the VA relied upon its well-established policy, motivated by its general business needs, to eliminate unnecessary documents from the claims record. *Micron* also is distinguishable on the facts because in *Micron*, the party held a second "shred party" (shredding hundreds of boxes of documents) after it reasonably anticipated litigation, instituted a destruction policy by which it destroyed all of its old backup tapes of emails, and instructed its employees to look for helpful documents to retain - all in furtherance of its litigation strategy. The standard that the Court employed to determine whether the party accused of spoliation acted in bad faith is whether the

spoliating party intended to impair the ability of the potential defendant to defend itself, and whether the opposing party was prejudiced. *Micron*, 2011 WL 18159785 at *12-14. In addition, in *Hynix*, the spoliating party, in its "shred day," kept no record of what was destroyed. *Hynix*, 2011 WL 1815978 at *5. In sharp contrast here, the VA engaged in a good faith effort to maintain all relevant documents, eliminate only duplicate records, and the VA kept a record of the document it eliminated. The VA did nothing with respect to the duplicate medical record of Mr. Alexce to impair his ability to advance his claim and did nothing to prejudice Mr. Alexce. Thus, pursuant to the rationales of *Micron* and *Hynix*, the VA did not engage in spoliation.

Thus, if the Court concludes that it possesses jurisdiction to address Mr. Alexce's claim of entitlement to an adverse inference due to VA's alleged spoliation of evidence, it should affirm the Veterans Court's decision because Mr. Alexce identifies no error in that decision. Mr. Alexce asserts that, under the doctrine of spoliation, he is entitled to a presumption that the records destroyed by VA would have been sufficient to establish his entitlement to an increased disability rating. In rejecting that assertion, the Veterans Court relied upon three factors. First, the RO had specifically stated that the records were destroyed because they were duplicate copies of documents already contained in the claims

file. Second, VA's actions were consistent with its established procedures of excluding duplicate copies of the same record from the claims file, to control the size of those often-voluminous files. Third, the court noted that the presumption of regularity, as applied to the facts of this case, supports the conclusion that the destroyed documents were merely duplicate copies of the treatment records VA had already obtained.

B. Applicable Case Law On Spoliation

Mr. Alexce fails to establish that the Veterans Court misinterpreted any statute or regulation, erred with respect to any rule of law, or otherwise erred in concluding that an adverse inference was not warranted under the facts of this case. He asserts only that the facts of his case satisfy the criteria announced by the Court of Appeals for the Third Circuit in *Brewer v. Quaker State Oil Ref. Co.*, 72 F.3d 326, 334 (3rd Cir. 1995). In *Brewer*, the Third Circuit indicated that, for an adverse inference to be warranted, it must be shown (1) that the evidence in question was "relevant to an issue in a case," (2) "that the evidence in question [was] within the party's control," and (3) that "it must appear that there has been an actual suppression or withholding of the evidence." *Id.* In particular, Mr. Alexce asserts that, because VA admittedly shredded the records he provided, there necessarily was an "actual suppression or withholding of evidence." This argument

misunderstands the doctrine of spoliation as articulated by the Third Circuit and by this Circuit.

In *Jandreau v. Nicholson*, 492 F.3d at 1375, this Court explained the circumstances under which the destruction of records may support an adverse inference against the custodian of those records. The Court explained:

> The general rules of evidence law create an adverse inference when evidence has been destroyed and "(1) . . . the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) . . . the records were destroyed with a culpable state of mind; and (3) . . . the destroyed evidence was relevant to the party's claim or defense, such that a reasonable trier of fact could find that it would support that claim or defense." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2nd Cir. 2002)(internal citation and quotation marks omitted) . . .

Jandreau, 492 F.3d at 1375. Mr. Alexce has not attempted to demonstrate how those conditions are met in this case. As *Jandreau* indicates, one essential prerequisite for an adverse inference is a showing that "the records were destroyed with a culpable state of mind." *See also Cromer v. Nicholson*, 455 F.3d at 1351 ("Cromer has identified no case in which an adverse presumption or inference was drawn in the absence of bad faith or, at a minimum, negligence"); *Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed. Cir. 1986) ("the test is whether the court could draw 'from the fact that a party has destroyed evidence that the party did so in bad faith.'") (quoting *S.C. Johnson & Sons, Inc. v. Louisville &*

Nashville Railroad Co., 695 F.2d 253, 258 (7th Cir. 1982)).

In this case, the Veterans Court found no evidence of a culpable intent or improper purpose on VA's part. Rather, the court found that VA's actions were taken pursuant to established procedure of removing and destroying duplicate copies of documents that are already in the record. The Veterans Court's finding that VA destroyed the records pursuant to established procedures because they were duplicate copies of existing records makes clear that Mr. Alexce has not satisfied the second *Jandreau* element of culpable intent. Further, the finding that the destroyed documents were merely copies of records already in the record makes clear that the other *Jandreau* elements have not been met. The removal or destruction of a duplicate copy of a document that remains in the record does not in any way alter the content of the evidentiary record and does not adversely affect the claimant such that VA would be under an obligation to preserve the duplicate. Further, because a duplicate copy of a document would have no value greater than the copy already in the record, there is no basis for a trier of fact to find that adding the duplicate copy to the record would support the claim in a way that the previously-obtained copy did not support the claim.

Mr. Alexce has identified no error in that determination and offers no basis for imputing culpable intent to VA. He points to no evidence suggesting that VA

destroyed the documents for an improper purpose. Indeed, he points to no evidence suggesting that the documents were anything other than duplicate copies of treatment records already contained in his claims file. Although Mr. Alexce submitted the documents in question to VA and he should be expected to have some record or at least a recollection regarding the nature of those documents, he has offered no clue as to the nature and source of those documents. As this Court has stated, "[t]he burden is on the party seeking to use the evidence to show the existence of each [of the three *Jandreau*] criteria." *Jandreau*, 492 F.3d at 1375. Because Mr. Alexce failed to carry that burden, the Veterans Court correctly denied his claim.

Mr. Alexce appears to rely upon the flawed premise that the fact that VA destroyed the documents, standing alone, is sufficient to warrant an adverse inference, irrespective of the reasons for VA's action. In *Cromer*, however, this Court expressly rejected the contention that an adverse inference could be drawn in the absence of a showing of bad faith or, at least, negligence on the Government's part. *Cromer*, 455 F.3d at 1350-51. Further, to the extent Mr. Alexce seeks to suggest that the Third Circuit's decision in *Brewer* supports the view that a showing of bad faith or negligence is not required, his reliance upon that decision is misplaced. The Third Circuit explained that the requirement under its precedent

for "an actual suppression or withholding of the evidence" mandated a showing of culpable intent:

> No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for. *See generally* 31A C.J.S. Evidence § 156(2); 29 Am.Jur.2d *Evidence* § 177 ("Such a presumption or inference arises, however, only when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent").

Brewer, 72 F.3d at 334.

Mr. Alexce's suggestion that the destruction of documents warrants an adverse presumption irrespective of the basis for the destruction is thus contrary to this Court's precedent and contrary to the very case upon which he relies. Moreover, imposing an adverse inference under the low threshold suggested by Mr. Alexce would create a serious inconsistency with the standards prescribed by Congress for adjudication of veterans benefits claims. *See Cromer*, 455 F.3d at 1350 (adverse inferences "are contrary to the general evidentiary burden in veterans' benefit cases, which requires that 'a claimant has the responsibility to present and support a claim for [VA] benefits.' 38 U.S.C. § 5107(a).").

Accordingly, the Veterans Court's decision is consistent with *Jandreau*, *Cromer*, and *Brewer* and reflects the Veterans Court's finding that VA's

destruction of duplicate copies of evidence was a routine matter than did not adversely affect Mr. Alexce and that Mr. Alexce failed to establish the culpable intent necessary to support an adverse inference.[4]

Although not necessary to a decision, we note that Mr. Alexce unquestionably had access to the records in question, given that he provided them to VA. An adverse inference generally is not appropriate where the parties have equal access to the evidence in question. *See Eaton*, 790 F.2d at 878 (destruction of the original relevant documents was "harmless" where those documents had been previously produced to the plaintiff); *In re Ionosphere Clubs, Inc. v. Chemical Bank, Inc.*, 177 B.R. 198, 207 (Bankr. S.D.N.Y. 1995) (when missing or destroyed

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[4] *Kirkendall v. Department of the Army*, 573 F.3d 1318, 1325-27 (Fed. Cir. 2009), a recent case on spoliation, is distinguishable. In *Kirkendall*, a case brought under veterans' preference statutes, the agency confessed that it destroyed documents where the relevance of the documents was beyond doubt, and, without those documents, the petitioner was "at a loss" to determine whether, compared to non-veteran competitors for the position at issue, his status as a veteran had worked against him. *Id.* at 1326-27. The petitioner made a "compelling case" that his litigation was hampered because the agency destroyed the evidence that might have shown a violation his veterans' rights, and the destruction was in violation of the agency's own document retention program. *Id.* Nothing even comparable is present here.

In addition, while the Court recognized in *Kirkendall* that the issue of whether the standard is bad faith or negligence was left open in *Jandreau*, 492 F.3d at 1372, even if the lower "negligence" standard were to apply, there is no evidence of any negligence here.

information is not in exclusive control of one party, adverse inference is not warranted because no one has been harmed). Mr. Alexce has not suggested that he provided VA with his only copy of the documents in question and that he and his attorney have lost all recollection of the nature and content of those documents. Although he unquestionably had, and may still have, copies of those documents, he has not alleged that the documents he provided to VA were anything other than treatment records from the New Orleans VAMC, which were already in the record before VA, nor has he alleged that a copy of the documents he submitted is not currently in the VA record. Rather, he appears to rely solely upon the assertion that VA's destruction of the evidence entitles him to a default judgment.

Because Mr. Alexce has identified no error in the Veterans Court's decision denying him an adverse inference, this Court should affirm the Veterans Court's decision.

V. Mr. Alexce Has Not Demonstrated Any Violation Of His Due Process Rights

In the event this Court finds it appropriate to address Mr. Alexce's due process claim, it should reject that claim and affirm the decision of the Veterans Court because Mr. Alexce has shown no violation of his due process rights.

"Procedural due process imposes constraints on governmental decisions

which deprive individuals of 'liberty' or 'property' interests." *Edwards v. Shinseki*, 582 F.3d 1351, 1355 (Fed. Cir. 2009) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976)). Although we maintain that property right protections do not attach to mere applicants for benefits (or in this case, requests for additional benefits), *Lyng v. Payne*, 476 U.S. 926, 942 (1986), this Court has held that claims of entitlement to veterans disability benefits are a property interest protected by the Due Process Clause. *Cushman*, 576 F.3d at 1298.

It is unclear from Mr. Alexce's brief whether his claim is that he was denied due process because he was not given adequate notice of VA's destruction of the duplicate records, or because VA allegedly decided his claim based on a "tampered" record (*see* Appellant's brief at 8-9, 11).

To the extent his due process argument rests upon an assertion of inadequate notice, it fails because Mr. Alexce received ample notice of the evidence VA considered in reaching its decision and ample opportunity to identify any evidence that was not among the evidence listed by VA as having been obtained and considered in his case. He failed to identify any such evidentiary deficiencies before VA or the Veterans Court and he does not, in this appeal, identify any evidence that was not considered by VA.

The "core of due process is the right to notice and a meaningful opportunity

to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). Existing VA procedures prescribed by statute and regulation provide for such notice and opportunity throughout the adjudication process. *See Thurber v. Brown*, 5 Vet. App. 119, 123 (1993) ("entire thrust of VA's nonadversarial claim system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process"). Numerous statutory and regulatory provisions establish the requirements for notice and the opportunity to respond at various stages of VA proceedings. *See, e.g.*, 38 U.S.C. §§ 5103(a), 5104, 7105(d); 38 C.F.R. § 3.103(b).

A VA regulation, 38 C.F.R. § 19.38 provides that, when a claim has been remanded for additional development, unless that development results in a full grant of the benefits sought, VA must issue an SSOC documenting the additional development conducted on remand and must provide the claimant a 30-day period to respond to any matters addressed in the SSOC. This procedure serves to notify the claimant of the evidence developed and considered on remand and to provide the claimant an opportunity to notify VA if he believes the statement is inaccurate or incomplete, or if he believes additional evidence should be obtained.

Mr. Alexce asserts that he was entitled to notice that VA had destroyed his records and the opportunity to submit additional evidence or to show that the

evidence he submitted was not duplicative of existing evidence. Although VA did not specifically inform Mr. Alexce that it had destroyed those duplicate copies, the February 17, 2005, SSOC sent to Mr. Alexce pursuant to 38 C.F.R. § 19.38 expressly informed him of the additional evidence VA considered following the Board's September 2004 remand. The SSOC stated that VA had obtained and considered treatment records from the New Orleans VAMC for the period from November 5, 2002, to September 20, 2004, and it noted further that he had identified that facility as the only place his condition had been treated. A39. This notice, sent less than two months after Mr. Alexce submitted the records to VA, provided Mr. Alexce with adequate notice that, if he believed he had provided VA with medical records of treatment other than at the New Orleans VAMC between the dates listed in the SSOC, he should inform VA of that fact. Further, the SSOC expressly informed Mr. Alexce of his opportunity to respond to any matters in the SSOC with which he disagreed. As the Board found, Mr. Alexce did not identify any other evidence that was not already in the record. A54.

Mr. Alexce has not shown that he was deprived of notice of VA's actions on remand or the evidentiary basis on which the Board would decide his claim or that he was denied an opportunity to respond. The record shows that Mr. Alexce received treatment for his leg disability only at the New Orleans VAMC, VA

obtained the records of his treatment at that facility, and VA found the records submitted by Mr. Alexce, which he identified as medical records, to be duplicate copies of treatment records. It thus appears that the records Mr. Alexce submitted were copies of his treatment records from the New Orleans VAMC. Mr. Alexce has not alleged otherwise. If he believed that he had submitted medical records distinct from those pertaining to his treatment at the New Orleans VAMC, VA's February 17, 2005, SSOC would have clearly provided him notice that VA did not consider those records and notice that he had an opportunity to respond by asserting that VA should consider them.

Due process requires the opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). In this case, the February 2005 SSOC listing the evidence obtained on remand was provided shortly after Mr. Alexce's January 2005 submission, at a time when he and his attorney reasonably could be expected to recall the nature of the evidence he submitted even if they failed to retain copies of it. He thus had a meaningful opportunity to address any deficiencies in the evidence that could have related to VA's destruction of the duplicate records. Even to this date several years later, he has conspicuously failed to provide any information as to what records he actually submitted in January 2005, even though he reasonably may be expected to know

what records he submitted and whether they related to matters other than his treatment at the New Orleans VAMC. Accordingly, he has simply failed to show that he was denied notice and a reasonable opportunity to support his claim.

To the extent that Mr. Alexce's brief references *Cushman* and the importance of a "tampered-free record" suggest that he is alleging that VA violated his due process rights by relying upon an altered or inadequate record, his argument is similarly devoid of any support. Appellant's brief at 9, 11. In *Cushman*, this Court found that a VA employee had altered a medical record for unknown reasons and VA's reliance upon the altered record violated Mr. Cushman's right to a fundamentally fair adjudication. *Cushman*, 576 F.3d at 1300. The Court noted that "the substance of the alterations spoke directly to" the central issue in Mr. Cushman's claim, concerning his ability to work, and therefore "was indeed prejudicial" to him. *Id.* Although *Cushman* did not elaborate upon the type of evidentiary irregularity that would rise to the level of a due process violation, this case is not similar to *Cushman*. Here, there is no mystery as to why VA destroyed the documents in question. VA expressly found that they were merely duplicate copies of evidence already in the record. As the Veterans Court noted, the exclusion of duplicates from the claims file was consistent with VA procedures, which prohibit inclusion of duplicate copies of documents in the claims file, in

order to prevent unnecessarily increasing the size of those often-voluminous files. Moreover, although Mr. Alexce has first-hand knowledge of the nature and content of the documents he submitted, he has neither alleged nor shown that they were anything other than what the RO found them to be, *i.e.*, duplicate copies of his treatment records. There is thus no basis for finding that the evidentiary record before VA was deficient in any respect, much less in a respect that could rise to the level of a violation of constitutional rights.

Finally, Mr. Alexce has failed to show how he was harmed by the alleged due process violation. As noted above, he points to nothing in the records to suggest that the documents he submitted were anything other than duplicate copies of evidence VA already had. The exclusion of duplicate copies does not prevent VA from considering the content of the record based upon the copy that is in the claims file. Accordingly, even if VA were required to provide him notice that it was excluding the duplicate records he submitted, he could not have been harmed by the lack of notice or the exclusion of those duplicates.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court dismiss this appeal or, alternatively, affirm the decision of the Veterans Court.

Respectfully submitted,

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May 31, 2010

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RESPONDENT-APPELLEE'S APPENDIX

Index to Appendix

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No: 06-3559

PERRY R. ALEXCE, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered this date.

Dated: February 25, 2010

FOR THE COURT:

NORMAN Y. HERRING
Clerk of the Court

By: /s/ Abie M. Ngala
Deputy Clerk

Copies to:

Naomi E. Farve, Esq.

VA General Counsel (027)

Derr

Designated for electronic publication only

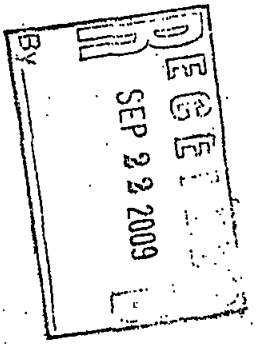
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 06-3559

PERRY R. ALEXCE, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.



Before DAVIS, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

DAVIS, *Judge*: U.S. Army veteran Perry R. Alexce appeals through counsel from a May 11, 2006, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 10% for a postsurgical knee condition. This Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's May 2006 decision.

The appellant raises a single argument on appeal. He asserts that VA's destruction of medical evidence that he submitted in January 2005 constitutes spoliation. He argues for sanctions including an adverse presumption that the evidence destroyed would have proven that he is entitled to a disability rating in excess of 10%.

The Secretary responds that VA destroyed the evidence because it was duplicative of medical records already in the claims file. He further states that such destruction of duplicative material is standard procedure. *See* VA Adjudication Procedure Manual and Manual Rewrite (M-21-1MR), pt. III, subpt. ii, ch 4, Sec G, para. 23(d). The manual, which sets forth claims handling procedure for internal VA purposes, states that the objective of this procedure for eliminating duplicate documents

is to prevent the claims file–which can become quite voluminous in the course of protracted development–from growing in size beyond what is demanded by the claim. *Id.*

In such administrative matters the Court will assume, in the absence of clear evidence to the contrary, that VA properly discharged its official duties. *See Warfield v. Gober*, 10 Vet.App. 483, 486 (1997); *Ashley v. Derwinski*, 2 Vet.App. 62, 64-65 (1992). The Court has previously applied this presumption to matters involving the maintenance of a claims file. *See Redding v. West*, 13 Vet.App. 512, 515 (2000) (no clear evidence that VA removed a document from the claims file and concealed it). Of course, if it could be shown that documents were destroyed that were both nonduplicative and relevant, such developments could have substantially different implications. *See Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009).

Therefore, in consideration of the foregoing, the Court AFFIRMS the Board's May 11, 2006, decision.

DATED: September 22, 2009

Copies to:

Naomi E. Favre, Esq.

VA General Counsel (027)

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

PERRY R. ALEXCE,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 06-3559
	)	
JAMES B. PEAKE, M.D.	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	
	)	
	)	

Motion For Both Single-Judge
Reconsideration and a
Panel Decision

Comes now Appellant-Petitioner, Perry Alexce, who requests a reconsideration of the single-judge decision in this case, dated September 22, 2009, and who also requests a panel decision in the instant case.

Points of Law Overlooked
Or Misunderstood

The Court overlooked (and/or misunderstood) that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause of the United States Constitution.

The Court further overlooked (and/or misunderstood) that the unilateral removal of relevant documents from Appellant's claim file, without prior notice to Appellant, was a violation of Appellant's due process right to a fair hearing and determination of his case.

Table of Cases

Discussion

In the Court's September 22, 2009 decision in this case, it intimated that a different outcome may have resulted if Appellant's case came within the purview of Cushman v. Shinseki, 576 F. 3d 1290 (Fed. Cir. 2009)

Appellant submits that his case indeed falls within the purview of the Cushman case, and should therefore, be decided accordingly.

Argument

Appellant submitted medical records he believed substantiated essential elements of his claim to entitlement to disability benefits as a result of his military service.

The medical records were relevant to his claim.

Without prior notice to the Veteran, the VA unilaterally, and without prior notice to the veteran, removed the medical records from Appellant's claim file.

Such a "removal" violated Appellant's right to "due process"

Conclusion

Based on the foregoing: 1) the Court's September 22, 2009 decision should be vacated; and 2) an Order should be entered in favor of Appellant-Petitioner.

Respectfully Submitted

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Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 06-3559

PERRY R. ALEXCE, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Chief Judge*, and DAVIS and SCHOELEN, *Judges*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

In a memorandum decision dated September 22, 2009, the Court affirmed the Board of Veterans' Appeals decision dated May 11, 2006. That decision denied a disability rating in excess of 10% for a post-surgical knee condition. On October 13, 2009, the appellant filed a motion for reconsideration by the single judge, and, alternatively, for a panel decision.

Upon consideration of the foregoing, the prior pleadings of the parties, and the record on appeal, it is

ORDERED, by the single-judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for a panel decision is denied.

DATED: February 2, 2010 PER CURIAM.

Copies to:

Naomi E. Farve, Esq.

VA General Counsel (027)

Department of Veterans Affairs

Request for Information

General Information

Address Code: 13 File No.: [redacted] Insurance No.:
VA Requesting Office: Requester ID: ADJVDANG
NEW ORLEANS RO Submit Date: 10/27/2004
701 LOYOLA AVENUE
NEW ORLEANS, LA 70113

Veteran Name: ALEXCE, PERRY R SSN: [redacted] Date of Birth: 11/13/1937
Place of Birth: Date of Death:

Claim Date: 03/26/2003 Receipt Date: 11/01/2004
Branch Completion Date: 11/08/2004 Branch Completed By: VALLBROO
Overall Status: CO Overall Completion Date: 11/08/2004

Period of Service Data for Branch: ARMY

Name	SN	EOD	RAD	COD	Duty Status	RT Date	Retired Status	Pay Grade
ALEXCE, PERRY R	54344274	05/23/1963	05/21/1965	HON	DCH			E4

Request/Response Information

REQUEST: 099
PLEASE VERIFY ALL THE VETERAN'S PERIODS OF ACTIVE DUTY, ACTIVE DUTY FOR TRAINING, AND INACTIVE DUTY TRAINING. THIS REQUEST IS ASSOCIATED WITH A REMAND FROM BVA. WE WOULD APPRECIATE ANYTHING YOU CAN DO TO EXPEDITE THE REQUEST. THANKS.

RESPONSE: 99
THE VETERAN SERVED ACTIVE DUTY FROM 05/23/1963 TO 05/21/1965, HON. SERVICE NO. 54344274. USAR/INACTIVE 05/22/1965 TO 04/30/1969 HON.

OMB Approved No. 2900-0001
Respondent Burden: 1 hour 30 minutes

(DO NOT WRITE IN THIS SPACE)
VA DATE STAMP

Department of Veterans Affairs

VETERAN'S APPLICATION FOR COMPENSATION AND/OR PENSION, VA Form 21-526, Part A: General information

Please read the attached "General Instructions" before you fill out this form.

SECTION I Tell us what you are applying for

Check the box that says what you are applying for. Be sure to complete the other Parts you need.

1. What are you applying for? If you are unsure please refer to the "General Instructions" page 2 Section 1: Preparing your application

- [X] Compensation ▶ Fill out Part A of Form 21-526 and Parts B and C
- [ ] Pension ▶ Fill out Part A of Form 21-526 and Parts C and D
- [ ] Compensation and Pension ▶ Fill out Part A of VA Form 21-526 and Parts B, C and D

2a. Have you ever filed a claim with VA
- [X] No *(If "No," skip Item 2b and go to Item 3)*
- *(If "Yes," provide file number below)*
- [ ] Yes ______ *(Go to 2b)*

2b. I filed a claim for
- [ ] Compensation
- [ ] Pension
- [ ] Other ______

SECTION II Tell us about you

We need information about you to process your claim faster.

3. What is your name? Perry R. Alexccc
First *Middle* *Last* *Suffix (If applicable)*

4. What is your Social Security number? 438-56-5557

5. What is your sex? [X] Male [ ] Female

6a. Did you serve under another name?
- [ ] Yes *(If "Yes," go to Item 6b)*
- [X] No *(If "No," go to Item 7)*

6b. Please list the other name(s) you served under ______

Give us your current mailing address in the space provided. If it will change within the next three months, give us that new address in block 29 "Remarks." Also in block 29, give us the date you think you will be at the new address.

7. What is your address? 2604 ~~Desto~~ Decscilon(?)
Street address, rural route, or P.O. Box *Apt. number*
NOLA 70117
City *State* *ZIP Code* *Country*

8. What are your telephone numbers?
Daytime (504) 944-5905
Evening ( )

9. What is your e-mail address? vet not familiar(?)

10. What is your date of birth? 11 / 13 / 1939
month *day* *year*

11. Where were you born? New Orleans, LA
City *State* *Country*

110 CPL-OC
12-4
D
12-5

OWCP used to be called the U.S. Bureau of Employees Compensation

12a. Are you receiving disability benefits from the Office of Workers' Compensation (OWCP)?
- [ ] Yes
- [X] No
(If "Yes," answer 12b and 12c also)

12b. When was the claim filed? ____/____
month *year*

12c. What disability are you receiving benefits for? ______

C/3

13a. What is the name of your nearest relative or other person we could contact if necessary? Perry R. Alexcc, JR.

13c. What is his/her telephone number?
Daytime ( )
Evening ( )

13b. What is this person's address? 2637 Trenil(?) NOLA

13d. How is this person related to you? son

VA FORM SEP 1999 **21-526** SUPERSEDES VA FORM 21-526, MAR 1999, VA FORM 21-526(Test), JAN 1995 AND VA FORM 21-526SF (Test), JUL 1996 WHICH WILL NOT BE USED. *21-526, Part A* *page 1*

RECORD ON APPEAL

16

SECTION III Tell us about your active duty

1. Enter complete information for all periods of service. If more space is needed use Item 29 "Remarks"
2. Attach your original DD214 or a certified copy to this form. (We will return original documents to you.)

14a. I entered active service the first time. . . (mo day yr)	14b. Place:	14c. My service number was . . .	
Mar 1963	Ft Polk LA	593 42 27	
14d. I left this active service. . . (mo day yr)	**14e. Place:**	**14f. Branch of Service**	**14g. Grade, rank, or rating**
21 Mar 65	Ft Hood TX	A	
14h. I entered my second period of active service. . . (mo day yr)	**14i. Place:**	**14j. My service number was . . .**	
14k. I left this active service. . . (mo day yr)	**14l. Place:**	**14m. Branch of Service**	**14n. Grade, rank, or rating**

The VA has a registry of veterans who served in the Gulf War. This area has also been called the "Persian Gulf." If you served there, we will include your name in the registry. If you want your medical information included, you must check "Yes" in Item 16b. For more information about the registry, see page 4 of the General Instructions for VA Form 21-526.

15a. Did you serve in Vietnam?
☐ Yes ☒ No
(If "Yes," answer Item 15b also)

15b. When were you in Vietnam?
from (mo day yr) | *to* (mo day yr)

16a. Were you stationed in the Gulf after August 1, 1990?
☐ Yes ☒ No
(If "Yes," answer Item 16b also)

16b. Do you want to have medical and other information about you included in the "Gulf War Veterans' Health Registry?"
☐ Yes ☐ No

17a. Have you ever been a prisoner of war?
☐ Yes ☒ No
(If "Yes," answer Items 17b, 17c, and 17d also)

17b. What country or government imprisoned you?

17c. When were you confined?
from (mo day yr) | *to* (mo day yr)

17d. What was the name of the camp or sector and what are the names of the city and country near its location

SECTION IV Tell us about your reserve duty

18a. Are you currently assigned to an active reserve unit?
☐ Yes ☒ No
(If "Yes," answer Item 18b also)

18b. What is the name, mailing address, and telephone number of your current unit?

18c. Were you previously assigned to an active reserve unit within the last 2 years?
☐ Yes ☒ No
(If "Yes," answer Item 18d also)

18d. What is the name, mailing address, and telephone number of that unit?

SECTION IV (Continued) Tell us about your reserve duty

18e. Do you have an inactive reserve obligation? (You perform no active duty, but you could be activated if there was a national emergency)

☐ Yes ☒ No ☐ Don't know

(If "Yes," answer Item 18f also)

18f. What is your reserve obligation termination date?

mo day yr

Instructions 18g-18k

If you are currently or have ever been a full time reservist for operational or support duty,

1. *Complete 18g-18k for that service only.*
2. *Attach proof of reserve service*

18g. I entered reserve service. . .

mo day yr | Place: | 18h. My service number was . . .

18i. I left reserve service. . .

mo day yr | Place: | 18j. Branch of service | 18k. Grade, rank, or rating

Instructions 18l-18p

If your disability occurred or was aggravated during any period of reserve duty,

1. *Complete 18l-18p for the period when your disability occurred.*
2. *Attach proof that your disability occurred during reserve service.*

18l. I entered reserve service. . .

mo day yr | Place: | 18m. My service number was . . .

18n. I left reserve service. . .

mo day yr | Place: | 18o. Branch of service | 18p. Grade, rank, or rating

SECTION V Tell us about your National Guard duty

19a. Are you currently a member of the National Guard?

☐ Yes ☒ No ☐ Not assigned yet

(If "Yes," answer Item 19b also)

19b. What is the name, mailing address, and telephone number of your current unit?

19c. Were you previously assigned to a guard unit within the last 2 years?

☐ Yes ☒ No

(If "Yes," answer Item 19d also)

19d. What is the name, mailing address, and telephone number of that unit?

Instructions 19e-19i

If you were activated to Federal Active Duty under the Authority of Title 10, United States Code,

1. *Complete 19e-19i for that service only.*
2. *Attach proof of this Federal Active Duty*

19e. I entered Federal Active Duty. . .

mo day yr | Place: | 19f. My service number was . . .

19g. I left Federal Active Duty. . .

mo day yr | Place: | 19h. Branch of service | 19i. Grade, rank, or rating

Instructions 19j-19n

If your disability occurred or was aggravated during any period of guard duty,

1. *Complete 19j-19n for the period when your disability occurred.*
2. *Attach proof that your disability occurred during National Guard Service.*

19j. I entered National Guard. . .

mo day yr | Place: | 19k. My service number was . . .

19l. I left National Guard. . .

mo day yr | Place: | 19m. Branch of service | 19n. Grade, rank, or rating

SECTION VI Tell us about your travel status

20a. Were you injured while traveling to or from your military assignment? *(If "Yes," answer items 20b thru 20e and Section I of Part B: Compensation)* ☐ Yes ☒ No	20b. When did your injury happen? ___/___/___ mo day yr	20c. Where did your injury happen? *(City, State, Country)*	20d. Where were you treated? (Provide name and address of Doctor's office, hospital, etc.)	20e. What agency did you file an accident report with?

SECTION VII Tell us about your military benefits

When you file this application, you are telling us that you want to get VA compensation instead of military retired pay. If you currently receive military retired pay, you should be aware that we will reduce your retired pay by the amount of any compensation that you are awarded. VA will notify the Military Retired Pay Center of all benefit changes.

You must sign 21e if you want to keep getting military retired pay instead of VA compensation.

Please see page 4 of the General Instructions for VA Form 21-526.

If you have gotten both military retired pay and VA compensation, some of the amount you get may be recouped by VA, or in the case of VSI, by the Department of De

21a. Are you receiving or will you receive retired or retainer pay that is based on your military service? ☐ Yes ☒ No *(If "Yes," answer items 21b thru 21f. If "No," skip to item 22)*	21b. What branch of service is paying or will pay your retired or retainer pay?	21c. What is the monthly amount? $

21d. What is your retirement based on?

☐ Length of service ☐ Disability ☐ TDRL (Temporary Disability Retired List)

21e. Sign here if you want to receive military retired pay *instead of* VA compensation

21f. Have you received or will you receive any of the following military benefits?
(Please check the appropriate boxes and tell us the amount)

Benefit	*Amount*
(1) ☐ Lump Sum Readjustment Pay	$
(2) ☐ Separation pay under 10 USC 1174	$
(3) ☐ Special Separation Benefit (SSB)	$
(4) ☐ Voluntary Separation Incentive (VSI)	$
(5) ☐ Disability Severance Pay *(name of disability)*	$
(6) ☐ Other *(tell us the type of benefit)*	$

SECTION VIII Give us direct deposit information

If benefits are awarded we will need more information in order to process any payments to you. Please read the paragraph starting with, *"All federal payments..."* and then either:

1. Attach a voided check, or
2. Answer questions 22-24 to the right.

All federal payments beginning January 2, 1999, must be made by electronic funds transfer (EFT) also called Direct Deposit. Please attach a voided personal check or deposit slip or provide the information requested below in items 22, 23 and 24 to enroll in Direct Deposit. If you do not have a bank account we will give you a waiver from Direct Deposit, just check the box below in item 22. The Treasury Department is working on making bank accounts available to you. Once these accounts are available, you will be able to decide whether you wish to sign-up for one of the accounts or continue to receive a paper check. You can also request a waiver if you have other circumstances that you feel would cause you a hardship to be enrolled in Direct Deposit. You can write to: Department of Veterans Affairs, 125 S. Main Street Suite B, Muskogee OK 74401-7064 and give us a brief description of why you do not wish to participate in Direct Deposit.

22. Account number *(Please check the appropriate box and provide that account number, if applicable)*

☐ Checking ☐ Savings

☐ I certify that I do not have an account with a financial institution or certified payment agent

Account number ___

23. Name of financial institution ___

24. Routing or transit number ___

SECTION IX Give us your signature

1. Read the box that starts, "I certify and authorize the release of information:"
2. Sign the box that says, "Your signature."
3. If you sign with an "X," then you must have 2 people you know witness you as you sign. They must then sign the form and print their names and addresses also.

I certify and authorize the release of information:
I certify that the statements in this document are true and complete to the best of my knowledge. Any physician, dentist, or hospital that has treated or examined me, or that I have consulted professionally, may give the Department of Veterans Affairs any information about me, and I waive any privilege which makes the information confidential.

25. Your signature	26. Today's date: 12/04/01 (mo day yr)
X (X) Pvt Alvarez	
27a. Signature of witness (If claimant signed above using an "X")	27b. Printed name and address of witness
28c. Signature of witness (If claimant signed above using an "X")	28b. Printed name and address of witness

SECTION X

Remarks - Use this space for any additional statements that you would like to make concerning your application for Compensation and/or Pension

IMPORTANT

Penalty: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false, or for the fraudulent acceptance of any payment which you are not entitled to.

29. Remarks *(If you need more space to answer a question or have a comment about a specific item number on this form please identify your answer or statement by the item number)*

SC right leg injury operation at Fort Texas, 1963

no treatment since service

DEPARTMENT OF VETERANS AFFAIRS
VARO
701 Loyola Avenue
New Orleans, LA 70113

Perry R. Alexce

VA File Number
[redacted]

Rating Decision
December 4, 2002

INTRODUCTION

Perry Alexce is a Vietnam Era and Peacetime veteran. He served in the Army from May 23, 1963 to May 21, 1965. He filed a claim for increased evaluation that was received on July 31, 2002.

DECISION

Evaluation of status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes, which is currently 0 percent disabling, is increased to 10 percent effective December 4, 2001.

EVIDENCE

- VA Examination, VAMC New Orleans, scheduled for October 17, 2002
- VAMC Treatment Reports, VAMC New Orleans, from May 30, 2002 through November 5, 2002

REASONS FOR DECISION

Evaluation of status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes currently evaluated as 0 percent disabling.

In September, 1963 the veteran complained of pain in the right knee after twisting it. In February 1964 the veteran had elective surgery for removal of a calcified hematoma overlying the area of exostosis. VAMC treatment reports dated May 30, 2002 through November 5, 2002 show the veteran was seen on May 30, July 31, September 13, October 8 and October 23, 2002 for pain in the right knee.

On May 30, 2002 the veteran was seen for complaints of pain in the right knee and was diagnosed with internal derangement of knee probable patellofemoral syndrome. On July 31, 2002 the veteran was seen again for pain in the right knee with pain 3/10 when sitting and 9/10 when walking. The veteran was then diagnosed with right knee patellofemoral syndrome and given a plan of physical therapy, ibuprofen, and softer soled and cushioned shoes. On September 13, 2002 the veteran was seen for follow-up and still complained of pain in right knee. The veteran was referred to Pain Management for evaluation of knee. On October 8, 2002 the veteran was seen again for pain of right knee and was given a trial of Naprosyn. On October 23, 2002 the veteran was seen for follow-up of right knee pain. X-ray of knee from June, 2002 were reviewed. Anterior, posterior, lateral, tunnel and sunrise views were obtained. No fracture was noted, joint space was normal in width. There were small bony projections along the medial aspect of the right distal femur. A small metallic foreign body was noted posterior to the proximal tibia. Mild degenerative spur formation was noted along the posterior surface of the patella. The veteran was diagnosed with mild degenerative changes, metallic foreign body posterior to knee. Bony projections along medial aspect of distal femur, likely at tendon insertion sites. Physical examination on October 23, 2002 showed atrophy of quads, right greater than left, range of motion within normal limits bilateral, no medial/lateral/anterior/posterior instability, bilateral, no effusions of either knee, no effusion in either knee popliteal fossa. Veteran states pain is inside knee. The veteran was prescribed KT for quad strengthening, terminal knee extension, glucosamine over the counter, stationery biking with seat raised so knee can be extended, continue ibuprofen, lateral wedge for right shoe, and return for follow-up in four to five months.

A VA examination was scheduled for the veteran and was canceled on October 17, 2002 because the veteran failed to report. Evidence expected from this examination may have been material to the outcome of this claim.

The evaluation of status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes is increased to 10 percent disabling effective December 4, 2001.

An evaluation of 10 percent is assigned from December 4, 2001, original date of claim. An evaluation of 10 percent is granted if the record shows recurrent subluxation or lateral instability of the knee which is slight or confirmed findings such as swelling, muscle spasm, or satisfactory evidence of painful motion. A higher evaluation of 20 percent is not warranted unless there is evidence of moderate subluxation or lateral instability of the knee. The 10 percent evaluation is granted since the evidence shows pain on motion.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Rating Decision	*Department of Veterans Affairs* *VARO*			Page 1 12/04/2002
NAME OF VETERAN Perry R. Alexce	VA FILE NUMBER [redacted]	SOCIAL SECURITY NR [redacted]	POA	COPY TO

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
05/23/1963	05/21/1965	Army	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		NONE

JURISDICTION: Claim for Increase Received 07/31/2002

SUBJECT TO COMPENSATION (1. SC)

5010-5257 STATUS POST EXCISION OF LESION OF BONE, RIGHT MEDIAL FEMORAL CONDYLE WITH MILD DEGENERATIVE CHANGES
Service Connected, Vietnam Era, Incurred
10% from 12/04/2001

COMBINED EVALUATION FOR COMPENSATION:

10% from 12/04/2001

Angela Raymond, RVSR

Steve Bernard

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

IN THE APPEAL OF
PERRY R. ALEXCE

[redacted]

DOCKET NO. 03-28 841A) DATE SEP 27 2004
)
)

On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in New Orleans, Louisiana

THE ISSUE

Entitlement to a higher initial rating for status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes, currently evaluated as 10 percent disabling.

REPRESENTATION

Appellant represented by: Naomi E. Farve, Attorney at Law

WITNESS AT HEARING ON APPEAL

Appellant

IN THE APPEA[illegible]
PERRY R. ALEXCE [redacted]

ATTORNEY FOR THE BOARD

T. L. Konya, Associate Counsel

INTRODUCTION

The veteran served on active duty from May 1963 to May 1965.

This case comes to the Board of Veterans' Appeals (Board) on appeal from a May 2002 rating action awarding the veteran service connection for status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes, and thereafter assigning a 0 percent rating. A December 2002 decision by the RO in New Orleans, Louisiana, awarded an increased rating of 10 percent for effective December 4, 2001, the date of the award of service connection.

The appeal is REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC. VA will notify you if further action is required on your part.

REMAND

The Veterans Claims Assistance Act of 2000 (VCAA), 38 U.S.C.A. § 5100 et seq. (West 2002), was enacted during the course of the appeal at issue here. *See* 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2003) (regulations promulgated to implement the statutory changes). Among other things, the VCAA enhanced VA's duty to assist a claimant in developing facts pertinent to his claim and expanded VA's duty to notify the claimant and his representative, if any, concerning certain aspects of claim development.

With respect to notice, the VCAA provides that, upon receipt of a complete or substantially complete application, VA must notify the claimant and his representative, if any, of any information or lay or medical evidence not previously provided that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a). The

notice should indicate what information or evidence should be provided by the claimant and what information or evidence VA will attempt to obtain on the claimant's behalf. *Id.*

The Board notes that the claim for a higher initial rating for status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes is a "downstream" issue from the claim for service connection for status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes, which the RO granted in its May 2002 rating decision. VA's Office of General Counsel (GC) has held that, if, in response to notice of a decision on a claim for which VA has already provided notice pursuant to 38 U.S.C.A. § 5103(a), VA receives a notice of disagreement that raises a new, "downstream" issue, i.e., increased rating after an initial award of service connection, VA is not required to provide 38 U.S.C.A. § 5103(a) notice with respect to that new issue. VAOPGCPREC 8-2003. However, review of the claims folder fails to reveal adequate 38 U.S.C.A. § 5103(a) notice to the veteran on the underlying service connection claim. Therefore, pursuant to the GC opinion, discussed above, VA is not exempted from providing the veteran with 38 U.S.C.A. § 5103(a) notice on the issue of entitlement to higher initial rating for status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes.

Additionally, efforts should be made to verify the veteran's service period. 38 U.S.C.A. § 5103(A)(c)(1), 38 C.F.R. § 3.159(c)(3)).

During the veteran's travel Board hearing, he testified that approximately 9 months prior to the hearing, he was discharged from Rehabilitation from the VA medical center (VAMC) in New Orleans, Louisiana. On remand, the RO should contact the VAMC in New Orleans, Louisiana and obtain all the veteran's treatment records dated November 2002 to the present.

Also, during the veteran's May 2004 travel Board hearing, he testified he is currently in receipt of Social Security benefits which he began receiving in 2001. "As part of the Secretary's obligation to review a thorough and complete record, VA is required to obtain evidence from the Social Security Administration . . . and

to give that evidence appropriate consideration and weight." *Hayes v. Brown*, 9 Vet. App. 67, 74 (1996). On remand, the RO should contact the SSA to obtain all relevant records used to reach its decision.

In addition, VA has a duty to assist the veteran in developing facts pertinent to his claim. 38 U.S.C.A. § 5103A. This duty includes the conduct of a thorough and comprehensive medical examination. *Robinette v. Brown*, 8 Vet. App. 69, 76 (1995). Where the veteran claims that his condition is worse than when originally rated, and the available evidence is too old for an adequate evaluation of the veteran's current condition, VA's duty to assist includes providing a new examination. *Weggenmann v. Brown*, 5 Vet. App. 281, 284 (1993). In this case, the veteran has never undergone a comprehensive and thorough VA examination with respect to his service-connected disability. In December 2002, the RO conceded that there was an increase in disability and assigned an increased evaluation from December 2001. Though, the RO attempted to arrange for several comprehensive examinations to assess fully the severity of the veteran's disability, there is documentation within the claims folder which reveals that the veteran failed to report for his examinations. During the veteran's travel Board hearing, he testified that on one occasion he never received notice of the examination, and on another occasion he did report for the examination, but was informed that the examination was cancelled. Nonetheless, on remand, the veteran should be scheduled for a new examination.

The actions identified herein are consistent with the duties imposed by the VCAA. However, identification of specific actions requested on remand does not relieve the RO of the responsibility to ensure full compliance therewith. Hence, in addition to the actions requested above, the RO should also undertake any other development and/or notification action deemed warranted by the VCAA prior to adjudicating the claim on appeal.

In view of the foregoing, this case is remanded to the RO (via the AMC) for the following:

1. The RO should take the necessary action to comply with all VCAA notice obligations in accordance with 38 U.S.C.A. §§ 5102, 5103, and 5103A (West 2002), as well as *Quartuccio v. Principi* and *Charles v. Principi*, and any other applicable legal precedent. The RO should allow the appropriate period of time for response.

2. The RO should verify all the veteran's periods of active duty, active duty for training and inactive duty training. The report of verification should be associated with the claims folder.

3. The veteran should be contacted and requested to provide the names, addresses and approximate dates of treatment for any health care providers, VA or non-VA, who have treated him for his disorder from December 2000 to the present, and which have not already been made part of the record. After the releases are signed, the RO should obtain and associate with the claims folder all of the veteran's treatment records, including records from the VAMC in New Orleans, Louisiana, dated November 2002 to the present. All attempts to procure records should be documented in the file. If the RO cannot obtain the records, a notation to that effect should be inserted in the file. The veteran should be informed of failed attempts to procure records, in order that he be allowed an opportunity to obtain those records for submission to VA.

4. The RO should contact the SSA and obtain a copy of the veteran's disability determination along with all

supporting medical records. All records received should be associated with the claims folder.

5. After all documents are obtained and have been associated with the claims folder, the RO should arrange for the veteran to be scheduled for an orthopedic examination to determine the severity of his service-connected status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes. The claims folder must be made available to the examiner for the examination and the examination report must state whether such review was accomplished. The orthopedist should describe in detail all symptoms reasonably attributable to each service-connected knee disability and its current severity. The examiner should indicate the range of motion expressed in degrees, including the specific limitation of motion due to pain, and state the normal range of motion for the right knee. The examiner should indicate whether the veteran has either instability or recurrent subluxation and if either recurrent subluxation or lateral instability is found, the examiner should indicate whether such symptoms are best described as slight, moderate, or severe. The examiner should also indicate whether the veteran has frequent episodes of locking, pain or effusion in the joint. Complete diagnoses should be provided.

The physician should then set forth the extent of any functional loss present in the veteran's right knee due to weakened movement, excess fatigability, incoordination, or pain on use. The examiner should also describe the level of pain experienced by the veteran and state whether any pain claimed by him is

supported by adequate pathology and is evidenced by his visible behavior. The examiner should elicit information as to precipitating and aggravating factors (i.e., movement, activity), effectiveness of any pain medication or other treatment for relief of pain, functional restrictions from pain on motion, and the effect the service-connected right knee has upon his daily activities. The degree of functional impairment or interference with daily activities, if any, by the service-connected disability should be described in adequate detail.

Any additional impairment on use, or in connection with any flare-up should be described in terms of the degree of additional range-of-motion loss. The physician should describe in adequate detail neurologic symptoms, if any, involving the knee reasonably attributable to the service-connected disability (versus other causes). The conclusions should reflect review of the claims folders, and the discussion of pertinent evidence.

6. The veteran must be given adequate notice of the date and place of any requested examination. A copy of all notifications must be associated with the claims folder. The veteran is hereby advised that failure to report for a scheduled VA examination without good cause shown may have adverse effects on his claim.

7. The RO must review the claims file and ensure that there has been full compliance with all notification and development action required by 38 U.S.C.A. §§ 5102, 5103, and 5103A (West 2002) and 38 C.F.R. § 3.159 (2003), and that all appropriate development has been

completed (to the extent possible) in compliance with this REMAND. If any action is not undertaken, or is taken in a deficient manner, appropriate corrective action should be undertaken. *See Stegall v. West*, 11 Vet. App. 268 (1998).

8. Thereafter, the RO should readjudicate the issue on appeal. The RO is advised that they are to make a determination based on the law and regulations in effect at the time of their decision, to include any further changes in VCAA and any other applicable legal precedent. If the benefits sought on appeal remain denied, the veteran should be provided a supplemental statement of the case (SSOC). The SSOC must contain notice of all relevant actions taken on the claim for benefits, to include a summary of the evidence and applicable law and regulations considered pertinent to the issues currently on appeal. A reasonable period of time should be allowed for response.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999). This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* The Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 707(a), (b), 117 Stat. 2651 (2003) (to be codified at 38 U.S.C. §§ 5109B, 7112).

Renée M. Pelletier

RENÉE M. PELLETIER
Veterans Law Judge, Board of Veterans' Appeals

IN THE APPEAL [redacted]
PERRY R. ALEXCE

Under 38 U.S.C.A. § 7252 (West 2002), only a decision of the Board of Veterans' Appeals is appealable to the United States Court of Appeals for Veterans Claims. This remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal. 38 C.F.R. § 20.1100(b) (2003).

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
701 Loyola Avenue
New Orleans LA 70113-1912

October 27, 2004

PERRY R ALEXCE
6038 BURGUNDY ST
NEW ORLEANS LA 70117

In reply, refer to:
321/211APP
File Number: 438 56 5557
Perry R. Alexce

IMPORTANT -- reply needed

Dear Mr. Alexce:

We are working on your appeal for:

- **Entitlement to a higher initial rating for status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes**

However, we need additional information and evidence.

This letter will give you information about what we will do, and what you can do to help us. Please see the enclosed attachment "How You Can Help and How VA Can Help You" for more information about your claim.

What Do We Still Need from You?

We need additional things from you. ***Please put your VA file number on the first page of every document you send us.***

1. As we consider your claim, you may submit evidence showing that your service-connected **status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes** has increased in severity. This evidence may be a statement from your doctor, containing the physical and clinical findings, the results of any laboratory tests or x-rays, and the dates of examinations and tests. You may also submit statement from other individuals who are able to describe from their knowledge and personal observations in what manner your disability has become worse.

If you are in need of medical treatment for your service-connected conditions, please contact the nearest Department of Veterans Affairs Medical Center or Ambulatory Care Center for assistance.

If you have recently received treatment at a Department of Veterans Affairs facility or treatment authorized by the Department of Veterans Affairs, please furnish the dates and places of treatment. We will then obtain the necessary reports of such treatment.

If you have not recently been examined or treated by a doctor and you cannot submit other evidence of increased disability, you may submit your own statement. This should completely describe your symptoms, their frequency and severity, and other involvement, extension and additional disablement caused by your disability.

2. Please provide the names, addresses, and approximate dates of treatment for any health care providers, VA or non-VA, who have treated you for your disorder from December 2000 to the present, and which have not already been made part of the record.

Please complete and sign the enclosed VA Form 21-4142, Authorization for Release of Information, so that we may obtain your treatment records from your private physician(s) and/or hospital(s). Please be sure to *furnish the full name and address including ZIP code of the facility or doctor* where you sought treatment and the approximate dates of treatment. **You may list only one physician/hospital facility on each form.** Our request will not be answered if more than one facility is listed on this form.

It may expedite a decision in your case if you would personally contact the facility or doctor and have them send reports of your treatment direct to our office.

3. Please send us the original or a **certified copy** of your DD Form 214. You may bring your original DD Form 214 to the office of public records (clerk of court) to have the original certified. ***If you choose to send us the original, we will return it to you.***

Please see the attached information sheet "What the Evidence Must Show". If there is any other evidence or information that you think will support your claim, please let us know. If you have any evidence in your possession that pertains to your claim, please send it to us.

Where Should You Send What We Need?

Please send what we need to this address:

Department of Veterans Affairs
Regional Office
701 Loyola Avenue
New Orleans LA 70113-1912

How Soon Should You Send It?

We encourage you to send us this information and evidence as soon as you can, or contact us **within 60 days** from the date of this letter. Unless we hear from you, VA may decide your claim as soon as we have completed our attempts to get all the relevant evidence that we know about on your claim.

How Can You Contact Us?

If you are looking for general information about benefits and eligibility, you should visit our web site at http://www.va.gov. Otherwise, you can contact us in several ways. Let us know your VA file number, **438 56 5557**, when you do contact us.

- Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.
- On the Internet at https://iris.va.gov.
- Write to us at the address at the top of this letter.

We have also enclosed information about how you can help the VA and how the VA can help you, and what the evidence must show.

We are trying to decide claims as quickly as possible. We appreciate your help.

Sincerely yours,

James Fowler

James Fowler
Veterans Service Center Manager

Enclosures: How You Can Help and How VA Can Help You
What the Evidence Must Show (Increase Compensation)
VA Form 21-4142
VA Form 21-4138

cc: PRIVATE ATTORNEY –NAOMI E. FARVE

211APP/301/VBD

How You Can Help and How VA Can Help You

We want to tell you about the information and evidence we need to support your claim.

We have received the following:

- Your Notice of Disagreement, which we received on March 26, 2003.

VA is responsible for getting the following evidence:

- Relevant records from any Federal agency. This may include medical records from the military, VA Medical Centers (including private facilities where VA authorized treatment), or the Social Security Administration.
- VA will provide a medical examination for you, or get a medical opinion, if we determine it is necessary to decide your claim.
- Verification of Service from the Service Department
- Medical treatment records from VAMC New Orleans

On your behalf, VA will make reasonable efforts to get the following evidence:

- Relevant records not held by any Federal agency. This may include records from State or local governments, private doctors and hospitals, or current or former employers.

How Can You Help?

If the evidence is not in your possession, you must give us enough information about the evidence so that we can request it from the person or agency that has it. If the holder of the evidence declines to give it to us, asks for a fee to provide it, or VA otherwise cannot get the evidence, we will notify you. *It is your responsibility to make sure we receive all requested records that are not in the possession of a Federal department or agency.*

What the Evidence Must Show

What Must the Evidence Show to Establish Entitlement to the Benefit You Want?

To establish entitlement to an increased evaluation for your service-connected disability, the evidence must show that your service-connected condition has gotten worse.

How Will VA Help You Obtain Evidence for Your Claim?

This letter tells you what records or evidence we need to grant the benefit you claimed. If they are needed for your claim, we're requesting all records held by Federal agencies to include your service medical records or other military records, and medical records at VA hospitals. We're making reasonable efforts to help you get private records or evidence necessary to support your claim. We'll tell you if we are unable to get records that we requested. We'll also assist you by providing a medical examination or getting a medical opinion if we decide it's necessary to make a decision on your claim.

OMB Approved No. 2900-0075
Respondent Burden: 15 minutes

Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

PRIVACY ACT INFORMATION: The law authorizes us to request the information we are asking you to provide on this form (38 U.S.C. 501(a) and (b)). The responses you submit are considered confidential (38 U.S.C. 5701). They may be disclosed outside the Department of Veterans Affairs (VA) only if the disclosure is authorized under the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22, Compensation, Pension, Education and Rehabilitation Records - VA, published in the Federal Register. The requested information is considered relevant and necessary to determine maximum benefits under the law. Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: VA may not conduct or sponsor, and respondent is not required to respond to this collection of information unless it displays a valid OMB Control Number. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have comments regarding this burden estimate or any other aspect of this collection of information, call 1-800-827-1000 for mailing information on where to send your comments.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN *(Type or print)*	SOCIAL SECURITY NO.	VA FILE NO.
Perry R Alexce		C/CSS - 438-56-5557

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

While ON Alert for Germany, I Injured my Right KNEE. While At Fort Hood, I WAS Informed That I Needed Surgery. My Condition has become worse. Surgery Was Performed At Fort Hood Hospital - Wait for VCS + SSN Medals 11/29/04 vbd

RECEIVED NOV 18 2004 VARO NEW ORLEANS, LA

(CONTINUE ON REVERSE)

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

SIGNATURE	DATE SIGNED
Perry Alexce	11/16/04

ADDRESS	TELEPHONE NUMBERS *(Include Area Code)*	
	DAYTIME	EVENING
6038 Burgundy St New Orleans, LA. 70117	(504) 281-0594	

PENALITY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM JUN 2000 21-4138 EXISTING STOCKS OF VA FORM 21-4138, APR 1994, WILL BE USED

RECORD ON APPEAL

Department of Veterans Affairs

AUTHORIZATION AND CONSENT TO RELEASE INFORMATION TO THE DEPARTMENT OF VETERANS AFFAIRS (VA)

IF YOU HAVE ANY QUESTIONS ABOUT THIS FORM, CALL VA TOLL-FREE AT 1-800-827-1000 (TDD 1-800-829-4833 FOR HEARING IMPAIRED).

SECTION I - VETERAN/CLAIMANT IDENTIFICATION

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN *(Type or print)*	2. VETERAN'S VA FILE NUMBER
Perry R Alexce	438-56-5557
3. CLAIMANT'S NAME *(If other than Veteran)* LAST NAME, FIRST, MIDDLE	4. VETERAN'S SOCIAL SECURITY NUMBER
5. RELATIONSHIP OF CLAIMANT TO VETERAN	6. CLAIMANT'S SOCIAL SECURITY NUMBER

SECTION II - SOURCE OF INFORMATION

7A. LIST THE NAME AND ADDRESS OF THE SOURCE SUCH AS A PHYSICIAN, HOSPITAL, ETC. *(Include ZIP Codes, and also a telephone number, if available)*	7B. DATE(S) OF TREATMENT, HOSPITALIZATIONS, OFFICE VISITS, DISCHARGE FROM TREATMENT OR CARE, ETC. *(Include month and year)*	7C. CONDITION(S) *(Illness, injury, etc.)*
V.A. Medical Center of New Orleans 1601 Perdido St New Orleans, LA.	2001 TO PRESENT	KNEE problems (R) KNEE

8. COMMENTS:

I was injured while in Service On Alert Status. I was Carrying All of my heavy Gear when I injured my KNEE. while At Fort Hood, Surgery WAS Recomended for my KNEE.

YOU MUST SIGN AND DATE THIS FORM ON PAGE 2 AND CHECK THE APPROPRIATE BLOCK IN ITEM 9C.

VA FORM SEP 2003 21-4142 SUPERSEDES VA FORM 21-4142, APR 2003, WHICH WILL NOT BE USED.

SECTION III - CONSENT TO RELEASE INFORMATION

READ ALL PARAGRAPHS CAREFULLY BEFORE SIGNING. YOU MUST CHECK THE APPROPRIATE STATEMENT UNDERLINED IN PARENTHESES IN PARAGRAPH 9C.

9A. The information requested on this form is solicited under Title 38, U.S.C. The form authorizes release of information in accordance with the Privacy Act of 1974, 5 U.S.C. 552a. 38 U.S.C. 7332, and the Health Insurance Portability and Accountability Act (HIPAA), implemented by 45 Code of Federal Regulations Parts 160 and 164. Your disclosure of the information requested on this form is voluntary. However, if the information including your Social Security Number (SSN) is not furnished completely or accurately, the health care provider to which this authorization is addressed may not be able to identify and locate your records, and provide a copy to VA. Further, VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file.

9B. I, the undersigned, hereby authorize the hospital, physician or other health care provider or health plan shown in Item 7A to release any information that may have been obtained in connection with a physical, psychological or psychiatric examination or treatment, with the understanding that VA will use this information in determining my eligibility to veterans benefits I have claimed. I understand that the health care provider or health plan identified in Item 7A who is being asked to provide the Veterans Benefits Administration with records under this authorization may not require me to execute this authorization before it will, or will continue to, provide me with treatment, payment for health care, enrollment in a health plan, or eligibility for benefits provided by it. I understand that once my health care provider sends this information to VA under this authorization, the information will no longer be protected by the HIPAA Privacy Rule, but will be protected by the Federal Privacy Act, 5 USC 552a, and VA may disclose this information as authorized by law. I also understand that I may revoke this authorization, at anytime (except to the extent that the health care provider has already released information to VA under this authorization) by notifying the health care provider shown in Item 7A. Please contact the VA Regional Office handling your claim or the Board of Veterans' Appeals, if an appeal is pending, regarding such action. If you do not revoke this authorization, it will automatically end 180 days from the date you sign and date the form (Item 10C).

9C. I [X] (AUTHORIZE) [ ] (DO NOT AUTHORIZE) the source shown in Item 7A to release or disclose any information or records relating to the diagnosis, treatment or other therapy for the condition(s) of drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), sickle cell anemia or psychotherapy notes. IF MY CONSENT TO THIS INFORMATION IS LIMITED, THE LIMITATION IS WRITTEN HERE:

10A. SIGNATURE OF VETERAN/CLAIMANT OR LEGAL REPRESENTATIVE	10B. RELATIONSHIP TO VETERAN/CLAIMANT *(If other than self, please provide full name, title, organization, city, State and ZIP Code. All court appointments must include docket number, county and State)*	10C. DATE
[signature]		11/16/04

10D. MAILING ADDRESS *(Number and Street or rural route, city, or P.O. State and ZIP Code)*	10E. TELEPHONE NUMBER *(Include Area Code)*
6038 Burgundy St New Orleans, LA 70117	(504) 281-0594

The signature and address of a person who either knows the person signing this form or is satisfied as to that person's identity is requested below. This is not required by VA but may be required by the source of the information.

11A. SIGNATURE OF WITNESS	11B. DATE

11C. MAILING ADDRESS OF WITNESS

OMB Approved No. 2900-0075
Respondent Burden: 15 minutes

Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

PRIVACY ACT INFORMATION: The law authorizes us to request the information we are asking you to provide on this form (38 U.S.C. 501(a) and (b)). The responses you submit are considered confidential (38 U.S.C. 5701). They may be disclosed outside the Department of Veterans Affairs (VA) only if the disclosure is authorized under the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22, Compensation, Pension, Education and Rehabilitation Records - VA, published in the Federal Register. The requested information is considered relevant and necessary to determine maximum benefits under the law. Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: VA may not conduct or sponsor, and respondent is not required to respond to this collection of information unless it displays a valid OMB Control Number. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have comments regarding this burden estimate or any other aspect of this collection of information, call 1-800-827-1000 for mailing information on where to send your comments.

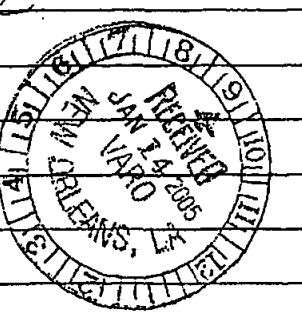
FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)	SOCIAL SECURITY NO.	VA FILE NO.
Perry Alexie	[redacted]	/CSS -

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

Additional Medical Documentation

Please associate these Medical Records with the Veteran's Claim file.

Duplicate VA Tx records destroyed 2-17-05 K Kelly



(CONTINUE ON REVERSE)

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

SIGNATURE	DATE SIGNED
Mamie E. Jones	1-7-05

ADDRESS	TELEPHONE NUMBERS (Include Area Code)	
	DAYTIME	EVENING
3305 Montegut St N.O. La. 70126	289-5389	

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM JUN 2000 21-4138 EXISTING STOCKS OF VA FORM 21-4138, APR 1994, WILL BE USED

U.S.GPO: 2003 521-791/99667

DEPARTMENT OF VETERANS AFFAIRS
New Orleans Regional Office
701 Loyola Ave.
New Orleans, LA 70113

FILE COPY

FEB 2 2 2005

FILE COPY

PERRY R. ALEXCE
3305 MONTEGUT ST.
NEW ORLEANS, LA 70126

In Reply Refer To:
21/Appeals
438 56 5557
P. R. ALEXCE

Dear Mr. Alexce:

This is in further reference to the appeal you have filed from our decision on your claim for benefits. It is not a decision on the appeal you have initiated. It is a Supplemental Statement of the Case which contains changes or additions to the original Statement of the Case sent to you on October 20, 2003.

Before returning your records to the Board of Veterans' Appeals, we are giving you a period of 60 days to make any comment you wish concerning the additional information. A response at this time is optional. If we receive no additional information from you within 60 days, we will return your records to the Board of Veterans' Appeals for review of the issues on appeal, and the Board of Veterans' Appeals will provide you with a copy of its decision. If you feel that you have stated your case completely, you should let us know so that we may forward your appeal to the Board without waiting for the 60-day period to expire.

Sincerely yours,

James Fowler

James Fowler
Service Center Manager

Enclosure: VA Form 21-4138

CC: Private Attorney

- ↑ VAOS
- PCLR 070
- ↑ VACOS 02/22/05
DRO
05/03/05
vbd
rbd

RECORD ON APPEAL

A recent court decision held that VA must wait one year before denying a claim. In the Veterans Benefits Act of 2003, Congress reinstated VA's authority to make decisions on all claims without waiting one year. Therefore, we have decided your claim.

On 10-27-04, we sent you a letter telling you what information and evidence is necessary to support this claim. You have until 10-27-05 to make sure we receive information and evidence we requested from you. If we receive the information and evidence to support this claim after that date, we may not be able to pay benefits from the date we received your claim.

INTRODUCTION:

Perry R. Alexce is a Peacetime and Vietnam era veteran and served in the Army from May 23, 1963 to May 21, 1965. The Board of Veterans Appeals remanded his current appeal on September 27, 2004.

DECISION:

Evaluation of status post excision of bone lesion from right medial femoral condyle with mild degenerative changes of right knee, which is currently 10 percent disabling, is continued.

EVIDENCE:

- Board of Veterans Appeals remand dated 9-27-04
- Treatment reports from VAMC New Orleans, LA, from 11-5-02 to 9-20-04
- In response to a letter dated 10-27-04 informing the veteran of the provisions of PL106-475, the Veterans Claims Assistance Act, and notifying him of the evidence necessary to complete his claim, including any and all treatment since December, 2000 to the present, the veteran reported in a statement received 11-18-04 that all treatment has been at VAMC New Orleans, LA.
- Report from Social Security Administration received 1-3-05 that the veteran did not apply for disability benefits.
- VA examination dated 2-3-05

ADJUDICATIVE ACTIONS:

09-27-2004	The appeal was remanded by the Board of Veterans' Appeals for additional development prior to appellate action.
10-27-2004	VA treatment records received; letter sent to veteran
11-18-2004	Statement received from veteran

01-03-2005 Report from Social Security Administration received

02-03-2005 VA examination conducted at VAMC New Orleans, LA.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol "§" denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

38 USC Section 5107. Claimant responsibility; benefit of the doubt

(a) Claimant responsibility - Except as otherwise provided by the law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) Benefit of the Doubt - The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

§3.102 (New) Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. (Authority: 38 U.S.C. 501(a))

§3.159 (New) Department of Veterans Affairs assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence.

(1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim. If VA does not receive the necessary information and evidence requested from the claimant within one year of the date of the notice, VA cannot pay or provide any benefits based on that application. If the claimant has not responded to the request within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the request, VA must readjudicate the claim. (Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. (Authority: 38 U.S.C. 5102(b), 5103A(3))

(c) VA's duty to assist claimants in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records. (Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records. (Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. (Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions.

(i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured. (Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance: VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law. (Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records.

(1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to

obtain, VA will request that the claimant obtain the records and provide them to VA. (Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any. (Authority: 38 U.S.C. 5102(b), 5103(a))

§3.321(b)(1) General rating considerations

Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

§4.1 Essentials of evaluative rating

This rating 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 percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition. Over a period of many years, a veteran's disability claim may require reratings in accordance with changes in laws, medical knowledge and his or her physical or mental condition. It is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history.

§4.3 Resolution of reasonable doubt

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant. See §3.102 of this chapter.

§4.7 Higher of two evaluations.

Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.

§4.10 Functional impairment.

The basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body to function under the ordinary conditions of daily life including employment. Whether the upper or lower extremities, the back or abdominal wall, the eyes or ears, or the cardiovascular, digestive, or other system, or psyche are affected, evaluations are based upon lack of usefulness, of these parts or systems, especially in self-support. This imposes upon the medical examiner the responsibility of furnishing, in addition to the etiological, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification, full description of the effects of disability upon the person's ordinary activity. In this connection, it will be remembered that a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity.

§4.40 Functional loss.

Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. It is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss, with respect to all these elements. The functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated structures, or to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled. A little used part of the musculoskeletal system may be expected to show evidence of disuse, either through atrophy, the condition of the skin, absence of normal callosity or the like.

§4.45 The joints

As regards the joints the factors of disability reside in reductions of their normal excursion of movements in different plants. Inquiry will be directed to these considerations:

(a) Less movement than normal (due to ankylosis, limitation or blocking, adhesions, tendon-tie-up, contracted scars, etc.).

(b) More movement than normal (from flail joint, resections, nonunion of fracture, relaxation of ligaments, etc.).

(c) Weakened movement (due to muscle injury, disease or injury of peripheral nerves, divided or lengthened tendons, etc.).

(d) Excess fatigability.

(e) Incoordination, impaired ability to execute skilled movements smoothly.

(f) Pain on movement, swelling, deformity or atrophy of disuse. Instability of station, disturbance of locomotion, interference with sitting, standing and weight-bearing are related considerations. For the purpose of rating disability from arthritis, the shoulder, elbow, wrist, hip, knee, and ankle are considered major joints; multiple involvements of the interphalangeal, metacarpal and carpal joints of the upper extremities, the interphalangeal, metatarsal and tarsal joints of the lower extremities, the cervical vertebrae, the dorsal vertebrae, and the lumbar vertebrae, are considered groups of minor joints, ratable on a parity with major joints. The lumbosacral articulation and both sacroiliac joints are considered to be a group of minor joints, ratable on disturbance of lumbar spine functions.

§4.59 Painful motion

With any form of arthritis, painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints. Muscle spasm will greatly assist the identification. Sciatic neuritis is not uncommonly caused by arthritis of the spine. The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. Crepitation either in the soft tissues such as the tendons or ligaments, or crepitation within the joint structures should be noted carefully as points of contact which are diseased. Flexion elicits such manifestations. The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.

§4.71a Schedule of ratings-musculoskeletal system

5010 Arthritis, due to trauma, substantiated by X-ray findings:

Rate as arthritis, degenerative.

5003 Arthritis, degenerative (hypertrophic or osteoarthritis):

Degenerative arthritis established by X-ray findings will be rated on the basis of limitation of motion under the appropriate diagnostic codes for the specific joint or joints involved (DC 5200 etc.). When however, the limitation of motion of the specific joint or joints involved is noncompensable under the appropriate diagnostic codes, a rating of 10 pct is for application for each such major joint or group of minor joints affected by limitation of motion, to be combined, not added under diagnostic code 5003. Limitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion. In the absence of limitation of motion, rate as below:

With X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups, with occasional incapacitating exacerbations	20
With X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups	10

Note (1): The 20 pct and 10 pct ratings based on X-ray findings, above, will not be combined with ratings based on limitation of motion.

Note(2): The 20 pct and 10 pct ratings based on X-ray findings, above, will not be utilized in rating conditions listed under diagnostic code 5013 to 5024, inclusive.

5257 Knee, other impairment of:

Recurrent subluxation or lateral instability:	
Severe	30
Moderate	20
Slight	10

5260 Leg, limitation of flexion of:

Flexion limited to 15°	30
Flexion limited to 30°	20
Flexion limited to 45°	10
Flexion limited to 60°	0

5261 Leg, limitation of extension of:

Extension limited to 45°	50
Extension limited to 30°	40
Extension limited to 20°	30
Extension limited to 15°	20

Extension limited to 10°	10
Extension limited to 5°	0

5262 Tibia and fibula, impairment of:

Nonunion of, with loose motion, requiring brace	40
Malunion of:	
With marked knee or ankle disability	30
With moderate knee or ankle disability	20
With slight knee or ankle disability	10

REASONS AND BASES:

Evaluation of status post excision of bone lesion from right medial femoral condyle with mild degenerative changes of right knee currently evaluated as 10 percent disabling.

We have denied an increased evaluation for status post excision of bone lesion from right medial femoral condyle with mild degenerative changes of right knee. We based this on VA treatment records which show the veteran has patellofemoral syndrome of right knee; however, no physical findings regarding the right knee are noted in these records.

Report from Social Security received 1-3-05 shows the veteran has never applied for disability benefits.

VA examination dated 2-3-05 shows the examiner reviewed the veteran's claims file. It was noted the veteran provided a history of having an extraarticular mass over the medial femoral condyle, which was excised in 1964. The veteran reported he was able to work from 1965 to 1982 as a stevedore, but then started having stiffness in his right knee and had been able to work only managing a bar until he reached age 65 and took his retirement. He reported aching is present throughout the right knee, more in the retropatellar area than anywhere else.

Physical examination revealed the knee to be stable; the patella was stable. There was a 1/4 crepitance in both knees. There was no swelling. Range of motion was shown as unlimited; from 0 degrees of extension to 140 degrees of flexion. X-rays revealed evidence of mild degenerative joint disease in the right knee. The examiner reported, I have reviewed his chart and reveals that the mass was never intraarticular. The changes that he has are therefore not related in any way to this mass. This mass was of as little significance to his knee joint as if the mass was not even on that extremity. It is coincidental that he has arthritis in the knee. He worked very strenuous physical activity for 17 years. That, plus the passage of time, I feel, is the likely cause of the very mild degenerative changes in right knee. Diagnosis was shown as mild degenerative changes in the right knee not related to nonmalignant exostosis of the distal femur.

We have continued the previously assigned 10 percent evaluation. A 10 percent evaluation is assigned for painful or limited motion of a major joint or group of minor joints, and may also be applied once to multiple joints if there is no limited or painful motion; or for knee flexion which is limited to 45 degrees; or whenever extension of the knee is limited to 10 degrees. A higher evaluation of 20 percent is not warranted unless extension of the knee is limited to 15 degrees; or evidence demonstrates knee flexion which is limited to 30 degrees. We cannot assign a higher evaluation at this time because the requisite limitation of motion of the right knee is not shown. The examiner has specifically reported the veteran's degenerative changes of the right knee are in no way related to the previous excision of bone lesion.

PREPARED BY K. Kelly

K. KELLY, Rating VSR
438565557-050217.SOC

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

IN THE APPEAL OF
PERRY R. ALEXCE

DOCKET NO. 03-28 841A) DATE MAY 11 2006
)
)

On appeal from the
Department of Veterans Affairs Regional Office in New Orleans, Louisiana

THE ISSUE

Entitlement to a higher initial evaluation, in excess of 10 percent, for status post excision of lesion of bone, right medial femoral condyle.

REPRESENTATION

Appellant represented by: Naomi E. Farve, Attorney

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

R. E. Smith, Counsel

INTRODUCTION

The veteran had active military service from May 1963 to May 1965.

This matter came before the Board of Veterans' Appeals (Board) on appeal from a May 2002 rating action awarding the veteran service connection for status post excision of lesion of bone, right medial femoral condyle with mild degenerative changes, and thereafter assigning a 0 percent rating. A December 2002 decision by the Department of Veterans Affairs (VA), New Orleans, Louisiana Regional Office (RO), awarded an increased rating of 10 percent for effective December 4, 2001, the date of the award of service connection.

In May 2004, the veteran appeared at the RO and offered testimony in support of his claim before the undersigned. A transcript of the veteran's testimony has been associated with his claims file.

This case was previously before the Board and, in September 2004, it was remanded to the RO for further development. The case has since been returned to the Board and is now ready for appellate review.

FINDING OF FACT

The veteran's right knee disability is asymptomatic; complaints of pain and radiological evidence of mild degenerative changes are unrelated to the service-connected disorder.

CONCLUSION OF LAW

The criteria for a rating in excess of 10 percent for status post excision of lesion of bone, right medial femoral condyle have not been met. 38 U.S.C.A. §§ 1155, 5107 (West 2002); 38 C.F.R. §§ 4.7, 4.40, 4.45, 4.59 and Part 4, Diagnostic Codes 5010-5257, 5260, 5261 (2005).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veterans Claims Assistance Act of 2000 (VCAA) is applicable to this appeal. To implement the provisions of the law, the VA promulgated regulations codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a)). The Act and implementing regulations provides that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim. It also includes new notification provisions. In this case, the veteran's claim for service connection was received in December 2001. In correspondence dated in February 2002, he was notified of the provisions of the VCAA as they pertain to the issue of service connection. In May 2002, service connection was granted for status post excision of a lesion of the right medial femoral condyle, and a zero percent rating was assigned. A timely appealed was filed by the veteran. In a rating action in December 2002, rating was increased to 10 percent. In correspondence dated in October 2004, the veteran was notified of the provisions of VCAA as they pertain to claims for increased ratings. Clearly, from submissions by and on behalf of the veteran, he is fully conversant with the legal requirements in this case. Thus, the content of this letter complied with the requirements of 38 U.S.C.A. § 5103(a) and 38 C.F.R. § 3.159(b).

The Board concludes that the discussion in the October 2004 VCAA letters informed the veteran of the information and evidence needed to substantiate his claims and complied with VA's notification requirements. Specifically, the Board concludes that this letter informed him why the evidence on file was insufficient to grant the claims; what evidence the record revealed; what VA was doing to develop the claims; and what information and evidence was needed to substantiate his claims.

On March 3, 2006, the United States Court of Appeals for Veterans Claims (Court) issued its decision in the consolidated appeal of *Dingess/Hartman v. Nicholson*, Nos. 01-1917 & 02-1506. The Court in *Dingess/Hartman* holds that the VCAA notice requirements of 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b) apply to all five elements of a "service connection" claim. This includes notice that a *disability*

rating and an *effective date* for the award of benefits will be assigned if service connection is awarded.

In the present appeal, the veteran was not provided with initial notice of the type of evidence necessary to establish a disability rating or the effective date for the disability on appeal in a letter. However, as the Board concludes below that the preponderance of the evidence is against the veteran's claim for an increased rating, any question as to the appropriate effective date to be assigned is rendered moot.

The Board observes that VA has also satisfied its duty to assist the veteran. The veteran has been provided with every opportunity to submit evidence and argument in support of his claims, and to respond to VA notices. Specifically, VA has associated with the claims folder the veteran's service medical records, VA treatment records, as well as recent VA examination reports. The veteran has not identified any additional evidence pertinent to his claims, not already of record and there are no additional records to obtain.

As all notification has been given and all relevant available evidence has been obtained, the Board concludes that any deficiency in compliance with the VCAA has not prejudiced the veteran and is, thus, harmless error. *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 549 (Fed. Cir. 1998); *Bernard v. Brown*, 4 Vet. App. 384 (1993).

Factual Background

The veteran's service medical records show that the veteran underwent excision of lesion of bone, medial femoral condyle of the right knee.

A RO rating decision, dated in May 2002, established service connection for status post excision of lesion of bone, right medial condyle. A zero percent rating was assigned.

The record reveals that in May and September 2002, the veteran failed to report for scheduled VA medical examinations.

VA outpatient treatment records show that in July 2002, the veteran was evaluated for complaints of right knee pain, which he reported as dull and aching in nature. On physical examination, the knee had full range of motion. Motor strength was 5/5 and sensation was intact. There was tenderness to palpation at the infrapatellar insertion. Right knee patellofemoral syndrome was diagnosed. He was again evaluated for complaints of right knee pain brought on by walking in October 2002. The pain was described as intermittent, affecting physical activities and mobility. Pain was managed by medication. Range of motion of the knee was within normal limits and there was no instability or effusion. The examiner reviewed a June 2002 x-ray of the right knee and noted mild degenerative changes. There was also a metallic foreign body posterior to the knee and bony projections along the medial aspect of the distal femur. Right knee degenerative changes and right knee patellofemoral syndrome were diagnosed.

An RO rating action dated in December 2002 increased the disability evaluation for the service connected right knee disorder from 0 percent to 10 percent, under Diagnostic Code 5010-5257 of the Rating Schedule, effective from December 2001.

At his hearing in May 2004, the veteran described his knee injury in service and recent treatment. He said that his knee condition had progressively deteriorated and that he used a cane to assist ambulation.

The veteran was afforded a VA orthopedic examination in February 2005. Physical examination revealed the knee to be stable. There was no swelling. The veteran exhibited an unlimited range of motion from 0 to 140 degrees. X-ray revealed evidence of mild degenerative joint disease in the right knee. The veteran's examiner reported that he had reviewed the veteran's claims file and that it revealed that the mass excised in service was never intraarticular. He stated that the knee changes were not related in any way to this mass. Mild degenerative changes in the right knee not related to nonmalignant exostosis of the distal femur was the diagnosis.

In a May 2005 addendum to the February 2005 examination, the examiner noted that the veteran's range of motion was not limited by pain, weakness, lack of endurance or fatigue. He added, in fact, there was no limitation of motion at all. He added that there was no evidence of instability, recurrent subluxation, locking, or pain. He added that in addition it should be understood that the veteran had an excision of a lesion that was not within the knee joint. It was extraarticular. He further stated that, therefore, any changes that occur in the knee at this time are unlikely to be related to an excision of a nonarticular surface condition, but rather due to the ageing process and the physical activity required in the veteran's former employment as a stevedore.

Analysis

Disability evaluations are determined by the application of a schedule of ratings, which represent, as far can be practically determined, the average impairment of earning capacity resulting from disability. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1. Separate diagnostic codes identify the various disabilities. The VA has a duty to acknowledge and consider all regulations that are potentially applicable through the assertions and issues raised in the record, and to explain the reasons and bases for its conclusion. *Schafrath v. Derwinski,* 1 Vet. App. 589 (1991).

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, 58 (1994). However, where the question for consideration involves the propriety of the initial evaluations assigned, such as here, evaluation of the medical evidence since the grant of service connection and consideration of the appropriateness of "staged ratings" is required. *See Fenderson v. West*, 12 Vet. App. 119 (1999).

Moreover, pertinent regulations do not require that all cases show all findings specified by the Rating Schedule, but that findings sufficiently characteristic to identify the disease and the resulting disability and above all, coordination of rating with impairment of function will be expected in all cases. 38 C.F.R. § 4.21 (2004). Therefore, where there is a question as to which of two evaluations shall be applied,

the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for the higher rating. 38 C.F.R. § 4.7.

The Court has held that when a diagnostic code provides for compensation based solely on limitation of motion, the provisions of 38 C.F.R. §§ 4.40 and 4.45 (2004) must also be considered, and that examinations upon which rating decisions are based must adequately portray the extent of the functional loss due to pain "on use or due to flare- ups." *DeLuca v. Brown*, 8 Vet.App. 202 (1995).

Regulations define disabilities of the musculoskeletal system as primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. 38 C.F.R. § 4.40.

Disabilities of the joints consist of reductions in the normal excursion of movements in different planes. Consideration is to be given to whether there is less movement than normal, more movement than normal, weakened movement, excess fatigability, incoordination, pain on movement, swelling, deformity or atrophy of disuse, instability of station, or interference with standing, sitting, or weight bearing. 38 C.F.R. § 4.45 (2004).

When the requirements for a compensable rating of a diagnostic code are not shown, a 0 percent rating is assigned. 38 C.F.R. § 4.31. (2004).

The lay statements and testimony describing the symptoms of the veteran's disabilities are deemed competent evidence. *Espiritu v. Derwinski*, 2 Vet.App. 492 (1992). However, these statements must be considered with the clinical evidence of record and in conjunction with the pertinent rating criteria.

5003 Arthritis, degenerative (hypertrophic or osteoarthritis):

Degenerative arthritis established by X-ray findings will be rated on the basis of limitation of motion under the appropriate diagnostic codes for the specific joint or joints involved (DC 5200 etc.). When however, the limitation of motion of the specific joint or joints involved is noncompensable under the

appropriate diagnostic codes, a rating of 10 pct is for application for each such major joint or group of minor joints affected by limitation of motion, to be combined, not added under diagnostic code 5003. Limitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion. In the absence of limitation of motion, rate as below:

With X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups, with occasional incapacitating exacerbations	20
With X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups	10

Note (1): The 20 pct and 10 pct ratings based on X-ray findings, above, will not be combined with ratings based on limitation of motion.

Note (2): The 20 pct and 10 pct ratings based on X-ray findings, above, will not be utilized in rating conditions listed under diagnostic code 5013 to 5024, inclusive.

38 C.F.R. § 4.71a, Diagnostic Code 5003 (2005)

5257 Knee, other impairment of:

Recurrent subluxation or lateral instability:	
Severe	30
Moderate	20
Slight	10

38 C.F.R. § 4.71a, Diagnostic Code 5257 (2005)

5260 Leg, limitation of flexion of:

Flexion limited to 15°	30
Flexion limited to 30°	20
Flexion limited to 45°	10
Flexion limited to 60°	0

38 C.F.R. § 4.71a, Diagnostic Code 5260 (2005)

5261 Leg, limitation of extension of:

Extension limited to 45°	50
Extension limited to 30°	40
Extension limited to 20°	30
Extension limited to 15°	20
Extension limited to 10°	10
Extension limited to 5°	0

38 C.F.R. § 4.71a, Diagnostic Code 5261 (2005)

In VAOPGCPREC 23-97 (July 1, 1997), VA General Counsel stated that, when a knee disorder is rated under Diagnostic Code 5257, and a veteran also has limitation of knee motion, which at least meets the criteria for a no percent evaluation under Diagnostic Code 5260 or 5261, separate evaluations may be assigned for arthritis or limitation of motion and flexibility. However, General Counsel stated that if the veteran does not meet the criteria for a zero percent rating under either Diagnostic Code 5260 or Diagnostic Code 5261, there is no additional disability for which a separate rating for arthritis may be assigned. *See also* VAOPGCPREC 9-98 (August 14, 1998).

The veteran is currently in receipt of a 10 percent rating under Diagnostic Code 5010-5257 for his right knee disability.

The Board initially notes that the record establishes that the veteran has right knee pathology unrelated to his service-connected post operative knee disability that is manifested by subjective complaints of pain, and radiological evidence of osteoarthritis characterized as mild by the veteran's VA examiner in February 2005.

The veteran's symptoms, as noted on his most recent VA examination and the addendum to that examination, do not include limitation of motion. As such, despite the veteran's complaints of pain and its questionable relationship to the service-connected disability, there is no objective evidence of motion limitation such as to

warrant assignment of even a 0 percent rating for the right knee disorder under Diagnostic Code 5260 and/or 5261.

Furthermore, again notwithstanding the origin of the pathology, neither does the evidence show the presence of other right knee manifestations that would support the assignment of an evaluation in excess of that currently assigned for this disability. The medical evidence does not objectively confirm right knee instability. In fact, the February 2005 VA examination specifically notes that the veteran's right knee is stable ligamentously. Absent objective evidence of instability, a separate or higher evaluation under Diagnostic Code 5257 is not warranted.

There are otherwise no objective findings demonstrating entitlement to a rating in excess of 10 percent for the right knee under any other potential applicable diagnostic code. As such, the veteran's claim for increased evaluation for his right knee disorder must be denied. Furthermore, the Board finds that the current 10 percent rating represents the highest rating warranted since December 2001 and staged ratings from that date are not applicable. *Fenderson v. West*, 12 Vet. App. 119 (1999).

ORDER

A higher initial evaluation, in excess of 10 percent, for status post excision of lesion of bone, right medial femoral condyle is denied.

Renée M. Pelletier

RENÉE PELLETIER
Veterans Law Judge, Board of Veterans' Appeals

Section G. Folder Maintenance

Overview

In this Section This section contains the following topics:

23. Maintenance and Renovation

Introduction

This topic contains information on the maintenance and renovation of folders, including

- folder maintenance
- general folder renovation policy
- renovation of segregated folders, and
- renovation of non-segregated folders.

Change Date

December 16, 2010

a. Folder Maintenance

Maintain Veterans folders to provide maximum protection of their contents by

- avoiding overcrowding in file cabinets, and
- replacing folders and envelopes that become damaged.

b. General Folder Renovation Policy

Renovate folders as needed to protect the contents.

Perform any required renovation *before* transferring a folder out of the office.

c. Renovation of Segregated Folders

Follow the steps in the table below to renovate a segregated folder.

Step	Action
1	Remove from compartment *A* • change of address notices, and • superseded stop or suspend pay notices and worksheets.
2	Remove from compartment *D* all material dated one year or older.
3	Check the material in all compartments for correct filing sequence.

Reference: For more information on the type of documents filed in each compartment of a segregated folder, see M21-1MR, Part III, Subpart ii, 4.F.21.c.

Continued on next page

23. Maintenance and Renovation, Continued

d. Renovation of Non-Segregated Folders

Follow the steps in the table below to renovate a non-segregated folder.

Step	Action
1	Ensure all documents relating to payments, allowances, and denials are filed on the left flap of the folder.
2	File documents in chronological order, with the oldest document to the rear and the newest document on the top.
3	Ensure replies to incoming correspondence are filed immediately above the incoming correspondence.
4	Remove duplicate copies of documents *unless* they contain notations of record value.
5	Remove the following documents *if* they have served their purpose and have no record value: • worksheets • control or suspense copies of Department of Veterans Affairs (VA) forms • form letters • diary slips • routing slips, and • letters of transmittal.
6	Dispose of the removed material according to *RCS VB-1, Part I, Item No. 13-052.000*.
7	Duplicate the old folder's markings on the new folder. ***Exception***: Do *not* duplicate the markings on obsolete folders.

Note: If an RO receives changes of address or direct deposit/electronic fund transfer (DD/EFT) for a claims folder located at RMC, those documents may be destroyed after any necessary action is taken. There is no need to transfer the documents, since the RMC will destroy them upon receipt.

CERTIFICATE OF SERVICE

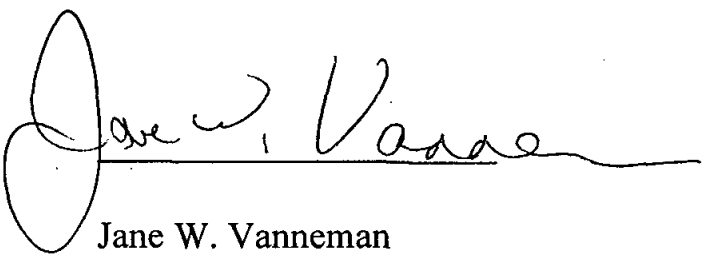
I hereby certify under penalty of perjury that on May 31, 2011, I caused to be served by United States mail, postage prepaid, copies of "BRIEF FOR RESPONDENT-APPELLEE," and "APPENDIX" addressed as follows:

Naomi Favre
PO Box 3265
New Orleans, LA 70177

Ena M. Seddard

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Procedure 32(a)(7)(B), this brief complies with the type-volume limitation. In making this certification, I have relied upon the word count function of the word-processing system used to prepare this brief. According to the word count, this brief contains 7,437 words.



Jane W. Vanneman