2008 BVA Decision Errors

2008 BVA Decision was a continuation of my 2005 BVA Decision which held that my previous C&P Exams were inadequate for failing to take DeLuca v. Brown, ie…additional limitation of function due to pain on movement, weakness, excess fatigability, or incoordination, including during repetitive use or during flare-ups.

Therefore, my case was remanded with the following instructions:

Back:

2. The veteran should be scheduled for a VA orthopedic examination in order to determine the impairment resulting from his service-connected disability of the lumbosacral spine. The claims file should be reviewed by the examiner in conjunction with the examination. The examination should include full range of motion studies, X-rays, and any other tests considered necessary by the examiner. The examiner should provide ranges of motion for the thoracolumbar spine, reflecting forward flexion, extension, left and right lateral flexion, and left and right rotation. In testing range of motion of the veteran's thoracolumbar spine, the examiner should note if the veteran has any additional limitation of motion due to such factors as weakness, fatigability, incoordination, restricted movement, or pain on motion. The examiner should also determine the frequency and duration of any incapacitating episodes resulting from the veteran's lumbosacral spine disability. Any other disability, to include any neurological disability, resulting from the veteran's lumbosacral strain also should be noted. The medical basis for all opinions expressed should also be given.

Left Knee:

3. The veteran should be scheduled for a VA orthopedic examination to determine whether he has a current left knee disorder, and whether such a disability is due to or the result of an injury sustained during military service. The veteran's claims folder should be sent to a VA physician for review in conjunction with the examination. A complete orthopedic examination, to include any clinical tests considered necessary by the examiner, should be conducted. After fully reviewing the record and examining the veteran, the examiner should state whether the veteran does in fact have a current disability of the left knee. If so, the examiner should also state whether it is at least as likely as not (that is, a probability of 50 percent or better) that the veteran's current left knee disorder began during military service, or is otherwise etiologically related to any in-service disease or injury. The medical basis for all opinions expressed should also be given.

Final Instructions:

4. Thereafter, the RO should again consider the veteran's pending claims in light of any additional evidence added to the record. In readjudicating the veteran's increased rating claim, the RO should take into consideration 38 C.F.R. §§ 4.14, 4.40, 4.45, 4.59, and the holding in DeLuca v. Brown, 8 Vet. App. 202, 204-7 (1995). If the benefits sought on appeal remain denied, the appellant and his representative should be furnished a Supplemental Statement of the Case and given the opportunity to respond thereto.

2006 C&P Exam was inadequate for the following reasons:

* The Examiner was a PA-C instead of an Orthopedic Specialist.
* The Examiner forced all of my Range of Motions (ROM.) She actually used both hands pushing on my shin to get my left knee to 140
* The exam failed to follow the Remand from the 2005 BVA Decision (*Stegall* violation.)
* The Examiner ignored SF600’s with favorable opinions:
  + 01 JUN 1994: Radiologic Report Lumbosacral Spine: IMPRESSION: Lumbar Spondylosis.
  + 13 JUN 1994: This 30 y/o w male presenter with ??? recurrent pain in the sacrolumbac region with radiation to legs, motor/sensory deficit, or loss of flexibility.
  + 13 JUN 1994: SF 513: Orthopedics Consultation Request, Albany, GA. Note: x-rays show spondylosis.
  + 14 JUL 1994: SF 513: Physical Therapy Consultation Report, Albany, GA: Report: No lordotic curve. A/P: MLBP.
  + 14 JUL 1994: SF 513: Physical Therapy Consultation Request, Ft. Benning. Exam – normal except for “down arrow” in lordotic curve, x-rays show L-5 spondylosis. Provisional Diagnosis: Mechanical LBP.
  + 21 JUL 1994: SF 513: Assessment: Mech LBP, No lordotic.
  + 01 AUG 1994: c/o back pain and knee pain- Assessment: Chronic mechanical Low back pain. P/Sched. f/u @ ortho.
  + 16 AUG 1994: SF 513, Request Eval. for Fitness For Duty.
  + 19 SEP 1994: SF 600 JAX, Assessment: Low back syndrome.
  + 19 SEP 1994: NAVHOSEJAX 6320/15: Diagnosis: Low Back Syndrome.
  + 14 JUN 1995: James R. Hagler, M.D. CAPT MC USNR: Knees some mild crepitus.
  + 09 AUG 1995: J.K. Evans, M.D. LCDR USNR: The patellar compression test is positive bilaterally. There is patella crepitus noted bilaterally.
  + 09 AUG 1995: SF600, JAX. Assessment: Low Back Syndrome.
  + 08 NOV 1995: 31 yo ??? c/o pain radiating up lower back down both arms…. Assessment: Mech. LBP.
* The Examiner ignored IME’s with favorable opinions:
  + 14 FEB 1996: HCA Palmyra Medical Center: MRI Lumbar Spine:

IMPRESSION: 1) Degenerative changes of L4-5 and L5-S1 disks with no evidence of a herniated disk; 2) anterior spondylitic spurring at the L1 - 2 level; 3), no evidence of spinal stenosis.

* + 28 FEB 1996: Dr. Choi Medical Records: His MRI shows no herniated disk, but minor disk degeneration. I informed him of this and he understood.
  + 28 FEB 1996 Addendum: 14 May 1997 Dr. Choi Medical Records: 5-14-97 Addendum to visit of 2-28-96. His diagnosis should have been changed to degenerative arthritis of the lumbosacral spine after his MRI results. UC/sw
  + DX: 721.9 DEGENERATIVE ARTHRITIS OF THE LUMBOSACRAL SPINE.
  + 07 JUN 2002: Dr. Choi Knee Examination: Both knees have crepitation underneath the patella
  + 07 JUN 2002: X-RAYS: X-ray of the lumbosacral spine and both knees, AP and lateral standing view, was made and AP and lateral view of the lumbosacral spine shows no significant changes except he has some sclerosis at the facet joints of the lumbosacral spine and, knowing that years ago on the MRI report, he most likely continues to have degenerative lumbosacral arthritis.

DIAGNOSIS: 924.2 LOW BACK PAIN WITH HISTORY OF DEGENERATIVE ARTHRITIS BY MRI SCAN IN 1995

* + 28 APR 2003: VA Radiology Report: X-rays:

Findings: 1. Some mild levoscoliosis of the lumbosacral spine is noted, which may simply be positional. 2. There also appears to be some disk space narrowing at the L4-5 level, possibly at the L2-3 level, and perhaps at the L1-2 level. Anterior osteophytes are seen at L1, L2, L3, and L4. Pedicles are intact. No blastic or lytic changes are noted. There is no evidence of fracture. There is some straightening of the normal lordotic curve of the lumbar spine.

Impression: Degenerative changes, as described above, in the lumbosacral spine. Some mild levoscoliosis versus this simply being positional.

* The Examiner failed to use a goniometer.
* Even though the Examiner notated where pain began without the use of a goniometer, she completely disregarded additional limitation of motion due to such factors as weakness, fatigability, incoordination, restricted movement, or pain on motion was ignored. (Deluca.)
* The Examiner stated that No repetitions of movement were done secondary to the patient complaining that it increased his back pain.

Notes:

Lumbar Spondylosis: This condition is often used to describe degenerative arthritis (osteoarthritis) of the spine.

Anterior osteophytes: Bone spurs, are growths that form on the joints in the lower back as a result of degenerative changes to the spine

Patellofemoral pain syndrome: Crepitus of the knee, refers to a cracking or popping sound or sensation in the knee joint. When the pressure between the kneecap and the femur is greater than usual, the cartilage in the joint can start to soften and wear away

2008 BVA Decision was inadequate for the following reasons:

* Failed to address 2005 BVA Decision Remand Instructions (*Stegall* violation.)
* Relied on an inadequate 2006 C&P Exam.
* Used Previous C&P Exams already ruled as inadequate.
* VA ignores to conduct suggested test after x-rays of left knee during Claims.
* BVA must correctly apply the law, provide an adequate statement of reasons or bases for its determinations. *Tucker v. West*.
  + Ignoring SMR’s
  + Altering IME Statement’s.
* BVA must provide a statement of the reasons or bases for its determination that is “adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*
* In Bell v Derwinski, 2 Vet. App. 611 (1992), which was decided on July 21, 1992, the Court of Veterans Appeals created the constructive notice rule. That is, that medical records which are in VA's possession at the time VA adjudicators render a decision on a claim will be considered in the record at the time of the decision, regardless of whether the medical records were actually before the adjudicator at the time of the decision. Accordingly, as to final decisions made on or after July 21, 1992, evidence which was in VA's possession at the time the AOJ decision was made will be deemed to have been in the record before the AOJ at the time of that decision. The General Counsel found that if the outcome of the case is altered by the records, a later claim may result in a finding of clear and unmistakable error.