



**DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Seattle DROC**



**VA File Number
25 673 509**

**Represented By:
GORDON A GRAHAM
Decision Review Officer Decision
05/09/2023**

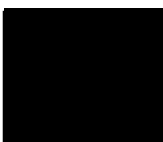
INTRODUCTION

The records reflect that you are a Veteran of the Vietnam Era. You served in the Army from June 7, 1967 to June 6, 1969. We received your request for a Higher Level Review on February 13, 2023. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

Please note: The evidentiary record closed on the date of notice of our prior decision, December 1, 2022. VA received additional evidence, which was not part of that decision after the record closed. If you would like VA to consider this evidence, you may submit a supplemental claim at any time; however, VA must receive your application within one year of the date of notice of this decision to preserve your right to receive the maximum possible benefit.

DECISION

A clear and unmistakable error is found in the evaluation of left knee painful motion, s/p fracture and degenerative joint disease and a retroactive increased evaluation to 10 percent disabling is established from May 25, 1983.



EVIDENCE

- VA Form 21-526, Veteran's Application for Compensation and/or Pension, received May 25, 1983
- Rating Decision, dated July 18, 1984
- Rating Decision, dated October 3, 2007
- VA Form 21-526EZ Veteran's Fully Developed Claim, received May 23, 2022
- Service Treatment Records, received July 26, 2013, for the period June 7, 1967 to June 6, 1969
- DD Form 214, Certificate of Release or Discharge from Active Duty, received June 6, 1969, for the period June 7, 1967 to June 6, 1969
- Rating Decision, Albuquerque VA Regional Hospital, dated November 9, 2022
- Notification Letter, dated December 1, 2022
- VA Form 20-0996, Decision Review Request - Higher Level Review, received February 13, 2023
- HLR Informal Conference Worksheet, conducted May 9, 2023

REASONS FOR DECISION

Whether the evaluation assigned for left knee painful motion, s/p fracture and degenerative joint disease was clearly and unmistakably erroneous.

Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been. In this case, a retroactive increase for left knee painful motion, s/p fracture and degenerative joint disease is granted as the previous evaluation decision was a clear and unmistakable error. (38 CFR 3.105)

Historically, rating decision July 18, 1984, denied entitlement to service connection for the Veterans claimed left knee condition based on the absence of federal service treatment records. A new claim was filed and based on the receipt of those records, rating decision October 3, 2007, established service connection for left knee patella femoral fracture and assigned a 0 percent evaluation from May 25, 2003, and a 10 percent evaluation from October 17, 2006. A claim for clear and unmistakable error was filed with VA on May 23, 2023, against rating decision October 3, 2007. Rating decision dated November 9, 2022, confirmed the clear and unmistakable error and assigned an initial grant date of May 25, 1983, for left knee painful motion, status post fracture and degenerative joint disease. However, both rating decisions of October 3, 2007, and November 9, 2022, failed to properly assign the appropriate evaluation.

In a medical document of record received May 25, 1983, Olympic Orthopedic and Fracture Clinic, the evidence supports the left knee injury with grinding, catching and crepitus. Objectively, the left knee was noted to have probable traumatic chondromalacia and lateral

patellar compression syndrome. The Veteran was also examined by VA on July 15, 1983, noting mild sub-patellar crepitus. The assessment was old fracture, left patella, without significant residual.

A 10 percent evaluation was warranted when the left knee was first evaluated by rating decision October 3, 2007, and again when evaluated by rating decision November 9, 2022.

In considering *Petitti v. McDonald*, concerning assignment of a compensable evaluation based on painful motion for a joint, the provisions of 38 CFR 4.59 are applicable. Additionally, as provided in 38 CFR 3.156(c)(4), a retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

Based on the foregoing, a 10 percent evaluation is retroactively assigned effective May 25, 1983.

We have assigned a 10 percent evaluation for your knee based on:

- Painful motion of the knee (38 CFR §4.59 allows consideration of functional loss due to painful motion to be rated to at least the minimum compensable rating for a particular joint. Since you demonstrate painful motion of the knee, the minimum compensable evaluation of 10 percent is assigned)

The provisions of 38 CFR §4.40 and §4.45 concerning functional loss due to pain, fatigue, weakness, or lack of endurance, incoordination, and flare-ups, as cited in *DeLuca v. Brown* and *Mitchell v. Shinseki*, have been considered and applied under 38 CFR §4.59.

A higher evaluation of 20 percent is not warranted for limitation of flexion of the knee unless the evidence shows:

- Limitation of flexion of 16 to 30 degrees. (38 CFR 4.71a)

Additionally, a higher evaluation of 20 percent is not warranted for limitation of extension of the knee unless the evidence shows:

- Limitation of extension of 15 to 19 degrees. (38 CFR 4.71a)

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 website, www.va.gov.