

No. 20-1321

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**United States Court of Appeals  
for the Federal Circuit**

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.

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**SUPPLEMENTAL BRIEF OF PETITIONER  
ON HEARING EN BANC**

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September 22, 2020

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## CERTIFICATE OF INTEREST

**Case Number** 20-1321

**Short Case Caption** *NOVA, Inc. v. Secretary of Veterans Affairs*

**Filing Party/Entity** National Organization of Veterans' Advocates, Inc., Petitioner

I certify the following information is accurate and complete to the best of my knowledge.

Date: September 22, 2020 Signature: /s/ Roman Martinez  
Name: Roman Martinez

- 1. Represented Entities.** Provide the full names of all entities represented by undersigned counsel in this case.

National Organization of Veterans' Advocates, Inc.

- 2. Real Party in Interest.** Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

None.

- 3. Parent Corporations and Stockholders.** Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None.

- 4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

Not applicable.

5. **Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

*NOVA v. Secretary of Veterans Affairs*, No. 17-1839 (Fed. Cir.).

*Military-Veterans Advocacy Inc. v. Secretary of Veterans Affairs*, No. 20-1537 (Fed. Cir.).

*Veterans Law Group, Inc. v. Wilkie*, No. 20-1899 (Fed. Cir.).

*Veterans of Foreign Wars v. Secretary of Veterans Affairs*, No. 20-1974 (Fed. Cir.).

6. **Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable.

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## INTRODUCTION

NOVA has standing to bring this case. ECF No. 87. In *Disabled American Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000) (*Gober*), this Court expressly held that “NOVA ha[d] established the associational standing requirements” because NOVA has “at least one veteran as a member,” and protecting veterans’ rights to disability benefits is “germane” to NOVA’s purpose. *Id.* at 689. The Court’s analysis rested on the assertions in NOVA’s petition for review, and its reasoning—which VA has not asked this Court to repudiate—fully applies to NOVA’s petition for review here, ECF No. 1-2 (Pet.). Because NOVA’s standing is self-evident under *Gober* and unchallenged by VA, additional evidence of NOVA’s standing is unnecessary.

To dispel any doubt, however, NOVA is providing the Court with evidence confirming that NOVA has Article III associational standing in this case based on (1) its veteran members; (2) its veteran members with knee injuries who are directly seeking disability benefits pursuant to the Knee Rules; and (3) its attorney members who have a direct financial stake in the Knee Rules due to their active representation of veterans with knee injuries. Furthermore, NOVA also has standing as an organization to challenge the Knee Rules, which frustrate NOVA’s mission and have caused NOVA to reallocate resources. For any and all of these reasons, NOVA has every right to challenge the Knee Rules at issue in this case.



## ARGUMENT

A petitioner has Article III standing to challenge agency action when it has suffered an “injury in fact” that is “fairly . . . trace[able] to the challenged action” and “likely” to be “redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations in original) (citations omitted). Here, NOVA has both associational standing based on its members and organizational standing in its own right.

### I. NOVA HAS ASSOCIATIONAL STANDING

An organization has “associational standing” based on “harm to one or more of its members” when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Gober*, 234 F.3d at 689 (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)). In *Gober*, the Court held that “NOVA ha[d] established the associational standing requirements” based on the assertions in its petition for review, *id.*, and the same is true here. Additional evidence of NOVA’s membership at the time it filed its petition confirms that conclusion.

#### A. *Gober* Upheld NOVA’s Standing Based On Its Veteran Members

The foundation for NOVA’s standing is this Court’s decision in *Gober*.

There, four organizations—NOVA, Disabled American Veterans, Paralyzed Veterans of America, and Vietnam Veterans of America—filed petitions for review under 38 U.S.C. § 502 challenging the validity of VA rules that restricted revisions to Board of Veterans’ Appeals’ decisions based on “clear and unmistakable error (‘CUE’).” 234 F.3d at 686. VA asserted that NOVA lacked standing. *Id.* at 689. Although VA conceded that “the other organization-petitioners” had standing because they were “organization[s] of veterans” whose members would have had “standing in their own right to challenge VA rulemaking,” VA asserted that NOVA lacked standing because it is “an organization of veterans’ attorneys and non-attorney representatives.” VA Br. 11-13, *Gober*, 234 F.3d 682 (Nos. 99-7061, 99-7071, 99-7084, 99-7085), 1999 WL 33608503. According to VA, this meant that NOVA could not satisfy the test for associational standing. *Id.*

This Court rejected VA’s argument, holding that “NOVA has established the associational standing requirements.” *Gober*, 234 F.3d at 689-90. The Court found the “first prong” of the associational standing test satisfied “because . . . NOVA includes at least one veteran as a member”—a fact VA had conceded “at oral argument.” *Id.* at 689. “[R]egardless of their status as veterans’ advocates,” the Court explained, “NOVA’s members who are veterans . . . are personally affected by the CUE rules” because they “have valid concerns about the effect of the rules on their ability to challenge a Board decision on the basis of CUE.” *Id.*

The Court further held that NOVA’s interest in the case—“trying to protect the rights of veterans, including those veterans who are among its members, in connection with CUE challenges to Board decisions”—was “‘germane’ to a purpose of NOVA” identified in its petition for review: “‘representation of all persons seeking benefits through the federal veteran’s benefits system, and in particular those seeking judicial review of denials of veterans’ benefits.’” *Id.* Because “NOVA’s challenge to the CUE rules [was] relevant to its purpose of aiding veterans in obtaining benefits,” the Court held “that NOVA has standing.” *Id.* at 690.

Since *Gober*, neither VA nor this Court has questioned NOVA’s standing to bring challenges under Section 502. And that is not for lack of opportunity.<sup>1</sup> Indeed, in a series of pending cases challenging regulations VA adopted to implement the Veteran Appeals Improvement and Modernization Act of 2017, VA has questioned *other* petitioners’ standing without questioning NOVA’s. *Compare* Dkt. 21 at 10-11 (Fed. Cir. No. 19-1685), *and* Dkt. 26 at 21-22 (Fed. Cir. No. 19-1687), *with* Dkt.

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<sup>1</sup> See, e.g., *NOVA v. Sec’y of Veterans Affairs*, 927 F.3d 1263 (Fed. Cir. 2019); *NOVA v. Sec’y of Veterans Affairs*, 809 F.3d 1359 (Fed. Cir. 2016); *Veterans Justice Grp., LLC v. Sec’y of Veterans Affairs*, 818 F.3d 1336 (Fed. Cir. 2016); *NOVA v. Sec’y of Veterans Affairs*, 725 F.3d 1312 (Fed. Cir. 2013); *NOVA v. Sec’y of Veterans Affairs*, 669 F.3d 1340 (Fed. Cir. 2012); *NOVA v. Sec’y of Veterans Affairs*, 476 F.3d 872 (Fed. Cir. 2007); *Paralyzed Veterans of Am. v. Sec’y of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003); *NOVA v. Sec’y of Veterans Affairs*, 330 F.3d 1345 (Fed. Cir. 2003); *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003); *NOVA v. Sec’y of Veterans Affairs*, 314 F.3d 1373 (Fed. Cir. 2003); *NOVA v. Sec’y of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001).

32 (Fed. Cir. No. 19-1680). VA’s silence in the 20 years since *Gober* is understandable given that *Gober*’s core conclusions—that “NOVA includes at least one veteran as a member,” and that NOVA’s “purpose [is] aiding veterans in obtaining benefits,” 234 F.3d at 689-90—remain unchanged.

**B. NOVA’s Allegations Establish Standing Under *Gober***

The first question in the Court’s briefing order asks whether “the allegations of the Petition [are] sufficient to establish standing, even without any evidence from NOVA, given that the Secretary does not challenge standing, or must NOVA submit evidence to establish Article III standing.” ECF No. 87 at 1. The allegations in NOVA’s petition are sufficient, and NOVA is not required to submit evidence.

As noted above, *Gober* held that NOVA “established the associational standing requirements” based on unchallenged allegations. 234 F.3d at 689; *see also, e.g., E. Paralyzed Veterans Ass’n, Inc. v. Sec’y of Veterans Affairs*, 257 F.3d 1352, 1356 (Fed. Cir. 2001) (finding that veterans’ organization “demonstrated” associational standing based on “alleg[ations]” in petition for review). And NOVA’s allegations in its petition in this case match—nearly verbatim—the allegations deemed sufficient in *Gober*. For the first associational standing prong, NOVA alleged that “[m]any of [its] members are veterans.” Pet. 6; *see Gober*, 234 F.3d at 689. For the second prong, NOVA alleged that its challenges to the M21-1 Manual provisions are “germane” to its purpose of providing “representation for all persons

seeking benefits through the federal veteran's benefits system, and in particular those seeking judicial review of denial of veterans' benefits.'" Pet. 6-7 (quoting *Gober*, 234 F.3d at 689). And for the third prong, NOVA alleged that its challenges "do not require the participation of NOVA's individual members" because they are "pure question[s] of law." Pet. 7; see *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287 (1986).

The Court's decision in *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017), is not to the contrary. There, the Court adopted the D.C. Circuit's evidentiary framework for establishing standing in the context of a petition for review of agency action: When the petitioner's "standing comes into doubt," the petitioner's "burden of production is 'the same as that of a plaintiff moving for summary judgment in the district court.'" *Id.* at 1172-73 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)). But under this framework, evidence beyond the "administrative record" is unnecessary when the petitioner's standing "is self-evident." *Id.* at 1173. Only when the petitioner's standing "is not self-evident" must the petitioner "either identify . . . record evidence sufficient to support its standing" or "submit additional evidence to the court of appeals." *Id.* (omission in original).

No additional evidence of NOVA's standing is necessary here, for two independent reasons. *First*, NOVA's standing is "self-evident" under *Gober*, which

is presumably why VA did not call it “into doubt.” *Id.* at 1172-73. Indeed, NOVA’s standing is so plain that, since *Gober*, VA has never again challenged it in the scores of cases filed by NOVA challenging myriad VA rules. *See supra* at 4 n.1.

*Second*, VA’s failure to contest the factual basis for NOVA’s standing establishes the requisite facts under *Phigenix*’s “summary judgment” test. 845 F.3d at 1172-73. The Federal Rules make clear that summary judgment may be supported by “admissions,” Fed. R. Civ. P. 56(c)(1)(A), and that a factual “allegation” in a pleading is deemed “admitted if a responsive pleading is required and the allegation is not denied,” Fed. R. Civ. P. 8(b)(6). Thus, allegations “treated as admitted since not denied” can demonstrate standing. *Legal Aid Soc’y of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1334 (9th Cir. 1979); *see also Aptive Envtl., LLC v. Town of Castle Rock*, 959 F.3d 961, 973 n.5 (10th Cir. 2020) (collecting cases holding that jurisdictional facts can be deemed admitted). Here, VA’s failure to contest the jurisdictional facts alleged in NOVA’s petition for review—despite multiple opportunities to do so—constitutes an admission of those facts.

**C. Evidence Confirms That NOVA Had Associational Standing At The Time It Filed Its Petition For Review**

Because NOVA’s petition sufficiently establishes its standing, more evidence is not necessary under *Gober*. But per the second question in the Court’s briefing order, NOVA is submitting such evidence along with this brief. ECF No. 87 at 2.

1. NOVA satisfies the first associational standing prong because its

“members would otherwise have standing to sue in their own right.” *Gober*, 234 F.3d at 689. To satisfy this requirement, NOVA need only establish that one of its members would have had standing when the petition for review was filed. *Id.* The evidence shows far more than that.

*First*, NOVA has many members who are veterans, which itself suffices to “establish[] . . . the first prong of the associational standing test.” *Id.*; *see id.* (“The first prong is met because . . . NOVA includes at least one veteran as a member.”). Those veteran members include Chris Attig, Peter Cianchetta, Andrew Tangen, and Michael Regis. *See* Attig Decl. ¶¶ 2-3; Cianchetta Decl. ¶¶ 2-3; Tangen Decl. ¶¶ 2-3; Regis Decl. ¶¶ 2-3.

*Second*, many of NOVA’s veteran members—including Mr. Cianchetta, Mr. Tangen, and Mr. Regis—currently suffer from knee disabilities and have been receiving, or are currently seeking, disability benefits governed by the Knee Rules. *See* Cianchetta Decl. ¶¶ 4-9; Tangen Decl. ¶¶ 4-6; Regis Decl. ¶¶ 4-9. Those NOVA members are directly injured by the unlawful restrictions on disability benefits that VA has incorporated into the Knee Rules—and they will directly benefit from a decision invalidating those Rules. *See E. Paralyzed Veterans*, 257 F.3d at 1356.

Mr. Cianchetta, for example, sustained an injury to his right knee while serving in the Air Force. Cianchetta Decl. ¶ 4. He has since undergone multiple knee surgeries. *Id.* ¶ 5. As a result of his knee injuries and those surgeries, Mr.

Cianchetta was advised in November 2018 that he needed a partial knee replacement. *Id.* The surgery was scheduled for April 2020, but was ultimately delayed until September 2020 in part because of the COVID-19 pandemic. *Id.* ¶¶ 5-6. Mr. Cianchetta has filed a claim seeking benefits for a knee replacement under Diagnostic Code (DC) 5055. *Id.* ¶ 7. Yet, under the Knee Replacement Rule, he is “categorically exclude[d]” from receiving those benefits because he received only a *partial* knee replacement. *Id.* ¶ 8; *see* NOVA Br. 11-13 (ECF No. 53). If NOVA succeeds in its challenge to the Knee Replacement Rule, Mr. Cianchetta “will be able to obtain a disability rating under DC 5055 for [his] partial knee replacement.” Cianchetta Decl. ¶ 9; *see Hudgens v. McDonald*, 823 F.3d 630, 639 (Fed. Cir. 2016).

Likewise, Mr. Tangen injured both of his knees while serving in the Navy in Afghanistan. Tangen Decl. ¶¶ 3-4. He has been receiving disability benefits for instability in both knees under DC 5257, which is governed by the Knee Joint Stability Rule, since at least September 2018. *Id.* ¶ 5. As Mr. Tangen has explained, the Knee Joint Stability Rule “prescribes a restrictive framework for VA regional office adjudicators to use in assigning disability ratings under DC 5257 based on measurements of joint translation.” *Id.*; *see* NOVA Br. 13-14. If NOVA’s challenge to that Rule succeeds, Mr. Tangen “will be able to seek and obtain a more favorable disability rating under DC 5257.” Tangen Decl. ¶¶ 5-6.

Mr. Regis similarly injured both of his knees while serving in the Air Force.



Regis Decl. ¶ 4. In 2016, he was diagnosed with knee instability in both knees. *Id.* ¶ 5. In February 2020, the Board of Veterans' Appeals remanded Mr. Regis's claim to the VA regional office. *Id.* ¶ 6. The claim is currently pending and seeks (among other things) knee instability ratings under DC 5257—which is governed by the Knee Joint Stability Rule—for both knees. *Id.* ¶ 7. As Mr. Regis has explained, the Knee Joint Stability Rule “is prone to measurement errors and undercompensates veterans like [him] for the actual, functional loss [they] have suffered.” *Id.* ¶ 8. If NOVA's challenge to the Knee Joint Stability Rule is successful, Mr. Regis “will directly benefit” because he will “more likely obtain separate knee disability ratings under DC 5257.” *Id.* ¶ 9.

*Third*, NOVA has many attorney members who are adversely affected by the Knee Rules because those rules diminish the contingency fees they will be able to earn, and the business they will be able to retain, by representing veterans in disability claims proceedings before VA. Many NOVA members, such as Mr. Tangen, Robin Hood, and Thomas Andrews, represent veterans in disability claims proceedings in which they seek to establish claims for benefits under DC 5055 and 5257. *See* Tangen Decl. ¶ 7; Hood Decl. ¶¶ 2, 6; Andrews Decl. ¶¶ 2-4. Indeed, Mr. Andrews represented the veteran in *Hudgens*—the very case the Knee Replacement Rule tries to repudiate. Andrews Decl. ¶ 4. NOVA's attorney members are typically compensated in these proceeding through contingency-fee arrangements under

which they receive compensation based on a percentage of the disability benefits they are able to obtain on behalf of their veteran clients. *See* Hood Decl. ¶ 5; Andrews Decl. ¶ 3.

The Knee Rules directly affect NOVA’s attorney members’ ability to earn such fees—and also to retain clients. As NOVA has explained, both rules restrict the ability of veterans to obtain disability benefits for knee injuries. NOVA Br. 10-14. Because the Knee Rules reduce the benefit payments available to veteran clients, they directly reduce the contingency fees that can be earned by the NOVA members representing those clients. *See* Hood Decl. ¶¶ 5-8; Andrews Decl. ¶¶ 3, 5-6. In some cases, the Knee Rules also lead NOVA members to turn down potential engagements of veterans unable to establish an entitlement to benefits under the rules’ overly-stringent standards. *See* Hood Decl. ¶ 7; Andrews Decl. ¶ 5.

Both the Supreme Court and this Court have recognized that there is “little doubt” that these sorts of direct economic injuries to lawyers are “adequate injury-in-fact to meet the constitutional minimum of Article III standing.” *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989).<sup>2</sup> Direct

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<sup>2</sup> *See also* *Kowalski v. Tesmer*, 543 U.S. 125, 129 n.2 (2004) (assuming lawyers have Article III standing to challenge law ““reduc[ing] the number of cases in which they could be appointed and paid””); *id.* at 137-38 (Ginsburg, J., dissenting) (explaining that such lawyers “[i]nescapably” have standing); *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Willis v. Gov’t Accountability Office*, 448 F.3d 1341, 1348 (Fed. Cir. 2006) (holding that lawyer “may well” have Article III

economic injury to one’s business virtually always counts as injury-in-fact. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 236-37 (1990), *overruled in part on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004); *Craig v. Boren*, 429 U.S. 190, 194 (1976); *Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976).<sup>3</sup>

In short, NOVA’s “members would otherwise have standing to sue in their own right,” *Gober*, 234 F.3d at 689—either as veterans, veterans seeking knee disability benefits, or attorneys for veterans seeking such benefits.

2. NOVA also satisfies the second associational standing prong because its “interests” in this action are plainly “germane to the organization’s purpose.” *Gober*, 234 F.3d at 689. As NOVA Executive Director Diane Rauber has explained, NOVA is a not-for-profit national organization of attorneys and other qualified members who act as advocates for disabled veterans. Rauber Decl. ¶¶ 1, 3-4. NOVA’s “purpose is to assist veterans and their advocates in seeking disability

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standing to appeal denial of client’s fee award); *Rosinski v. Wilkie*, 31 Vet. App. 1, 9 (2019) (lawyer representing veterans suffered Article III injury because he had to “forego new clients” and earned a lower “effective hourly rate”).

<sup>3</sup> NOVA’s members also have prudential standing to challenge the rules based on their representation of veteran clients, both because the members themselves are “aggrieved” under 38 U.S.C. § 502 and 5 U.S.C. § 702 (as cross-referenced in Section 502), and because their clients are aggrieved, *Caplin*, 491 U.S. at 623 n.3. In any event, VA has forfeited any challenge to NOVA’s prudential standing, *see infra* at 13 n.4, and this Court’s supplemental briefing order properly focused only on Article III standing, *see* ECF No. 87 at 1.

benefits from VA, including through challenges to adverse decisions by VA’s regional adjudicators and by the Board.” *Id.* ¶ 5; *see also supra* at 4 n.1 (citing NOVA cases advancing this purpose).

The adverse impact of the Knee Rules looms large, both for NOVA’s veteran members—especially those with knee injuries—and for veterans represented by NOVA’s members. The Knee Rules harm veterans by depriving them of the disability benefits they are entitled to by law. NOVA Br. 10-14. In doing so, the Knee Rules “also make it more difficult for veterans’ advocates—including advocates who are members of NOVA—to successfully obtain benefits on behalf of veterans suffering from knee disabilities that fall within DC 5055 or 5257.” Rauber Decl. ¶ 9. NOVA’s interest in challenging the Knee Rules—which obstruct the path of veterans seeking disability benefits to which they are entitled—is manifest.

3. Finally, NOVA satisfies the third associational standing prong because “neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Gober*, 234 F.3d at 689. This case presents a pure legal question: whether VA’s Knee Rules are unlawful under the Administrative Procedure Act. *See* NOVA Br. 9-10. The resolution of that question does not require individualized participation. *See Brock*, 477 U.S. at 287.<sup>4</sup>

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<sup>4</sup> In any event, VA has forfeited any challenge to the third prong of the associational standing test, which is “prudential,” not “grounded on Article III.”

## II. NOVA ALSO HAS ORGANIZATIONAL STANDING

The Court also asked whether NOVA has standing on any other basis. ECF No. 87 at 2. In addition to associational standing, NOVA also has organizational standing. Organizations, like individuals, “can establish their own standing.” *Am. Anti-Vivisection Soc’y v. U.S. Dep’t of Agric.*, 946 F.3d 615, 618 (D.C. Cir. 2020). Organizations are held to the same standard “as in the case of an individual: Has the plaintiff alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction?” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (internal quotation marks omitted). A “concrete and demonstrable injury to [an] organization’s activities—with the consequent drain on the organization’s resources”—suffices to establish standing. *Id.* at 379; *see* 13A Richard D. Freer & Edward H. Cooper, *Federal Practice and Procedure* § 3531.9.5 (3d ed. Apr. 2020, Westlaw) (collecting cases).

The harm that the Knee Rules have caused NOVA as an organization satisfies this test. The Knee Rules undoubtedly frustrate NOVA’s purpose and mission, as explained above and in Ms. Rauber’s declaration. *See supra* at 12-13; Rauber Decl. ¶¶ 5-6, 9-10. And NOVA has used its limited resources to counteract the harm the

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*United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554-55 (1996); *see June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020) (plurality opinion) (prudential standing “can be forfeited or waived”); *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment) (same); *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1279-80 (Fed. Cir. 2006) (same).

Knee Rules have done to its mission. For example, NOVA drafted and circulated summaries of both Knee Rules to its members—after carefully reviewing those rules—as part of a service provided to subscribing NOVA members. Rauber Decl. ¶¶ 12-13. NOVA has also devoted its staff, administrative, and financial resources to hosting multiple Continuing Legal Education and other trainings that provide information about the Manual since the Knee Rules took effect. *Id.* ¶¶ 11, 14. And NOVA submitted comments to VA in connection with the proposed rulemaking that precipitated the Knee Joint Stability Rule. *Id.* ¶ 6.

### CONCLUSION

For the foregoing reasons, the Court should hold that NOVA has standing to bring this case under *Gober*. But if the Court modifies or clarifies the applicable standard, it should give NOVA an opportunity to satisfy that standard, either by adding new allegations to the petition or allowing a new petitioner to join the case and adopt NOVA's existing briefing and argument. *See Mentor H/S, Inc. v. Med. Device Alliance, Inc.*, 240 F.3d 1016, 1019 (Fed. Cir. 2001) (per curiam). NOVA has identified several veterans with individual standing who have volunteered to join the case on that basis, *see* Attig Decl. ¶ 4; Cianchetta Decl. ¶ 10; Tangen Decl. ¶ 8; Regis Decl. ¶ 10, and it could readily identify others if necessary. Allowing NOVA a fair opportunity to amend its petition would be an appropriate exercise of this Court's discretion in these circumstances.

Dated: September 22, 2020

Respectfully submitted,

/s/ Roman Martinez

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Shannon Grammel  
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*Counsel for Petitioner*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of this Court's order dated September 15, 2020 (ECF No. 87), because it does not exceed 15 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: September 22, 2020

/s/ Roman Martinez

Roman Martinez



## ADDENDUM

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*National Organization of Veterans' Advocates, Inc. v.  
Secretary of Veterans Affairs, No. 2020-1321*

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2	Declaration of Chris Attig, dated September 21, 2020
3	Declaration of Peter Cianchetta, dated September 21, 2020
4	Declaration of Robin Hood with Exhibit A, dated September 18, 2020
5	Declaration of Diane Boyd Rauber with Exhibit A, dated September 22, 2020
6	Declaration of Michael R. Regis, dated September 18, 2020
7	Declaration of Andrew Tangen, dated September 18, 2020

TAB 1

No. 20-1321

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**United States Court of Appeals  
for the Federal Circuit**

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**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,**

*Petitioner,*

v.

**SECRETARY OF VETERANS AFFAIRS,**

*Respondent.*

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**Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.**

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**DECLARATION OF THOMAS ANDREWS**

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I, Thomas Andrews, declare as follows:

1. I am an attorney licensed to practice law in South Carolina. I am also accredited by the Department of Veterans Affairs and admitted before the Court of Appeals for Veteran's Claims and this court. I make this declaration based on personal knowledge.

2. I am a member of the National Organization of Veterans' Advocates, Inc. (NOVA). I have been a member of NOVA since December 2011. I was a

member of NOVA at the time NOVA filed its petition for review in this case on January 3, 2020.

3. In my legal practice, I regularly represent veterans who have been denied disability benefits by VA. In addition to representing veterans in proceedings before the agency itself, I have also represented them at the Veterans Court and the Federal Circuit. I typically represent veterans on a contingency-fee basis. As a result, my compensation is directly tied to my clients' ability to obtain disability benefits upon a successful appeal from an initial rating decision by VA.

4. As part of my practice, I represent clients who seek disability benefits for partial knee replacements under DC 5055. For example, I was the lead attorney representing the veteran in *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016). In that case, this Court rejected VA's position that Diagnostic Code (DC) 5055 is limited only to veterans who undergo a total knee replacement, and is not available to veterans with a partial knee replacement. The knee disability rule at issue in this case, M21-1 Manual Section III.iv.4.A.6.a, directly contradicts *Hudgens* and is unlawful, for the reasons explained in NOVA's petition for review.

5. I have been adversely affected in my law practice because of M21-1 Manual Section III.iv.4.A.6.a. For example, three months ago, I was contacted by a veteran fighting a reduction of his existing benefits rating for a partial knee replacement pursuant to DC 5055 while also seeking a higher rating pursuant to DC

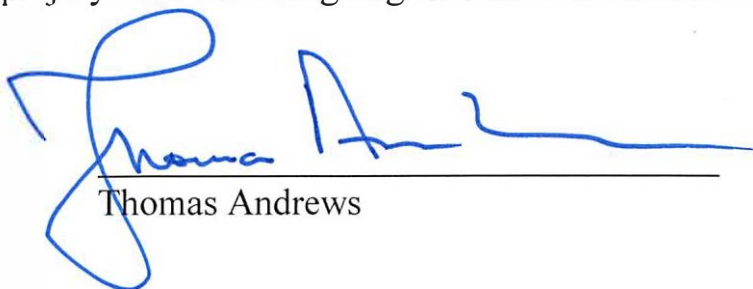
5055 for a partial knee replacement to his other knee. The reduction of one knee and inability to gain a higher rating for the other knee were specifically impacted by M21-1 Manual Section III.iv.4.A.6.a. I declined the case in significant part because the VA's erroneous and restrictive interpretation would make the case expensive to bring, make a positive result take years of litigation before the agency and courts, and render a positive result ultimately risky.

6. If NOVA prevails in its challenge to M21-1 Manual Section III.iv.4.A.6.a, I would be able to work with my current and future clients to obtain benefits for partial knee replacements under DC 5055. I thus have a direct stake in the outcome of this case because, if NOVA succeeds, I will be able to successfully represent clients seeking benefits for partial knee replacements under DC 5055, which will allow me to assist more veterans and thereby earn additional fees.

\* \* \* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 18, 2020.



Thomas Andrews

TAB 2

No. 20-1321

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United States Court of Appeals  
for the Federal Circuit

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

---

Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.

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**DECLARATION OF CHRIS ATTIG**

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I, Chris Attig, declare as follows:

1. I am an attorney licensed to practice law in Maryland and Texas. I make this declaration based on personal knowledge.

2. I am on the Board of Directors of the National Organization of Veterans' Advocates, Inc. (NOVA). I have been a member of NOVA since 2015. I was a member of NOVA at the time NOVA filed its petition for review in this case on January 3, 2020.



3. I am a veteran of the United States Army. I commissioned as an officer in the U.S. Army Field Artillery in May 1993. I graduated from U.S. Army Airborne School in 1995. I served in the Republic of Korea and at many stateside posts, including Ft. Bragg, Ft. Knox, Ft. Sill, Ft. Benning, and Ft. Hood. In July 1997, I left active duty as a Captain (O-3). I then served in the U.S. Army Reserves until 2004. As a veteran, I am necessarily injured by VA rules that make it harder for veterans to obtain the benefits they are due under law, as the Federal Circuit recognized in *Disabled American Veterans v. Gober*, 234 F.3d 682, 689 (Fed. Cir. 2000).

4. Based on my knowledge of this case, NOVA has Article III standing to represent my interests. But if the Court concludes otherwise, I would welcome the opportunity to join this case as a co-petitioner or intervenor, because my own legal interests are directly implicated by NOVA's challenge. If permitted to do so, I would be willing to join all of the briefing and argument presented to the Court on NOVA's behalf, without any need to file additional briefs or participate in oral argument.

\* \* \* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on September 21, 2020.

  
\_\_\_\_\_  
Chris Attig

TAB 3

No. 20-1321

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United States Court of Appeals  
for the Federal Circuit

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

---

Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.

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**DECLARATION OF PETER CIANCHETTA**

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I, Peter Cianchetta, declare as follows:

1. I am an attorney licensed to practice law in California. I make this declaration based on personal knowledge.

2. I am a member of the National Organization of Veterans' Advocates, Inc. (NOVA). I have been a member of NOVA since 2017. I was a member of NOVA at the time NOVA filed its petition for review in this case on January 3, 2020.

3. I am a veteran of the United States Air Force. I served on active duty from August 26, 1981 through August 25, 1985 and April 8, 1986 through February 6, 1991.

4. During my service in the Air Force, I sustained an injury to my right knee and was diagnosed with Chondromalacia Patellar Grade III when I underwent arthroscopic surgery on active duty. I was Medical Boarded out of the Air Force with a Disability rating of 20%.

5. I have subsequently undergone five arthroscopic surgeries on the right knee. I am currently rated 20% for "5260 ARTHROSCOPIC RIGHT KNEE LATERAL MENISCECTOMY." As a result of my knee injuries and subsequent surgeries, I was advised by Dr. Lawliss that I needed a patellofemoral replacement on November 13, 2018. Dr. Lawliss required I reduce my BMI prior to the surgery. October 26, 2019, after losing more than 50 pounds, Dr. Dilibero referred me to the VA San Francisco Orthopedic for the surgery. I met with Dr. Ward at the San Francisco VA and was scheduled for surgery in April 2020. Due to Dr. Ward's transfer and COVID-19, my surgery was delayed until September 14, 2020.

6. On September 14, 2020, I underwent patellofemoral arthroplasty surgery, also known as partial knee replacement, on my right knee. Although this procedure is classified as a partial knee replacement, it is similar to a total knee replacement in terms of the tremendous pain following surgery, the rigorous physical

therapy necessary for recovery, and the risks of chronic pain and permanent loss of range-of-motion in the knee.

7. On September 16, 2020 I filed a new claim for disability benefits for a knee replacement based on Diagnostic Code (DC) 5055. My claim seeks a 100% rating for a year following the Temporary Total Disability rating and a subsequent 30% or 60% rating as appropriate for the residual condition after recovery.

8. I am directly and adversely affected by M21-1 Manual Section III.iv.4.A.6.a, which categorically excludes partial knee replacements from the scope of Diagnostic Code (DC) 5055. Section III.iv.4.A.6.a prevents VA Regional Office adjudicators from granting me disability benefits under DC 5055—such as a year-long 100% disability rating—for my partial knee replacement.

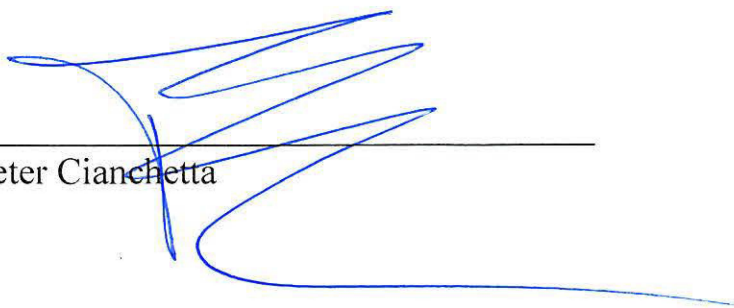
9. If NOVA's challenge to Section III.iv.4.A.6.a succeeds in this case, I will directly benefit because I will be able to obtain a disability rating under DC 5055 for my partial knee replacement.

10. Based on my knowledge of this case, NOVA has Article III standing to represent my interests. But if the Court concludes otherwise, I would welcome the opportunity to join this case as a co-petitioner or intervenor, because my own legal interests are directly implicated by NOVA's challenge. If permitted to do so, I would be willing to join all of the briefing and argument presented to the Court on NOVA's behalf, without any need to file additional briefs or participate in oral argument.

\* \* \* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 2020.

  
\_\_\_\_\_  
Peter Cianchetta

TAB 4

No. 20-1321

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United States Court of Appeals  
for the Federal Circuit

---

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

---

Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.

---

**DECLARATION OF ROBIN HOOD**

---

I, Robin Hood, declare as follows:

1. I am an attorney licensed to practice law in Mississippi. I make this declaration based on personal knowledge.
2. I am a member of the National Organization of Veterans' Advocates, Inc. (NOVA). I have been a member of NOVA since July 23, 2015. I was a member of NOVA at the time NOVA filed its petition for review in this case on January 3, 2020.



3. From October 2008 to March 2014, I served as a Rating Veteran Service Representative at the Department of Veterans Affairs (VA) Regional Office in Jackson, Mississippi. I resigned in part due to frustration at VA's unwillingness to award disability benefits for partial knee replacement under Diagnostic Code (DC) 5055. My position was ultimately vindicated in *Hudgens v. McDonald*, 823 F.3d 630, 639 (Fed. Cir. 2016), where the Federal Circuit held that DC 5055 does cover partial knee replacements. The knee disability rule at issue in this case, M21-1 Manual Section III.iv.4.A.6.a, directly contradicts *Hudgens* and is unlawful, for the reasons explained in NOVA's petition for review.

4. Since March 2014, I have been in private practice representing veterans who have been denied disability benefits by VA. Based on my fee figures, I've put at least \$16 million into the hands of veterans and survivors just in past due benefits, and a sizable multiple of that if you calculate the future benefits they receive.

5. I typically represent veterans on a contingency-fee basis. My compensation is directly tied to my clients' ability to obtain disability benefits upon a successful appeal from an initial rating decision by VA. I typically receive fees equal to the presumptively reasonable 20 percent of the past due disability benefits obtained for my clients.

6. As part of my practice, I represent clients who seek disability benefits for partial knee replacements under DC 5055. In one case, I represented a client

(initials E.D.) who filed such a claim (increased evaluation of left knee) on March 1, 2016. *See* Exhibit A. He was denied an increased evaluation on April 26, 2016. In my Notice of Disagreement filed November 29, 2016, I argued that E.D.'s partial knee replacement should be rated, and benefits should be granted, under DC 5055 as interpreted by *Hudgens*. During an informal conference with the Decision Review Officer that would be deciding the case, I explained that M21-1 Manual Section III.iv.4.A.6.a—which states that, after July 16, 2015, veterans with partial knee replacements are not eligible for ratings under DC 5055—is incorrect. But on July 27, 2018, E.D.'s claim for benefits was denied pursuant to that interpretation of DC 5055. As a result, I was unable to obtain compensation for my representation of E.D. The attached documents reflect my efforts on E.D.'s behalf, and VA's rejection of his claim.

7. Because of M21-1 Manual Section III.iv.4.A.6.a, I have had to decline to represent other veterans seeking benefits under DC 5055 for partial knee replacements.

8. If NOVA prevails in its challenge to M21-1 Manual Section III.iv.4.A.6.a, I would work with existing and former clients, including the veteran discussed above, to obtain benefits for partial knee replacements under DC 5055. I thus have a direct stake in the outcome of this case because, if NOVA succeeds, I will be able to successfully represent clients seeking benefits for partial knee

replacements under DC 5055, which will allow me to assist more veterans and thereby earn additional fees.

\* \* \* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 18, 2020.



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Robin Hood

# EXHIBIT A



11. LIST THE DISABILITY(IES) YOU ARE CLAIMING (If applicable, identify whether a disability is due to a service-connected disability, is due to confinement as a Prisoner of War, is due to exposure to Agent Orange, Asbestos, Mustard Gas, Ionizing Radiation, or Gulf War Environmental Hazards, or is related to benefits under 38 U.S.C. 1151).

- Example 1: Hearing loss
- Example 2: Diabetes-Agent Orange (exposed 12/72, Da Nang)
- Example 3: Left knee - secondary to right knee

**DISABILITIES**

1.	Bilateral Flat Feet
2.	SC Left Knee has increased in severity
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	
11.	
12.	
13.	
14.	
15.	
16.	
17.	
18.	
19.	
20.	

12. LIST VA MEDICAL CENTER(S) (VAMC) AND DEPARTMENT OF DEFENSE (DOD) MILITARY TREATMENT FACILITIES (MTF) WHERE YOU RECEIVED TREATMENT AFTER DISCHARGE FOR YOUR CLAIMED DISABILITY(IES) AND PROVIDE TREATMENT DATES:

A. NAME AND LOCATION	B. DATE(S) OF TREATMENT

13. **NOTE:** IF YOU WISH TO CLAIM ANY OF THE FOLLOWING, COMPLETE AND ATTACH THE REQUIRED FORM(S) AS STATED BELOW (VA forms are available at [www.va.gov/vaforms](http://www.va.gov/vaforms)).

For:	Required Form(s):
Dependents	VA Form 21-686c and, if claiming a child aged 18-23 years and in school, VA Form 21-674
Individual Unemployability	VA Form 21-8940 and 21-4192
Post-Traumatic Stress Disorder	VA Form 21-0781 and 21-0781a
Specially Adapted Housing or Special Home Adaptation	VA Form 26-4555
Auto Allowance	VA Form 21-4502
Veteran/Spouse Aid and Attendance benefits	VA Form 21-2680 or, if based on nursing home attendance, VA Form 21-0779

**SECTION II: SERVICE INFORMATION**

14A. DID YOU SERVE UNDER ANOTHER NAME?  
 YES (If "Yes," complete Item 14B)     NO (If "No," skip to Item 15A)

14B. PLEASE LIST THE OTHER NAME(S) YOU SERVED UNDER

15A. MOST RECENT ACTIVE SERVICE ENTRY (MM,DD,YYYY) Month     Day     Year	15B. SERVICE NUMBER (Fill out this item only if assigned a service number)	15C. RELEASE DATE OR ANTICIPATED DATE OF RELEASE FROM ACTIVE SERVICE Month     Day     Year
---	--	--

15D. DID YOU SERVE IN A COMBAT ZONE SINCE 9-11-2001?  
 YES     NO

15E. PLACE OF LAST OR ANTICIPATED SEPARATION

16A. ARE YOU CURRENTLY SERVING OR HAVE YOU EVER SERVED IN THE RESERVES OR NATIONAL GUARD? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete Items 16B thru 16F) (If "No," skip to Item 17A)	16B. COMPONENT  <input type="checkbox"/> NATIONAL GUARD <input type="checkbox"/> RESERVES	16C. OBLIGATION TERM OF SERVICE Month     Day     Year From:     -     - Month     Day     Year To:       -     -
---	--	---

16D. CURRENT OR LAST ASSIGNED NAME AND ADDRESS OF UNIT:	16E. CURRENT OR ASSIGNED PHONE NUMBER OF UNIT (Include Area Code)  ( )	16F. ARE YOU CURRENTLY RECEIVING INACTIVE DUTY TRAINING PAY?  <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
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17A. ARE YOU CURRENTLY ACTIVATED ON FEDERAL ORDERS WITHIN THE NATIONAL GUARD OR RESERVES?  <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete Items 17B & 17C)	17B. DATE OF ACTIVATION: (MM,DD,YYYY) Month     Day     Year -     -     -	17C. ANTICIPATED SEPARATION DATE: (MM,DD,YYYY) Month     Day     Year -     -     -
---	---	--

18A. HAVE YOU EVER BEEN A PRISONER OF WAR?  <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete Item 18B)	From: Month     Day     Year -     -     -	To: Month     Day     Year -     -     -
---	--	--

**SECTION III: SERVICE PAY**

19A. DID/DO YOU RECEIVE ANY TYPE OF SEPARATION/SEVERANCE/RETIRED PAY?  <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete Items 19B and 19C)	19B. LIST AMOUNT (If known)	19C. LIST TYPE (If known)
---	-----------------------------	---------------------------

**IMPORTANT:** Submission of this application constitutes an election of VA compensation in lieu of military retired pay if it is determined you are entitled to both benefits. If you are entitled to receive military retired pay, your retired pay may be reduced by the amount of any VA compensation that you are awarded. VA will notify the Military Retired Pay Center of all benefit changes. Receipt of military retired pay or Voluntary Separation Incentive (VSI) and VA compensation at the same time may result in an overpayment, which may be subject to collection. However, if you do not want to receive VA compensation in lieu of military retired pay, you should check the box in Item 20. Please note that if you check the box in Item 20, you **will not** receive VA compensation, if granted.

**20. I want military retired pay instead of VA compensation.**

**IMPORTANT:** You may elect to keep the training pay for inactive duty training days you received from the military service department. However, to be legally entitled to keep your training pay, you must waive VA benefits for the number of days equal to the number of days for which you received training pay. In most instances, it will be to your advantage to waive your VA benefits and keep your training pay. If you waive VA benefits to receive training pay by checking the box in Item 21, VA will adjust your VA award to withhold future benefits equal to the total number of inactive duty for training days waived and at the monthly rate in effect for the fiscal year period for which you received training pay. Your normal VA rate will be restored when the sufficient numbers of days' benefits have been withheld.

**21. I elect to waive VA benefits for the days I accrued inactive duty training pay in order to retain my inactive duty training pay.**

**SECTION IV: DIRECT DEPOSIT INFORMATION**

The Department of Treasury requires all Federal benefit payments 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, you must receive your payment through Direct Express Debit MasterCard. To request a Direct Express Debit MasterCard you must apply at [www.usdirectexpress.com](http://www.usdirectexpress.com) or by telephone at 1-800-333-1795. If you elect not to enroll, you must contact representatives handling waiver requests for the Department of Treasury at 1-888-224-2950. They will encourage your participation in EFT and address any questions or concerns you may have.

22. ACCOUNT NUMBER (Check the appropriate box and provide the account number, or simply write "Established" if you have a direct deposit with VA)

 Checking

 Savings

 I CERTIFY THAT I DO NOT HAVE AN ACCOUNT WITH A FINANCIAL INSTITUTION OR CERTIFIED PAYMENT AGENT

 Account No.: **ESTABLISHED**

23. NAME OF FINANCIAL INSTITUTION (Please provide the name of the bank where you want your direct deposit)

24. ROUTING OR TRANSIT NUMBER (The first nine numbers located at the bottom left of your check)

**SECTION V: CLAIM CERTIFICATION AND SIGNATURE**

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. I authorize any person or entity, including but not limited to any organization, service provider, employer, or government agency, to give the Department of Veterans Affairs any information about me, and I waive any privilege which makes the information confidential.

I certify I have received the notice attached to this application titled, **Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits.**

I certify I have enclosed all the information or evidence that will support my claim, to include an identification of relevant records available at a Federal facility such as a VA medical center; **OR**, I have no information or evidence to give VA to support my claim; **OR**, I have checked the box in **Item 25**, indicating that I do not want my claim considered for rapid processing in the Fully Developed Claim (FDC) Program because I plan to submit further evidence in support of my claim.

**ALTERNATE SIGNER:** By signing on behalf of the claimant, I certify that I am a court-appointed representative; **OR**, an attorney in fact or agent authorized to act on behalf of a claimant under a durable power of attorney; **OR**, a person who is responsible for the care of the claimant, to include but not limited to a spouse or other relative; **OR**, a manager or principal officer acting on behalf of an institution which is responsible for the care of an individual; **AND**, that the claimant is under the age of 18; **OR**, is mentally incompetent to provide substantially accurate information needed to complete the form, or to certify that the statements made on the form are true and complete; **OR**, is physically unable to sign this form.

I understand that I may be asked to confirm the truthfulness of the answers to the best of my knowledge under penalty of perjury. I also understand that VA may request further documentation or evidence to verify or confirm my authorization to sign or complete an application on behalf of the claimant if necessary. Examples of evidence which VA may request include: Social Security Number (SSN) or Taxpayer Identification Number (TIN); a certificate or order from a court with competent jurisdiction showing your authority to act for the claimant with a judge's signature and date/time stamp; copy of documentation showing appointment of fiduciary; durable power of attorney showing the name and signature of the claimant and your authority as attorney in fact or agent; health care power of attorney, affidavit or notarized statement from an institution or person responsible for the care of the claimant indicating the capacity or responsibility of care provided; or any other documentation showing such authorization.

25. The FDC Program is designed to rapidly process compensation or pension claims received with the evidence necessary to decide the claim. VA will automatically consider a claim submitted on this form for rapid processing under the FDC Program. Check the box below **ONLY** if you **DO NOT** want your claim considered for rapid processing under the FDC Program because you plan on submitting further evidence in support of your claim.

I DO NOT want my claim considered for rapid processing under the FDC Program because I plan to submit further evidence in support of my claim.

26A. VETERAN/SERVICE MEMBER/ALTERNATE SIGNER SIGNATURE (REQUIRED)

26B. DATE SIGNED  
**03-01-2016**

**SECTION VI: WITNESSES TO SIGNATURE**

27A. SIGNATURE OF WITNESS (If veteran signed above using an "X")

27B. PRINTED NAME AND ADDRESS OF WITNESS

28A. SIGNATURE OF WITNESS (If veteran signed above using an "X")

28B. PRINTED NAME AND ADDRESS OF WITNESS

**SECTION VII: POWER OF ATTORNEY (POA) SIGNATURE**

I certify that the claimant has authorized the undersigned representative to file this supplemental claim on behalf of the claimant and that the claimant is aware and accepts the information provided in this document. I certify that the claimant has authorized the undersigned representative to state that the claimant certifies the truth and completion of the information contained in this document to the best of claimant's knowledge. **NOTE: A POA's signature will not be accepted unless at the time of submission of this claim a valid VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative, or VA Form 21-22a, Appointment of Individual As Claimant's Representative, indicating the appropriate POA is of record with VA.**

29A. POA/AUTHORIZED REPRESENTATIVE SIGNATURE

29B. DATE SIGNED  
**03-01-2016**

**PRIVACY ACT NOTICE:** The form will be used to determine allowance to compensation benefits (38 U.S.C. 5101). The responses you submit are considered confidential (38 U.S.C. 5701). VA may disclose the information that you provide, including Social Security numbers, outside VA if the disclosure is authorized under the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment 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. VA may make a "routine use" disclosure for civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration. Your obligation to respond is required in order to obtain or retain benefits. Information that you furnish may be utilized in computer matching programs with other Federal or State agencies for the purpose of determining your eligibility to receive VA benefits, as well as to collect any amount owed to the United States by virtue of your participation in any benefit program administered by the Department of Veterans Affairs. Social Security Information: You are required to provide the Social Security number requested under 38 U.S.C. 5101(c)(1). VA may disclose Social Security numbers as authorized under the Privacy Act, and, specifically may disclose them for purposes stated above.

**RESPONDENT BURDEN:** We need this information to determine your eligibility for compensation. Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 25 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.





**DEPARTMENT OF VETERANS AFFAIRS  
VA Nashville Regional Office  
110 9th Ave. South  
Nashville, TN 37203**

**E [REDACTED] D [REDACTED]**

**VA File Number  
[REDACTED] 4992**

**Represented by:  
AMERICAN LEGION**

**Rating Decision  
04/26/2016**

**INTRODUCTION**

The records reflect that you are a veteran of the Gulf War Era and Peacetime. You served in the Army from July 31, 1975 to July 24, 1978 and from October 19, 1978 to October 31, 2003. You filed a claim for increased evaluation that was received on March 1, 2016. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

**DECISION**

1. Service connection for scar, left knee, status post arthroscopic surgery is granted with an evaluation of 0 percent effective April 24, 2004.
2. Evaluation of mild degenerative changes with chronic pain left knee, status post partial left knee replacement, which is currently 10 percent disabling, is continued.
3. Service connection for bilateral flat feet is denied.

**EVIDENCE**

E ■ ■ D ■ ■ ■  
4992  
Page 2 of 4

- DBQ Medical Opinion, received on April 09, 2016
- VA 21-526EZ, Fully Developed Claim (Compensation), received on March 01, 2016
- DBQ MUSC Foot Miscellaneous, received on April 09, 2016
- DBQ MUSC Knee and Lower Leg, received on April 09, 2016
- Service treatment records from July 31, 1975 to July 24, 1978 and from October 19, 1978 to October 31, 2003
- DD-214
- Military personnel records
- VA medical records from ■ ■ ■ ■ ■ Medical Center

### **REASONS FOR DECISION**

#### **1. Service connection for scar, left knee, status post arthroscopic surgery as secondary to the service-connected disability of mild degenerative changes with chronic pain left knee, status post partial left knee replacement.**

Service connection for scar, left knee, status post arthroscopic surgery has been established as related to the service-connected disability of mild degenerative changes with chronic pain left knee, status post partial left knee replacement.

A noncompensable evaluation is assigned from April 24, 2004, which is the date the VA ■ ■ ■ ■ ■ Medical Center medical examination documents an old surgical scar of the left knee. The recent VA examination confirms a scar still exists, and since this medical evidence in our custody we are able to go back on our effective date.

#1: A scar, located on your left lower extremity, measures 6.0 in<sup>2</sup> (38.7 cm<sup>2</sup>) superficial and linear. The scar is neither painful nor unstable.

We have assigned a noncompensable evaluation for your scar, left knee, status post arthroscopic surgery based on:

- One or more linear scars

Note: In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met. {38 CFR §4.31}

An additional, separate compensable evaluation under Diagnostic Code 7804 is not warranted unless there is at least one scar that is painful or unstable.

A higher evaluation is not warranted unless scars are considered disabling because of limitation of function of the affected part.

**2. Evaluation of mild degenerative changes with chronic pain left knee, status post partial left knee replacement currently evaluated as 10 percent disabling.**

The evaluation of mild degenerative changes with chronic pain left knee, status post partial left knee replacement is continued as 10 percent disabling. We reviewed the evidence received and determined your service-connected condition(s) hasn't/haven't increased in severity sufficiently to warrant a higher evaluation. We received your medical evidence which discusses the symptoms of your medical condition.

We have assigned a 10 percent evaluation for your left 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)

Additional symptom(s) include:

- X-ray evidence of degenerative arthritis

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 degenerative arthritis unless the evidence shows:

- X-ray evidence of involvement of two or more major joints or two or more minor joint groups, with occasional incapacitating exacerbations.

Additionally, 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.

**3. Service connection for bilateral flat feet.**

Service connection may be granted for a disability which began in military service or was caused by some event or experience in service. Service connection for bilateral flat feet is denied since this condition neither occurred in nor was caused by service. The evidence does not show an event, disease or injury in service. Your service treatment records do not contain complaints, treatment, or diagnosis for this condition. We did not find a link between your medical condition and military service. We received your medical evidence which discusses the symptoms of your medical condition.

The VA medical opinion found no link between your diagnosed medical condition and military service. The VA examiner opined that your foot condition is less likely than not (less than 50%

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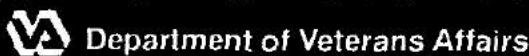
4992

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probability) incurred in or caused by the claimed in-service injury, event or illness. The VA examiner provided a rationale stating service treatment records were reviewed, and a single entry for acute right foot pain was located with negative x-ray from 1980; and a single episode of acute left foot pain was located with negative x-ray from 1993. There is also a mention of big toe pain in 1997. There is no notation of pes planus or plantar fasciitis located in the veteran's STRs. There is no indication that there was a chronic or intermittent foot condition in the service.

**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](http://www.va.gov).



**NOTICE OF DISAGREEMENT**

A CLAIMANT OR HIS OR HER DULY APPOINTED REPRESENTATIVE MAY FILE NOTICE EXPRESSING THEIR DISSATISFACTION OR DISAGREEMENT WITH AN ADJUDICATIVE DETERMINATION BY THE VA REGIONAL OFFICE. A DESIRE TO CONTEST THE RESULT WILL CONSTITUTE A NOTICE OF DISAGREEMENT (NOD.) WHILE SPECIAL WORDING IS NOT REQUIRED. THE NOD MUST BE IN TERMS WHICH CAN BE REASONABLY CONSTRUED AS DISAGREEMENT WITH THAT DETERMINATION AND A DESIRE FOR APPELLATE REVIEW. (AUTHORITY: 38 U.S.C. 7105)

(DO NOT WRITE IN THIS SPACE)  
 (VA DATE STAMP)

TO FILE A VALID NOD, THERE IS A TIME LIMIT OF ONE YEAR FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT. FOR CONTESTED CLAIMS INCLUDING CLAIMS OF APPORTIONMENT, THIS TIME LIMIT IS 60 DAYS FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT.

**NOTE:** You can *either* complete the form online or by hand. Please print information using blue or black ink, neatly, and legibly to help process the form.

**PART I - PERSONAL INFORMATION**

1. VETERAN'S NAME (First, middle initial, last)

E [redacted] [redacted] D [redacted]

2. VETERAN'S SOCIAL SECURITY NUMBER

[redacted] - [redacted] - [redacted]

3. VA FILE NUMBER

CICSS - [redacted] 4 9 2 2

**CLAIMANT'S PERSONAL INFORMATION**

4. CLAIMANT'S NAME (First, middle initial, last)

[redacted] [redacted] [redacted]

5. CURRENT MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

No. & Street [redacted]  
 Apt./Unit Number [redacted] City [redacted]  
 State/Province [redacted] Country [redacted] ZIP Code/Postal Code [redacted] - [redacted]

6. PREFERRED TELEPHONE NUMBER (Include Area Code)

[redacted] - [redacted] - [redacted]

7. PREFERRED E-MAIL ADDRESS

[redacted]

**PART II - TELEPHONE CONTACT**

8. WOULD YOU LIKE TO RECEIVE A TELEPHONE CALL OR E-MAIL FROM A REPRESENTATIVE AT YOUR LOCAL REGIONAL OFFICE REGARDING YOUR NOD?

YES  NO

(If you answered "Yes," VA will make up to two attempts to call you between 8:00 a.m. and 4:30 p.m. local time at the telephone number and time period you select below. Please select up to two time periods you are available to receive a phone call.)

8:00 a.m. - 10:00 a.m.  10:00 a.m. - 12:30 p.m.  12:30 p.m. - 2:00 p.m.  2:00 p.m. - 4:30 p.m.

Phone number I can be reached at the above checked time: [redacted]

**PART III - APPEAL PROCESS ELECTION**

9. SELECT ONE OF THE APPEALS PROCESSING METHODS BELOW (See Specific Instructions, Page 2, Part III for additional information)

Decision Review Officer (DRO) Review Process  
 Traditional Appellate Review Process

VETERAN'S SSN [REDACTED] - [REDACTED] - [REDACTED]

**PART IV - SPECIFIC ISSUES OF DISAGREEMENT**

10. NOTIFICATION/DECISION LETTER DATE

04/28/2016

11. PLEASE LIST EACH SPECIFIC ISSUE OF DISAGREEMENT AND NOTE THE AREA OF DISAGREEMENT. IF YOU DISAGREE ON THE EVALUATION OF A DISABILITY, SPECIFY PERCENTAGE EVALUATION SOUGHT, IF KNOWN. PLEASE LIST ONLY ONE DISABILITY IN EACH BOX. YOU MAY ATTACH ADDITIONAL SHEETS IF NECESSARY.

A. Specific Issue of Disagreement	B. Area of Disagreement	C. Percentage (%) Evaluation Sought (if known)
MILD DEGENERATIVE CHANGES WITH CHRONIC PAIN IN LEFT KNEE	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input checked="" type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify below)	SEEKING RATING INCREASE OF 30% OR HIGHER.
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify below)	
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify below)	
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify below)	
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify below)	

12A. IN THE SPACE BELOW, OR ON A SEPARATE PAGE, PLEASE EXPLAIN WHY YOU FEEL WE INCORRECTLY DECIDED YOUR CLAIM, AND LIST ANY DISAGREEMENT(S) NOT COVERED ABOVE:

CHRONIC CONDITION THAT HAS PROGRESSIVELY GOTTEN WORSE AND HAS CAUSED VET TO UNDERGO A PARTIAL KNEE REPLACEMENT IN 2015. THIS WARRANTS 13 MONTHS AT 100% AND A MINIMUM 30% EVALUATION. *See CAVC Decision in the "Hudgens" case.*

12B. DID YOU ATTACH ADDITIONAL PAGES TO THIS NOD?

YES  NO (If so, how many?)

**PART V - CERTIFICATION AND SIGNATURE**

I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

13A. SIGNATURE

Robin Hood, Esq. POA CODE: "ANT"

13B. DATE SIGNED

11-28-2016

PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.

## HLR Informal Conference Worksheet

Date: 07/27/2018

Claimant's Name: E [REDACTED] D [REDACTED]

File Number: [REDACTED]

POA: Robin Hood, Attorney

Higher-level Reviewer: Sandra Tow

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I certify I read the following statement to the claimant and/or representative:

“VA will conduct one informal conference during a higher-level review for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision.

I will document any arguments of fact or law presented by you and/or your representative. The informal conference is not for submission of evidence or introduction of facts not present prior to your election for higher-level review. If you have additional evidence that you would like to submit for review by VA, you may file a supplemental claim after VA issues notice of our decision on your request for higher-level review.”

---

**Instructions:** Provide a summary of the discussion by listing the issue, prior decision date, and all errors of fact or law identified by the claimant and/or representative. Do not include any new evidence or facts that present at the time of the prior decision.

---

**Issue:** Entitlement to a 13 month convalescent period under DC 5055 for partial knee replacement.

**Prior Decision Date:** 09/10/2015

**Identified Error(s) of Law or Fact:**

Attorney is appealing the fact the Hudgens Court decision regarding the ambiguity of the rating schedule concerning the assignment of 13 month convalescent periods for knee replacements (partial and total) wasn't final until 2016. He stated the manual guidance that claims for partial knee replacements received on or after July 16, 2015 are not entitled to the 13 month convalescent period is erroneous.

## HLR Informal Conference Worksheet

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**Higher Level Reviewer Signature:**

*Sandra D. Tow, DRO*

**Date:**

**July 27, 2018**





**DEPARTMENT OF VETERANS AFFAIRS  
Veterans Benefits Administration  
Regional Office**

**E [REDACTED] D [REDACTED]**

**VA File Number  
[REDACTED] 4992**

**Represented By:  
ROBIN E HOOD  
Rating Decision  
07/27/2018**

**INTRODUCTION**

As a result of the enactment of the Veterans Appeals Improvement and Modernization Act of 2017 (Public Law 115-55), the Department of Veterans Affairs (VA) is required to change its current appeals process. Under the authority of Public Law 115-55, VA created the Rapid Appeals Modernization Program (RAMP) to provide Veterans with the earliest possible resolution of their claims. You have chosen to participate in RAMP, and you selected to have your claim reviewed under the Higher-Level Review lane option.

The records reflect that you are a veteran of the Gulf War Era and Peacetime. You served in the Army from July 31, 1975, to July 24, 1978 and from October 19, 1978, to October 31, 2003. We received your request for higher-level review on May 10, 2018. Based on the review and the evidence listed below, we have made the following decision(s).

Please note: The evidentiary record closed upon receipt of your election for higher-level review. VA received additional evidence after your election that was not considered as part of this decision. 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.

E [REDACTED] D [REDACTED]  
[REDACTED] 4992  
2 of 3

### DECISION

Evaluation of mild degenerative changes with chronic pain left knee, status post partial left knee replacement (previously rated under DC 5257), which is currently 10 percent disabling, is continued.

### EVIDENCE

- DBQ MUSC Knee and Lower Leg, received on April 09, 2016
- VA medical records from [REDACTED] Medical Center were not found
- Prior Rating Decisions dated September 10, 2015 and April 26, 2016
- Statement attached to the Notice of Agreement received November 29, 2016
- VA Form 21-526EZ Application for Disability Compensation and Related Compensation Benefits received on July 16, 2015
- Operative report from the [REDACTED] Knee and Orthopedic Centers dated March 5, 2015 to March 26, 2015
- RAMP Opt-in Election received May 10, 2018
- Appeal Withdrawal Letter dated July 11, 2018
- Higher Level Review Informal Conference held July 27, 2018

### REASONS FOR DECISION

#### **Evaluation of mild degenerative changes with chronic pain left knee, status post partial left knee replacement (previously rated under DC 5257) currently evaluated as 10 percent disabling.**

The 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. An increase in the evaluation assigned for a disability is warranted when the average impairment in earning capacity resulting from such diseases and injuries in civil occupations has increased and the disability picture meets the criteria required for a higher rating. (specified under 38 C.F.R. §§ 4.1, 4.7).

The evaluation of degenerative changes left knee with partial left knee replacement is continued as 10 percent disabling as the current evidence fails to show your condition warrants a higher evaluation. You were previously assigned a temporary 100 percent evaluation for your partial left knee replacement surgery from March 26, 2015 to July 1, 2015. You requested 13 months convalescence for a knee replacement. However, you underwent a left knee resurfacing with patelloplasty which inserted tibia and femoral components with bone cement. This was not a total knee replacement which would have allowed us to grant the temporary 100 percent for 13 months and then continue the evaluation at 30 percent like you had requested. Based on the informal conference with your attorney, he provided legal arguments that you were entitled to the 100 percent for the 13 months based on a partial replacement because of the Hudgens v. McDonald court decision regarding the ambiguity in the rating schedule prior to the 2016 court

E [REDACTED] D [REDACTED]  
[REDACTED] 4992  
3 of 3

decision. Our guidance regarding this issue states: If a claim for evaluation of a partial knee replacement was filed and decided on or after July 16, 2015, then do not assign an evaluation under 38 CFR 4.71a, DC 5055. Explanation: Effective July 16, 2015, 38 CFR 4.71a was revised to clarify in a note that the provisions of 38 CFR 4.71a, DC 5055 apply only to total knee replacement.

Your claim for temporary total evaluation was received on July 16, 2015 and our guidance does not allow for a 13 month convalescence period for the partial knee replacement.

Favorable findings identified in this decision: None

Laws and regulations applicable to this issue:

- 38 C.F.R. §3.159 Department of Veterans Affairs assistance in developing claims.
- 38 C.F.R. §4.1 Essentials of evaluative rating.
- 38 C.F.R. §4.7 Higher of two evaluations.
- 38 C.F.R. §4.10 Functional impairment.
- 38 C.F.R. §4.71a (diagnostic code 5055) Schedule of ratings—musculoskeletal system.
- 38 C.F.R. §4.71a (5257) Schedule of ratings-musculoskeletal system
- 38 C.F.R. §4.71a (5260) Schedule of ratings-musculoskeletal system
- 38 C.F.R. §4.71a (5261) Schedule of ratings-musculoskeletal system
- 38 C.F.R. §4.40 Functional loss
- 38 C.F.R. §4.45 The joints.
- 38 C.F.R. §4.59 Painful 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 website, [www.va.gov](http://www.va.gov).

TAB 5

No. 20-1321

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United States Court of Appeals  
for the Federal Circuit

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.

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**DECLARATION OF DIANE BOYD RAUBER**

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I, Diane Boyd Rauber, declare as follows:

1. I am the Executive Director of the National Organization of Veterans' Advocates, Inc. (NOVA). I make this declaration based on personal knowledge, except where stated on information and belief. The information contained herein is applicable today and was applicable at the time NOVA filed its petition for review in this case on January 3, 2020.

2. I have been the Executive Director of NOVA since May 2016. I was the Executive Director of NOVA at the time NOVA filed its petition for review in this case on January 3, 2020.

3. NOVA is a not-for-profit national organization of attorneys and other qualified members who act as advocates for veterans seeking disability benefits through the federal veteran benefits system administered by the Department of Veterans Affairs (VA).

4. NOVA has several categories of members: attorneys (including private, legal aid, and law school clinic), agents, law office staff (including paralegals and assistants), law students, and representatives from VA-accredited veteran service organizations. More than 100 of NOVA's individual members are themselves veterans of the United States military who have sought or may seek disability benefits from VA.

5. NOVA's purpose is to assist veterans and their advocates in seeking disability benefits from VA, including through challenges to adverse decisions by VA's regional adjudicators and by the Board of Veterans' Appeals. NOVA's purpose is reflected in NOVA's Mission Statement, which contains the following core tenets:

- To develop through research, discussion, and the exchange of information a better understanding of federal veterans benefits law and procedure;

- To develop and encourage high standards of service and representation for all persons seeking benefits through the federal veterans benefits system and in particular those seeking judicial review of denials of veterans benefits;
- To conduct and cooperate in the conduct of courses of study for the benefit of its members and others desiring to represent persons seeking benefits through the federal veterans benefits system;
- To provide opportunity for the exchange of experience and opinions through discussion, study, and publications; and
- To do all and everything related to the above and in general to have all the powers conferred upon a corporation by the District of Columbia.

A true and correct copy of NOVA's mission statement, as reflected in NOVA's Bylaws (effective November 1, 2019), is attached hereto as Exhibit A.

6. In accordance with its mission, NOVA often engages in policy advocacy with Congress and VA directly on legislation, regulations, and other policy matters that implicate NOVA's goal of helping both veterans and their advocates. As one of many examples, NOVA submitted comments to VA in connection with the proposed rulemaking that precipitated M21-1 Manual Section III.iv.4.A.6.d, which governs disability ratings under Diagnostic Code 5257 and is being challenged in this case. *See* NOVA, Comment Letter on Proposed Rule Schedule for Rating Disabilities; Musculoskeletal System and Muscle Injuries (Oct. 2, 2017), <https://www.regulations.gov/document?D=VA-2017-VBA-0016-0012>. NOVA also often participates as an amicus curiae in cases raising issues governing veterans benefits. *See, e.g.,* NOVA Amicus Brief, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)

(No. 18-15), 2019 WL 423415; NOVA Amicus Brief, *Gray v. Wilkie*, 139 S. Ct. 2764 (2019) (No. 17-1679), 2018 WL 6929705.

7. In addition, NOVA regularly files petitions for review in the U.S. Court of Appeals for the Federal Circuit under 38 U.S.C. § 502 to directly challenge unlawful VA agency action. *See, e.g., Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 927 F.3d 1263 (Fed. Cir. 2019); *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 809 F.3d 1359 (Fed. Cir. 2016); *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 725 F.3d 1312 (Fed. Cir. 2013); *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 669 F.3d 1340 (Fed. Cir. 2012); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 476 F.3d 872 (Fed. Cir. 2007); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345 (Fed. Cir. 2003); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 314 F.3d 1373 (Fed. Cir. 2003); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001). NOVA's overarching purpose in these cases is to promote pro-veteran policies, to ensure that veterans are treated fairly and receive the benefits they are due under law, and to enhance the ability of veterans' advocates to advance veterans' rights in proceedings before VA and the federal courts.



8. NOVA's standing under Article III to challenge VA rules in the Federal Circuit was considered and resolved in *Disabled American Veterans v. Gober*, 234 F.3d 682, 689-90 (Fed. Cir. 2000), a case in which NOVA was a petitioner along with other veterans organizations. To my knowledge, NOVA's standing has not been challenged by VA or by the Court since *Gober* was decided.

9. In this case, NOVA is challenging two M21-1 Manual provisions governing knee disabilities: Section III.iv.A.6.a, which governs disability claims under Diagnostic Code (DC) 5055, and Section III.iv.A.6.d, which governs disability claims under DC 5257. These Manual provisions frequently reduce the disability ratings assigned by VA's regional officers to veterans—including veterans who are members of NOVA—suffering from knee disabilities, which in turn reduces the disability benefits VA will award to those veterans. These provisions also make it more difficult for veterans' advocates—including advocates who are members of NOVA—to successfully obtain benefits on behalf of veterans suffering from knee disabilities that fall within DC 5055 or 5257. NOVA thus has a substantial interest in challenging the validity of these provisions.

10. Since this Court's briefing order on September 15, 2020, I have heard from a substantial number of NOVA members who are directly and adversely affected by the M21-1 Manual provisions being challenged in this case. Those members include veterans who are hampered in their ability to obtain benefits under

those Manual provisions, as well as veteran advocates who are losing attorneys' fees as a result of their clients' inability to obtain benefits under those Manual provisions. If NOVA prevails in its challenge to these Manual provisions, these members will directly benefit. Some of these members are filing declarations in support of NOVA's standing in this case.

11. To fulfill its purpose and achieve its mission, NOVA devotes substantial staff, administrative, and financial resources to developing and providing Continuing Legal Education (CLE) and other informational sessions about pertinent topics in veterans benefits law. Since the Knee Rules took effect, NOVA has hosted multiple CLE and training sessions, which frequently include information about the M21-1 Manual and its provisions, as well as about the veterans benefits process. NOVA organized and funded these sessions with its own limited resources. These training sessions, in turn, generate funding for NOVA in the form of attendance fees.

12. NOVA also offers its members regular updates about revisions to the Manual so that they can stay up-to-date on the VA's many Manual changes and how those changes affect their representation and advocacy of veterans seeking disability benefits. As part of this service, NOVA's members have the option of subscribing to updates that are circulated approximately twice a month via email and that detail the VA's recent Manual changes. To prepare those updates, NOVA reviews all

changes VA has made to the Manual since the last update and summarizes those changes in writing. This is a time-intensive effort.

13. NOVA staff reviewed each of the Knee Rules at issue in this case, summarized those rules in writing, and circulated that summary to our members who subscribe to the update service. This required NOVA to spend time and attention on the Knee Rules that would otherwise have been spent pursuing NOVA's mission in other ways. On December 1, 2016, NOVA prepared and circulated an update summarizing changes to Manual Section III.iv.4.A.3.e, the Knee Replacement Rule. On April 24, 2018, NOVA prepared and circulated an update summarizing changes to Manual Section III.iv.4.A.6.d, the Knee Joint Stability Rule.

14. NOVA has also provided training to its members on how to identify and follow Manual changes—which can be frequent and extensive.

\* \* \* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 22, 2020.

  
\_\_\_\_\_  
Diane Boyd Rauber

# EXHIBIT A

# Bylaws

## As Amended November 1, 2019



As Amended 11.1.19

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.  
BY-LAWS**

(As Amended November 1,  
2019)

**ARTICLE I. NAME AND OFFICES**

**Section 1. Name**

The name of the Association shall be the National Organization of Veterans' Advocates, Inc.

**Section 2. Offices**

The principal office of the Association shall be located in Washington, D.C. The Association may have such other offices as may from time-to-time be designated by the Board of Directors.

**ARTICLE II. PURPOSES**

The purposes of this Association shall be:

1. To develop through research, discussion and the exchange of information a better understanding of federal veterans' benefits law and procedure;
2. To develop and encourage high standards of service and representation for all persons seeking benefits through the federal veterans' benefits system and in particular those seeking judicial review of denials of veterans' benefits;
3. To conduct and cooperate in the conduct of courses of study for the benefit of its members and others desiring to represent persons seeking benefits through the federal veterans benefits system;
4. To provide opportunity for the exchange of experience and opinions through discussion, study and publications; and,
5. To do all and everything related to the above and in general to have all the powers conferred upon a corporation by the District of Columbia.

**ARTICLE III. MEMBERSHIP**

**Section 1. New Members**

New membership is available to any individual who was not previously a member of NOVA, and who practices or intends to practice before the United States Court of Appeals for Veterans Claims and/or the U.S. Department of Veterans Affairs. It is not available to any person who works for the U.S. government whose duties include working on matters involving veterans' benefits. New membership is limited to the first year that an individual is a member of NOVA. New membership does not include voting privileges or eligibility to serve on the Board of Directors.

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## **Section 2. Sustaining Members**

Sustaining membership is available to any individual who is no longer a new member and who is admitted to practice before the United States Court of Appeals for Veterans Claims and/or the U.S. Department of Veterans Affairs. Sustaining membership is limited to practitioners actively engaged in representing claimants pursuing VA benefits either for a fee or on a pro bono basis. Membership in this category entitles members to vote at all membership meetings of the organization and to serve on the Board of Directors as further described in Article VI, Section 1. Sustaining membership is available to both attorney, as well as non-attorney practitioners. Sustaining members may make additional annual contributions to subsidize NOVA operations.

A. Gold member status will identify those members who in addition to their annual membership dues contribute an additional \$5,000 annually to NOVA. These members will be recognized annually at a NOVA membership meeting for their contribution with a plaque.

B. Silver member status will identify those members who in addition to their annual membership dues contribute an additional \$2,500 annually to NOVA. These members will be recognized annually at a NOVA membership meeting for their contribution.

C. Bronze member status will identify those members who in addition to their annual membership dues contribute an additional \$1,000 annually to NOVA. These members will be recognized annually at a NOVA membership meeting for their contribution.

## **Section 3. General Members**

General membership is limited to law students, law professors, and employees of legal services organizations or any other non-profit organization who represent claimants for VA benefits without charge to the claimant. Practitioners who represent claimants for VA benefits without charge to the claimant or receipt of remuneration of any kind for services to the claimant, including EAJA fees on behalf of themselves or their employers, may also be General members. Membership in this category does not include voting privileges or eligibility to serve on the Board of Directors.

### **Section 3A. Veterans Service Organization (VSO) Members**

Accredited representatives employed by any recognized veterans service organization will be VSO members. Membership in this category does not include voting privileges or eligibility to serve on the Board of Directors.

## **Section 4. Support Staff Members**

This special category of membership is limited to the clerical and paralegal support staff of Sustaining Members. Support Staff membership does not include voting privileges or eligibility to serve on the Board of Directors, and Support Staff members may, but are not required to, attend any NOVA Conferences.

## **Section 5. Honorary**

Individuals of distinction who have rendered outstanding service to the Association or distinguished members of the Association who have retired may be elected honorary members of

the Association by the Board. Honorary members shall not pay dues.

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## **Section 6. Application Process**

An individual who wishes to apply for membership in NOVA shall complete and submit the required membership fee and an application in a format approved by the Association. This application needs to be accepted by the Association before membership in NOVA is formally granted.

## **Section 7. Voting**

Only active sustaining members in good standing shall be entitled to vote.

## **Section 8. Duration of Membership and Resignation**

Membership in this Association may terminate by voluntary withdrawal as herein provided, or otherwise in pursuance of these by-laws. All rights, privileges, and interest of a member in or to the Association shall cease on the termination of membership. Any member may, by giving written notice of such intention, withdraw from membership. Such notice shall be presented to the Board at the next succeeding meeting of the Board. Withdrawals shall be effective upon fulfillment of all obligations to the date of withdrawal.

## **Section 9. Expectations Regarding the Minimum Standards of Practice**

Membership in this Association is conditioned upon each member maintaining certain minimum standards and practice before the United States Court of Appeals for Veterans Claims and/or the Department of Veterans Affairs. The expectation of membership in this Association is that a higher degree of competency will be maintained by its members to insure to veterans reliable and competent representation at the United States Court of Appeals for Veterans Claims and the Department of Veterans' Affairs. By applying for and accepting membership in this Association, the member agrees to comply with standards of practice specified by the By-Laws of the National Organization of Veterans' Advocates, Inc.

## **Section 10. Purpose and Intent for Setting Standards of Practice**

It is the intent of this Association to insure that its members are capable and competent to provide a minimum standard of practice as described in these By-Laws. The purpose of such standards is to convey not only to the public in general, but to veterans, the Department of Veterans Affairs, and the United States Court of Appeals for Veterans Claims specifically, that the members of this Association are committed to performing at a higher standard of practice in the representation of veterans' claims before the agency of original jurisdiction, the Board of Veterans' Appeals and the United States Court of Appeals for Veterans Claims. The purpose of describing what this Association considers minimum standards of practice is to distinguish the members of this Association by the maintenance of such standards. To that end, it is the purpose of these standards to provide a framework for identifying potential problems that may be experienced by our members. It is the intent of these By-Laws to provide support and assistance to its members in achieving and maintaining these minimum standards. Any member who experiences difficulties or problems in maintaining these standards shall be expected to cooperate with this Association in determining the nature, extent and appropriate intervention for a remedy of such difficulties. So long as a member cooperates with this Association in good faith in the evaluation and remediation of these problems, no sanctions will be undertaken.



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### **Section 11. Minimum Standards of Practice**

Every member of this Association agrees that they will comply with the following minimum standards of practice:

1. Representation of a veteran shall include a review of all relevant records.
2. Timely filing and responses to all Court and Department of Veterans Affairs designated time frames for pleadings, motions, appeals and responses.
3. Attendance at one NOVA Spring or Fall Conference every two years.
4. Compliance with the American Bar Association Model Rules of Professional Conduct.

### **Section 12. [RESERVED]**

### **Section 13. Investigation of Members**

Upon notification to the Board of Directors of any problem involving the practice before the United States Court of Appeals for Veterans Claims or the Department of Veterans Affairs by any member of this Association, such problem shall be referred to a committee appointed by the Board for investigation. The Committee shall notify the member subject to such investigation in writing of the creation of such Committee and inform the member regarding the nature and scope of such investigation. The Committee shall be responsible for the preparation of a written report of its investigation for submission to the Board. Such report shall make specific findings of fact and recommendations to the Board of Directors regarding the member under investigation. A copy of the report shall be made available to the member under investigation. Such reports shall be strictly confidential and will be required to be in writing and submitted to the Secretary of the Board. Every reasonable effort will be made by this Association to assist the member in whatever manner may be required to rectify the problems identified. The failure to cooperate with or to assist the investigating committee or the Board shall be grounds for termination of membership.

### **Section 14. Suspension and Expulsion**

Any member may be suspended or terminated for cause, including but not limited to any acts contrary to the purposes of this Association or upon suspension and/or disqualification of the individual from the representation of claimants by the United States Court of Appeals for Veterans Claims or the Department of Veterans Affairs. Sufficient cause for such suspension or termination of membership shall be violation of the by-laws or any lawful rule or practice duly adopted by the Association, or any other conduct prejudicial to the interest of the Association. Suspension or expulsion shall be by two-thirds vote of the entire membership of the Board of Directors; provided that a statement of the charges shall have been sent by certified or registered mail to the last recorded address of the member at least twenty (20) days before final action is taken thereon. This statement shall be accompanied by a notice of the time and place of the meeting of the Board, or its designee, at which the charges shall be considered and the member shall have the opportunity to appear via telephone conference call, which is the present method

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of regular Board meetings. The member may in addition be represented by counsel during such Board meeting. The Board may elect to hold such a hearing in person at a full Board meeting at a place and time designated by the Board. In the event of an in-person Board meeting rather than by telephone conference call, the member and/or an attorney on behalf of a member shall be entitled to be present in order to present any defense or mitigation to such charges before Board action shall be taken.

### **Section 15. Reinstatement Following Suspension or Expulsion**

Any former member of this organization who was suspended or expelled from membership pursuant to these By-Laws may, under certain circumstances, be considered for reinstatement of their membership. Eligibility for reinstatement will be available January 1 of the year following the period of suspension imposed by this Association and/or the period of suspension imposed by the United States Court of Appeals for Veterans Claims and/or the Department of Veterans Affairs. If the period of suspension is imposed by this organization only, and not by the Court, the decision of this organization to suspend shall include a specific period of suspension. If a person has been expelled from this organization but has not been expelled or disqualified from representation of veterans at the United States Court of Appeals for Veterans Claims and/or the Department of Veterans Affairs, the period of expulsion shall be a minimum of three years unless otherwise specified in the findings of expulsion by this organization at the time of the expulsion. These By-Laws will require a specific period of expulsion or exclusion from membership to be made at the time of the expulsion decision. Eligibility for reinstatement will be available on January 1 of the year following that period of expulsion or at such other time as the Board of Directors shall specify. If a person has been expelled from this organization as a result of disqualification of that individual from representation of claimants before the United States Court of Appeals for Veterans Claims and/or the Department of Veterans Affairs, eligibility for reinstatement will be considered January 1 of the year following the reinstatement or readmission of that member to the United States Court of Appeals for Veterans Claims and/or the Department of Veterans Affairs. Any former member seeking reinstatement of their membership in this organization shall submit a written Application for Reinstatement to the President of the Board of Directors describing the basis for the request of the former member for reinstatement. This written application shall include the remedial steps that have been taken by the former member to correct the circumstances which resulted in the former member's suspension or expulsion. Upon receipt of such a written Application for Reinstatement, the President of the Board of Directors shall circulate a copy of the same to each member of the Board of Directors. The President shall cause to be placed on the agenda of the next regularly scheduled full board meeting such Application for Reinstatement. The Board of Directors shall review the application and may exercise one of three options. Option One - to accept the application. Option Two - to reject the application. Option Three - to request from the applicant additional information or to impose certain conditions upon reinstatement. The decision of the Board of Directors shall be based upon the sound discretion of the Board and shall require a two-thirds majority vote of the entire membership of the Board of Directors for reinstatement. The decision of the Board of Directors shall be communicated to the former member seeking reinstatement in writing.

## **ARTICLE IV. DUES**

### **Section 1. Determination**

The Board of Directors shall determine the annual dues for each membership class of the Association.

### **Section 2. Failure to Pay**

Any member who fails to pay the appropriate membership fee within thirty (30) days from the date when due shall be notified of their delinquent account by mail, fax or email. If payment is not made within the next succeeding thirty (30) days the Member, without further notice and without hearing, will be dropped from the rolls and thereupon forfeit all rights and privileges of membership; provided that the Board may by rule prescribe procedures for extending the time for payment of dues and continuation of membership privileges upon request of a member and for good cause shown.

## **ARTICLE V. MEETINGS OF THE MEMBERSHIP**

### **Section 1. Annual**

There shall be an annual meeting of the Association held at such place and on such date as determined by the Board. The purpose of the annual meeting is for election of members to the Board of Directors, for receiving reports of officers, directors and committees, and for the transaction of any other business as determined by the Board. Notice of such meeting, submitted by the Secretary (or other individual designated by the Board), shall be transmitted to the last recorded address of each member at least thirty (30) days before the time appointed for the meeting. Transmission of this notice is permitted by electronic mail (e-mail), mail or via fax. Sustaining members who cannot attend the meeting may request an absentee ballot for the election. Such request must be made in writing or by email to the Executive Director must be received no later than 20 days prior to the meeting. The Executive Director, or his or her staff, shall timely distribute the absentee ballots. The completed absentee ballot must be received by the Secretary no later than five (5) days prior to the meeting.

### **Section 2. Special**

Special meetings of the Association may be called by the President or the Board, or shall be called by the President upon the written request of twenty five percent (25%) of the Sustaining members of the Association. Notice of any special meeting shall be transmitted to the last recorded address of each member at least thirty (30) days in advance, with a statement of time and place and information as to the subject or subjects to be considered. Transmission of this notice is permitted by electronic mail (email), mail or via fax.

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### **Section 3. Quorum**

Ten (10) percent of all Sustaining members must be present in person at any meeting of the Association to constitute a quorum, and, in case there be less than this number, the presiding officer may adjourn the meeting from time to time until a quorum is present.

### **Section 4. Order of Business**

The usual parliamentary rules as laid down in "Robert's Rules of Order" shall govern all deliberations, when not in conflict with these by-laws.

## **ARTICLE VI. BOARD OF DIRECTORS**

### **Section 1. General Powers**

The business and affairs of the Association shall be managed by or under the direction of the Board of Directors.

### **Section 2. Composition and Term**

Effective with the Board election in Fall 2008, and every year thereafter, there shall be three members elected to the Board, each for a three-year term. Following the Fall 2010 election, and every year thereafter, the Board shall consist of no more than nine elected members, except as follows. The immediate past President may continue to serve for up to one year from the end of his/her term as President, notwithstanding that his/her term as an elected member of the Board has expired. The term of newly elected Board members shall commence at 12:01 a.m., January 1 of the calendar year following their election, and end at 12:00 midnight on December 31, of the third calendar year following their election.

### **Section 3. Eligibility for Board Membership**

In order to be elected or appointed to serve on the Board of Directors, an individual must have been a Sustaining member in good standing for the five (5) years preceding his or her nomination, with active participation in NOVA, and must be either admitted to practice before the U.S. Court of Appeals for Veterans Claims or the Department of Veterans Affairs, or both. New, General, Support Staff, and Honorary members, as defined in Article III, may not serve on the Board of Directors. To ensure that all Board members can exercise independent judgment in all matters coming before the Board, no more than one person employed by or affiliated with the same entity, for employment or business purposes, may serve on the Board at the same time. Should the situation arise where more than one member of or member elect to the Board have such employment or business relationship, the entirety of the Board members unaffiliated with that entity shall determine a resolution by a majority vote. Nothing herein shall be construed to prohibit a Board member or member-elect from engaging in business referral arrangements, acting as co-counsel, or similar arrangements, or otherwise being a member of or participating in professional or social organizations.

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#### **Section 4. Nominations**

Nominations for positions on the Board of Directors shall be open each year from July 1 until 30 days prior to the Annual meeting held in conjunction with the Fall NOVA Conference. Sitting members of the Board with expiring terms in the year of the election will not be presumed to be running for reelection. The Secretary shall solicit nominees from the membership at large. These nominations must be directed to the Secretary. The Board shall select by majority vote a number of candidates equal to the number of positions on the Board to be filled at the upcoming election to appear on the ballot. Additional nominations must be endorsed with the names of not less than ten (10) Sustaining members, and such nominations must be received by the Secretary at least thirty (30) days prior to the date of the election.

The Secretary shall request that the Executive Director certify whether each nominee, individually, is eligible to serve on the Board, the Executive Director will timely provide that certification, and each certified nominee shall appear as a candidate on the ballot. Each candidate should provide to the Secretary a statement supporting his or her candidacy no later than two weeks prior to the election. The Secretary shall timely disseminate such statements to the membership at large. Any candidate who wishes to speak to the membership prior to balloting shall be given five (5) minutes to do so at the Annual Meeting.

Any candidate may withdraw his or her candidacy at any time prior to the balloting by giving written notice to the Secretary.

The Secretary shall notify the President of his or her intent to be a nominee for reelection. The President shall then appoint another Board member, not standing for reelection, to (1) undertake the Secretary's responsibilities for the course of the election as set forth in this section and (2) supervise and announce the results of the election.

#### **Section 5. Elections**

The Election of the Directors of the Board shall proceed as follows:

A. If the number of nominees is less than or equal to the number of open Board Positions, a motion, properly seconded, from a member to elect all candidates by acclamation will be accepted and voted upon by the Membership by voice vote, in lieu of the use of ballots. Otherwise, the procedure for voting by ballot in subsection B, below, will be followed.

B. If the number of nominees is greater than the number of open Board positions, or if no motion is passed to elect the nominees by acclamation as provided for in subsection A, above, each Sustaining members present shall be given a ballot and asked to write down a number of names equal to the number of open positions on the Board. (However, the Board may instead provide ballots with the names of the candidates pre-printed and ask the Sustaining members to place a mark by those candidates they wish to elect.) Any timely received absentee ballots shall be counted along with the ballots collected at the meeting. Those candidates who receive the most votes shall be elected to the Board.

C. If this process does not fill every open position, the number of Directors of the Board shall be reduced by that number until the next year's election or until filled in accordance with Section 10, below.

As Amended 11.1.19

## **Section 6. Meetings**

A. Except that the Board-elect shall have a special in-person meeting following the Organization's Annual Meeting, the Board shall meet, either in-person or by telephone conference, upon call of the President, at such times and places as he or she may designate, and shall be called to meet upon demand of a majority of its members. Notice of all meetings of the Board shall be sent by electronic mail (e-mail), mail, or telephone facsimile to each member of the Board at his/her last recorded address at least ten (10) days in advance of such meetings. In appropriate circumstances, the Board may waive the ten days advance notice by majority vote of the full Board. The Board may meet in executive session when deemed necessary.

B. Following the Annual Meeting each fall, there shall be a special in-person meeting of all continuing and newly elected Board Members for the sole purpose of electing officers to serve the following year. The current President shall preside.

## **Section 7. Quorum**

A majority of the Board shall constitute a quorum at any meeting of the Board. Any less number may adjourn from time to time until a quorum be present.

## **Section 8. Compensation**

Board members as such shall not receive any compensation for their services as members, but the Board may by resolution authorize reimbursement of expenses incurred in the performance of their duties. Such authorization may prescribe procedures for approval and payment of such expenses by designated officers of the Association. Nothing herein shall preclude a member from serving the Association in any other capacity and receiving compensation for such services.

## **Section 9. Resignation or Removal**

Any member may resign at any time by giving written notice to the President or Secretary. Such resignation shall take effect at the time specified therein, or, if no time is specified, at the time of acceptance thereof as determined by the President or the Board. Any Board member who shall have missed three consecutive full Board meetings shall be considered to have voluntarily forfeited his/her position as a member of the Board of Directors. No vote for removal shall be required. The removal shall be noted by the Secretary in the minutes of the next full Board meeting. Removal for cause shall require a two-thirds majority vote of a quorum at a full Board meeting, following notice to the Board member at any regularly scheduled or special Board meeting.

## **Section 10. Vacancies**

Any vacancies that may occur on the Board by reason of death, resignation or otherwise may be filled by an individual selected by the remaining members of the Board for the unexpired term.

## **Section 11. Resolutions**

Board members may pass a resolution without meeting or without ten (10) days advance notice if the resolution is agreed upon by the majority of the members of the Board.

## **ARTICLE VII. OFFICERS**

### **Section 1. Officers**

The officers of this Association shall be a President, a Vice President, a Secretary and a Treasurer. These officers shall be elected every year by the Board at the special Board-elect meeting held following the Organization's Annual Meeting each Fall. Election shall be by ballot and a majority of the votes cast shall elect, unless a motion for election by acclamation is passed. The new officers shall take office at 12:01 a.m., January 1, of the calendar year following their election, and shall serve until 12:00 midnight on December 31, of that year.

### **Section 2. Assistant Officers**

The President may, with the approval of the Board, appoint such assistant officers as may be necessary to manage the affairs of the Association.

### **Section 3. Succession**

Should the President become unable or unwilling to complete his or her term as President, the Vice President shall automatically succeed the President until a new President is elected by a majority vote of the Board.

### **Section 4. Vacancies**

Vacancies shall be filled at the next regular meeting of the Board or at any special meeting called by the Board for the purpose of filling a vacancy.

### **Section 5. President**

The President shall be selected by a majority vote of the members of the Board. He or she is charged with the responsibility for the management and direction of all operations, programs, activities, and affairs of the Association, including employment and termination of employment, and the determination of compensation of members of the staff and support personnel, functioning within the framework of policy aims and programs as generally determined by the Board. The President shall preside at meetings of the Association, and of the Board of Directors, and shall be a member ex-officio, with right to vote, of all committees. The President shall also, at the annual meeting of the Association and at such other times as he or she shall deem proper, communicate to the Association or to the Board such matters and make such suggestions as may in his opinion tend to promote the welfare and increase the usefulness of the Association, and shall perform such other duties as are necessarily incident to the office of President or as may be prescribed by the Board. An individual must have served as a member of the Board for at least two years in order to be elected President.

As Amended 11.1.19

### **Section 6. Vice President**

The Vice President may be designated by the President to perform the President's duties, in the event of his or her temporary disability or absence from meetings and shall have such other duties as the President or the Board of Directors may assign.

### **Section 7. Secretary**

The Secretary shall give notice and attend all meetings of the Association, keep a record of all proceedings, attest documents, supervise elections and announce and certify the outcome of elections, and perform such other duties as are usual for such official or as may be duly assigned.

### **Section 8. Treasurer**

The Treasurer shall be responsible for overseeing the financial affairs of the Organization, including the maintenance of a roster of paid members, the accounting for all income and disbursements, and the implementation of the Financial Policy of the Board of Directors. The Treasurer shall be bonded. The funds, books and vouchers in the Treasurer's keeping and those under the Treasurer's review shall at all times be subject to verification and inspection by the Board or its designees.

## **ARTICLE VIII. COMMITTEES**

### **Section 1. [RESERVED]**

### **Section 2. Seminar Committee**

A Seminar Committee shall be appointed by the President, whose duty it shall be to plan the Seminars for the Association. This Committee's report shall be submitted to the Board prior to each Seminar for its approval.

### **Section 3. Webinar Committee**

A Webinar Committee shall be appointed by the President, whose duty it shall be to plan the Webinars for the Association. This Committee's report shall be submitted to the Board prior to each Webinar for its approval.

### **Section 4. Executive Committee**

The Executive Committee shall be composed of the elected officers of the Association (President, Vice President, Secretary and Treasurer). A majority of the members of the Executive Committee shall constitute a quorum. Between meetings of the Board of Directors, the Executive Committee may perform those functions of the Board that must necessarily be performed prior to the next scheduled meeting of the Board and where the convening of a special Board meeting is deemed impractical by the Executive Committee, but not inconsistent with any prior action taken by the Board. The Executive Committee shall report any actions taken by the Executive Committee to the full Board at (i) its next succeeding meeting, or (ii) if that meeting is more than 20 days after the Executive Committee meeting, then by written notice mailed within 10 days of the date of the Executive Committee meeting at which such action was taken.



As Amended 11.1.19

### **Section 5. Ethics Committee**

An Ethics Committee shall be appointed by the President whose duty it shall be to provide information and training to the members, and make recommendations to the Board of Directors for action in cases of alleged ethical violations by members. The Committee shall have the authority to investigate all complaints or alleged allegations of unethical conduct by members.

### **Section 6. Amicus and Litigation Committee**

There shall be a Committee of the Board of Directors to recommend in which cases this Organization should submit amicus curiae briefs to the United States Court of Appeals for Veterans Claims, United States Court of Appeals for the Federal Circuit, the United States Supreme Court and any other court in which issues involving veterans' law may be pending. In addition, the Committee shall be responsible for any litigation deemed appropriate for the organization to initiate challenging actions of the Department of Veterans Affairs. It shall be the responsibility of the Committee to determine the cases in which litigation will be initiated or amicus briefs will be filed and to solicit attorneys to prepare and submit those briefs. The Committee shall consist of the Executive Director, the Chairpersons of the Congressional Testimony and Regulatory Comment Committees, and any other sustaining members appointed by the Board. The President shall select the Chairperson from those appointed.

### **Section 7. Congressional Testimony Committee**

A Congressional Testimony Committee shall be appointed by the President after the Annual Meeting whose duty it shall be to review Congressional testimony drafted by the Executive Director or others prior to its submission to the Board.

### **Section 8. Regulation Comment Committee**

A Regulation Comment Committee shall be appointed by the President, whose duty it shall be to review comments on proposed regulations drafted by the Executive Director or others prior to its submission to the Board.

### **Section 9. Authority of President to Create New Committees**

Such other committees, standing or special, shall be appointed by the President as the Organization or the Executive Board shall from time to time deem necessary to carry on the work of the Organization. The President shall be *ex officio* a member of all committees.

## **ARTICLE IX. ADMINISTRATIVE STAFF**

The Board of Directors may retain the services of an individual to serve as the Executive Director of the Organization, and such other staff as the Board deems necessary. These individuals may serve as employees or be retained as independent contractors, subject to the discretion of the Board. It shall be the duty of the Executive Director and other administrative staff to conduct the business of the Organization and to carry out its policies at the direction of the Board of Directors. No employee or independent contractor of the Organization shall be eligible to be a member of the Organization while so employed.

### **ARTICLE X. LIMITATION OF LIABILITIES**

Nothing herein shall constitute members of the Association as partners for any purpose. No member, officer, agent or employee of the Association shall be liable for the acts or failure to act on the part of any other member, officer, agent or employee of the Association. Nor shall any member, officer, agent or employee be liable for his acts or failure to act under these by-laws, excepting only acts or omissions to act arising out of willful misfeasance. (09/25/2008)

### **ARTICLE XI. FISCAL YEAR**

The fiscal year shall commence on the first day of January and shall end on the thirty-first day of December.

### **ARTICLE XII. SEAL**

The Association shall have a seal of such design as the Board of Directors may adopt.

### **ARTICLE XIII. INDEMNIFICATION**

The Association shall provide for indemnification by the Association of any and all of its Board of Directors members, officers or former Board of Directors members or officers against expenses actually and necessarily incurred by them in connection with the defense of any action, suit, or proceeding in which they or any of them are made parties, or a part, by reason of having been Board of Directors members or officers of the Association, except in relation to matters as to which such Board of Director members or officer or former Board of Director members or officer shall be adjudged in such action, suit, or proceeding to be liable for negligence or misconduct in the performance of duty and to such matters as shall be settled by agreement predicated on the existence of such liability for negligence or misconduct.

### **ARTICLE XIV. ASSOCIATION ASSETS**

#### **Section 1. Rights of Proprietorship**

Membership in the Association is a privilege and not a property right. No member shall have any ownership or property right in the funds, property, or other assets of the Association.

#### **Section 2. Dissolution of the Association**

On dissolution of the Association, any funds remaining shall be distributed to one or more regularly organized and qualified charitable, educational, scientific, or philanthropic organization to be selected by the Board of Directors.

### **ARTICLE XV. VOTING PROCEDURES**

Voting on any matter by the Board of Directors, may be conducted by e-mail, mail, telephone, or fax, if authorized by the President or a majority vote of the Board of Directors.

As Amended 11.1.19

### **ARTICLE XVI. AMENDMENTS**

These by-laws may be amended, repealed or altered in whole or in part upon a vote of two thirds of the members of the Board of Directors at any meeting called in conformance with Section 6 of Article VI, provided that a copy of any amendment proposed for consideration shall have been transmitted to each Board of Directors member at least thirty (30) days prior to the date of the meeting. Transmission of the amendment proposed for consideration is permitted by e-mail, mail or fax.

TAB 6

No. 20-1321

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United States Court of Appeals  
for the Federal Circuit

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.

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**DECLARATION OF MICHAEL R. REGIS**

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I, Michael R. Regis, declare as follows:

1. I am an attorney licensed to practice law in Maryland. I make this declaration based on personal knowledge.
2. I am a member of the National Organization of Veterans' Advocates, Inc. (NOVA). I have been a member of NOVA since 2018. I was a member of NOVA at the time NOVA filed its petition for review in this case on January 3, 2020.
3. I am a veteran of the United States Air Force. I served from February 1983 to March 2003 and retired honorably from the U.S. Armed Forces.

4. During my service in the Air Force, I injured both knees and was diagnosed through MRI with bilateral knee degenerative joint disease. I am currently service connected for both knees under Diagnostic Code (DC) 5260.

5. Because of bone-on-bone contact, I have received Synvisc injections twice a year since approximately 2014 in both knees. I have also been diagnosed with laxity of right knee and, per a 2016 VA compensation and pension examination, diagnosed with anterior right knee instability and with anterior left knee instability.

6. I have received a 10% disability rating for degenerative joint disease in my right knee and a 10% disability rating for degenerative joint disease in my left knee, under Diagnostic Codes (DC) 5260. My case is currently on remand from the Board of Veterans' Appeals (Board) for an increased right knee rating. On February 26, 2020, the Board remanded my right knee claim based on my entitlement to an initial rating in excess of 10% service-connected right knee, but the Board failed to grant a separate right knee rating based on knee instability. The Board has remanded the claim back to the VA regional office for development.

7. On remand, I seek a separate right knee anterior instability rating under DC 5257 as well as the maximum rating allowed for degenerative joint disease, and loss of range of motion in both the flexion (DC 5261) and extension (DC 5260) of both knees. Pending jurisdictional issues, I am also seeking a separate left knee anterior instability rating under DC 5257 as well as the maximum rating allowed for

degenerative joint disease, and loss of range of motion in both the flexion and extension of both knees.

8. VA will assess my pending claims to entitlement to benefits for my knee joint instability under M21-1 Manual Section III.iv.4.A.6.d, which governs DC 5257. As NOVA has explained in its petition, the knee joint stability provision in Section III.iv.4.A.6.d is prone to measurement errors and undercompensates veterans like me for the actual, functional loss we have suffered. I am adversely affected by Section III.iv.4.A.6.d's arbitrary, capricious, and unlawful interpretation of DC 5257.


9. If NOVA's challenge to Section III.iv.4.A.6.d succeeds in this case, I will directly benefit from the challenge because I will be able to be more likely obtain separate knee disability ratings under DC 5257.

10. Based on my knowledge of this case, NOVA has Article III standing to represent my interests. But if the Court concludes otherwise, I would welcome the opportunity to join this case as a co-petitioner or intervenor, because my own legal interests are directly implicated by NOVA's challenge. If permitted to do so, I would be willing to join all of the briefing and argument presented to the Court on NOVA's behalf, without any need to file additional briefs or participate in oral argument.

\* \* \* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 18, 2020.

  
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Michael R. Regis



TAB 7

No. 20-1321

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United States Court of Appeals  
for the Federal Circuit

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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Petition for Review of Changes to Department of Veterans Affairs Manual M21-1  
Pursuant to 38 U.S.C. § 502.

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**DECLARATION OF ANDREW TANGEN**

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I, Andrew Tangen, declare as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I make this declaration based on personal knowledge.

2. I am a member of the National Organization of Veterans' Advocates, Inc. (NOVA). I have been a member of NOVA since 2017. I was a member of NOVA at the time NOVA filed its petition for review in this case on January 3, 2020.

3. I am a veteran of the United States Navy, wherein I separated at the rank of Lieutenant Commander. During my service, I deployed in support of Counter

Terrorism Operations, Counter Piracy Operations, and Counter Narcotics Operations, including deployments to the Middle East and Afghanistan.

4. During my service in the military, I injured my knees on several occasions during dismounted patrols in the mountains of Afghanistan, while conducting small boat operations in support of Counter Piracy, and boarding ships in a non-compliant setting in support of Counter Piracy and Counter Narcotics Operations.

5. On September 21, 2018, I received a 10% disability rating from the Department of Veterans Affairs (VA) for the instability in both of my knees pursuant to Diagnostic Code (DC) 5257. This rating dictates the amount of disability benefits I can receive from VA. The rating determination was governed by M21-1 Manual Section III.iv.4.A.6.d, which prescribes a restrictive framework for VA regional office adjudicators to use in assigning disability ratings under DC 5257 based on measurements of joint translation. I am therefore directly and adversely affected by Section III.iv.4.A.6.d.

6. If NOVA's challenge to Section III.iv.4.A.6.d succeeds in this case, I will directly benefit because I will be able to seek and obtain a more favorable disability rating under DC 5257 and, accordingly, an increase in disability benefits.

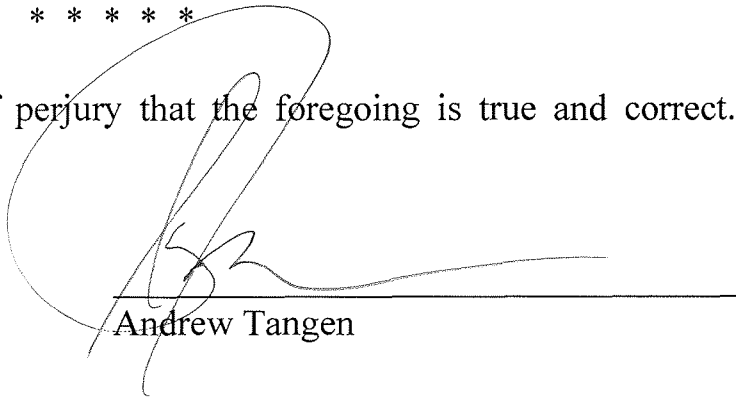
7. Additionally, in my practice, I regularly represent veterans seeking disability benefits—including benefits for knee disabilities under both DC 5055 and

5257—pro bono. In cases in which I am able to obtain benefits for my clients that have been wrongfully denied by VA, I regularly seek fees under the Equal Access to Justice Act. Both of the Manual provisions challenged by NOVA in this case undermine my ability to prevail on behalf of those clients, and therefore prevent my ability to obtain fees.

8. Based on my knowledge of this case, NOVA has Article III standing to represent my interests. But if the Court concludes otherwise, I would welcome the opportunity to join this case as a co-petitioner or intervenor, because my own legal interests are directly implicated by NOVA's challenge. If permitted to do so, I would be willing to join all of the briefing and argument presented to the Court on NOVA's behalf, without any need to file additional briefs or participate in oral argument.

\* \* \* \* \*

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on September 18, 2020.



Andrew Tangen