Slide 1 - Title

Slide notes

Andrew: "I cannot provide an opinion without resort to speculation." We've all read these words,

many of us have read them hundreds of times in hundreds of cases.

But there's something that lies underneath this inability to opine, something that begs

for a careful consideration rather than a callous casting aside of the evidence.

From the Training Academy in Denver, Colorado, and the Board of Veterans Appeals

in Washington, D.C., this is the pilot episode of The References, a collaborative

effort to explore the issues that define our department. Today we'll lead you from *Mitchell*

to *Sharp* and beyond in search of that something just underneath the surface of speculation.

Stay with us.

This is the first of, I hope, a lot of podcasts where we talk about things that are

affecting the Veterans Benefits Administration field in relation to some of the things that the Board of Veterans Appeals has noticed - things that we might be doing incorrectly, or have a different perspective on. I'm Andrew Latham; I'm from the Denver Training Academy. I'm a training consultant here for RVSRs.

Nate, do you want to go ahead and introduce yourself, too?

Nate: Sure, my name is Nate Kroes; I'm a Veterans Law Judge at the Board of Veterans Appeals.

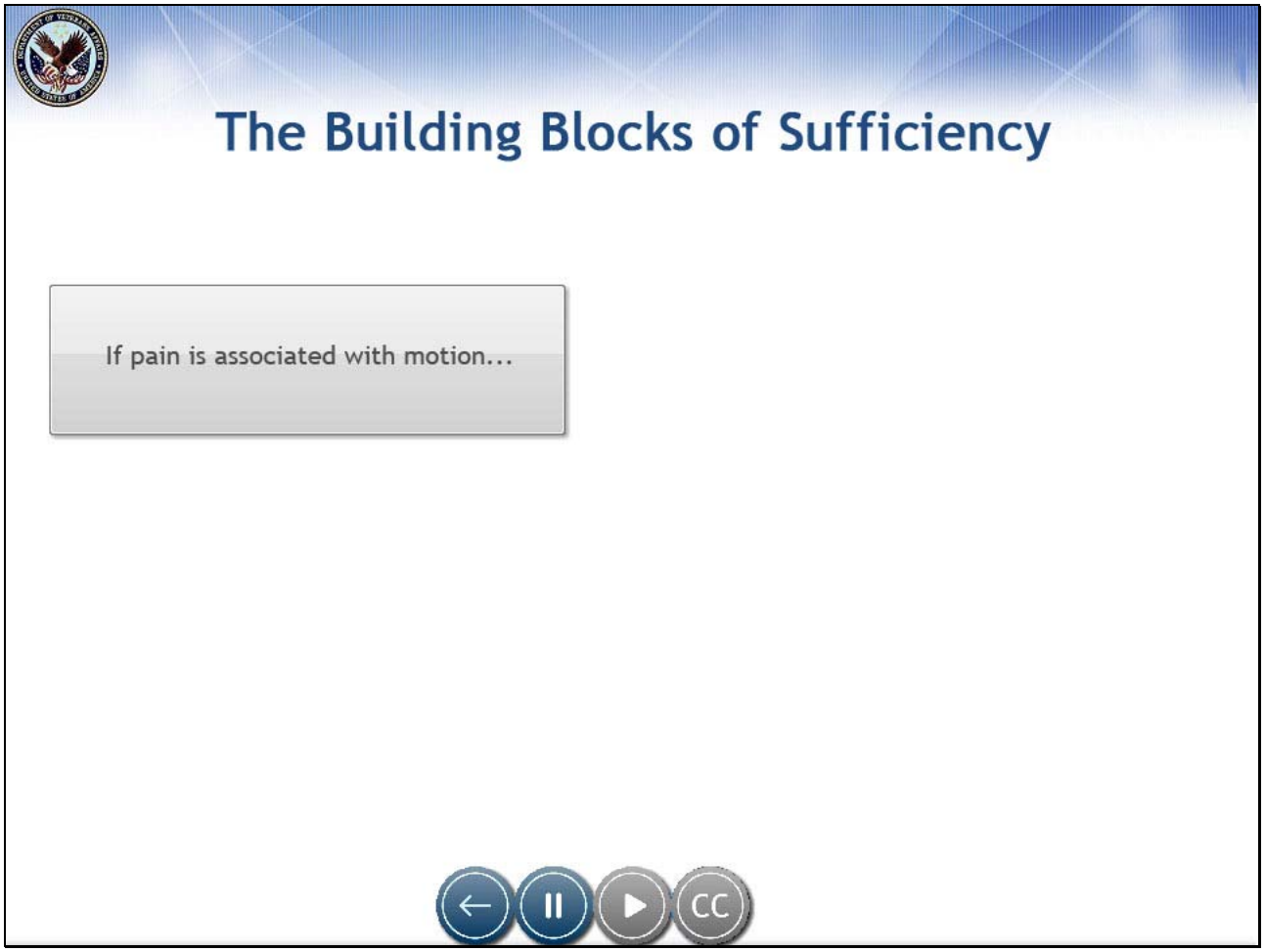
Andrew: Fantastic; we're going to work through this topic first, based on speculative opinions that we see. There's been a lot of talk lately between the Veterans Benefits Administration and the Board of Veterans Appeals on whether the opinions that we're getting back for *Mitchell* on musculoskeletal examinations have been sufficient, especially in the context of speculative opinions where examiners say they can't give an opinion. Nate, do you want to give us just a little bit of background on these Court cases in general?

Nate: Sure; there's kind of a line of cases with *DeLuca*, *Mitchell*, *Jones*, and *Sharp*, where the Court has really taken VA to task on accurately describing functional loss due to pain and other things outside of just the objective measurement of range of motion normally done on examinations. Probably the one that's given VA the most problems would be *Sharp* in that, while the Court has allowed for examiners to say that they can't offer an opinion about certain range of motion when they can't observe it, the Court has gone a step further and said "you need to explain this in a way that we can fully understand *why* you can't make an opinion; you can't just tell us that you can't make an opinion."

So that's kind of what the aim of this training is - to address how we can accurately provide the information that's needed so that we can make a final decision on the case.

Andrew: Nice; and I think it's...speculative opinions in general are kind of difficult because we know the Court has said that we can have speculative opinions or we can say that we can't have an opinion without resort to speculation, but what the Court means by having an adequate reasons and bases for that has been an evolving concept all the way up to *Sharp*.

Slide 2 - Building Blocks



Slide notes

Andrew: So, with that in mind, I'm going to move into the visuals.

And our first little visual presentation here is something I like to call

"The Building Blocks of Sufficiency." We're going to come back to

this slide two more times, but first we're going to start by just going through

what we need to do in a musculoskeletal examination when pain

is associated with motion - that's our first little building block here.

Slide 3 - Mitchell

Slide notes

Andrew: So, *Mitchell v. Shinseki*: it kind of comes after *DeLuca*, sort of says a very similar thing.

Do you feel like *Mitchell* gives us a different requirement than *DeLuca* did, or

is it more of a clarification of *DeLuca*, or how does that work?

Nate: I would see *Mitchell* more as a clarification of *DeLuca*; all of these cases seem to

stem from *DeLuca* which is rooted in Section 4.40 and 4.45 in the

Code of Federal Regulations, but *Mitchell* just kind of, I would say, clarifies *DeLuca*,

and a little bit about how pain itself is not necessarily indicative of impairment, but

that we have to determine what kind of impairment is caused by the pain.

Andrew: Absolutely. Like, even though pain itself isn't the functional loss,

if that pain results in more functional loss then we have to start considering that

for evaluation purposes. Whether you're on the VBA side or the BVA side,

it's a consideration for both of us, and it's something we definitely want to

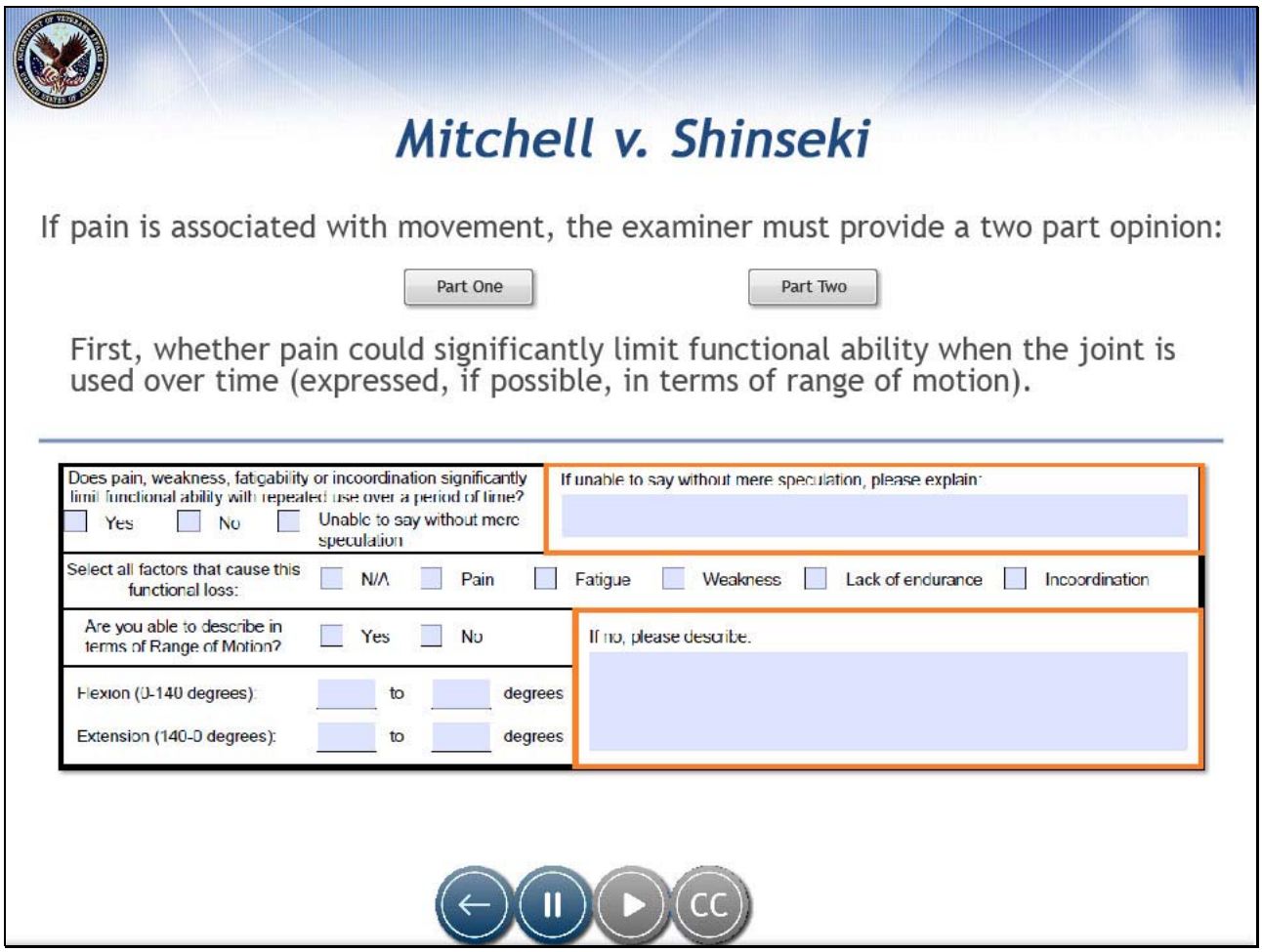
have in mind whenever we're looking at an examination.

So whenever that pain is associated with the motion, we're going to need a

two-part opinion, and the first part is whether pain can significantly limit functional ability

when the joint is used over time.

Slide 4 - Mitchell Part One



Slide notes

We ask examiners, in general, to express that in terms of range of motion, and sometimes that's possible and sometimes it's not. Do you think you see more people actually giving a range of motion measurement here or saying that they can't?

Nate: My view of what I see is somewhat limited in that I see the ones that have been denied, as opposed to the broader spectrum of the claims that have come up, but with the cases I see, most of the time the examiners indicate that they're unable to describe the range of motion after repetitive use over time or over time in general.

Andrew: And when you get those opinions you realize in the context of *Sharp* that they might not be entirely sufficient. If you're looking at the visuals with us, the little orange boxes highlight the spots on the disability benefits questionnaires (DBQs)

where the examiner should either give you that range of motion or, if they can't give you that range of motion without speculating, that they need to explain.

Now, you'll notice that those boxes aren't very big, so there might be an example from the examiner that needs to go into the "Remarks" section of the DBQ where there's a bit more space.

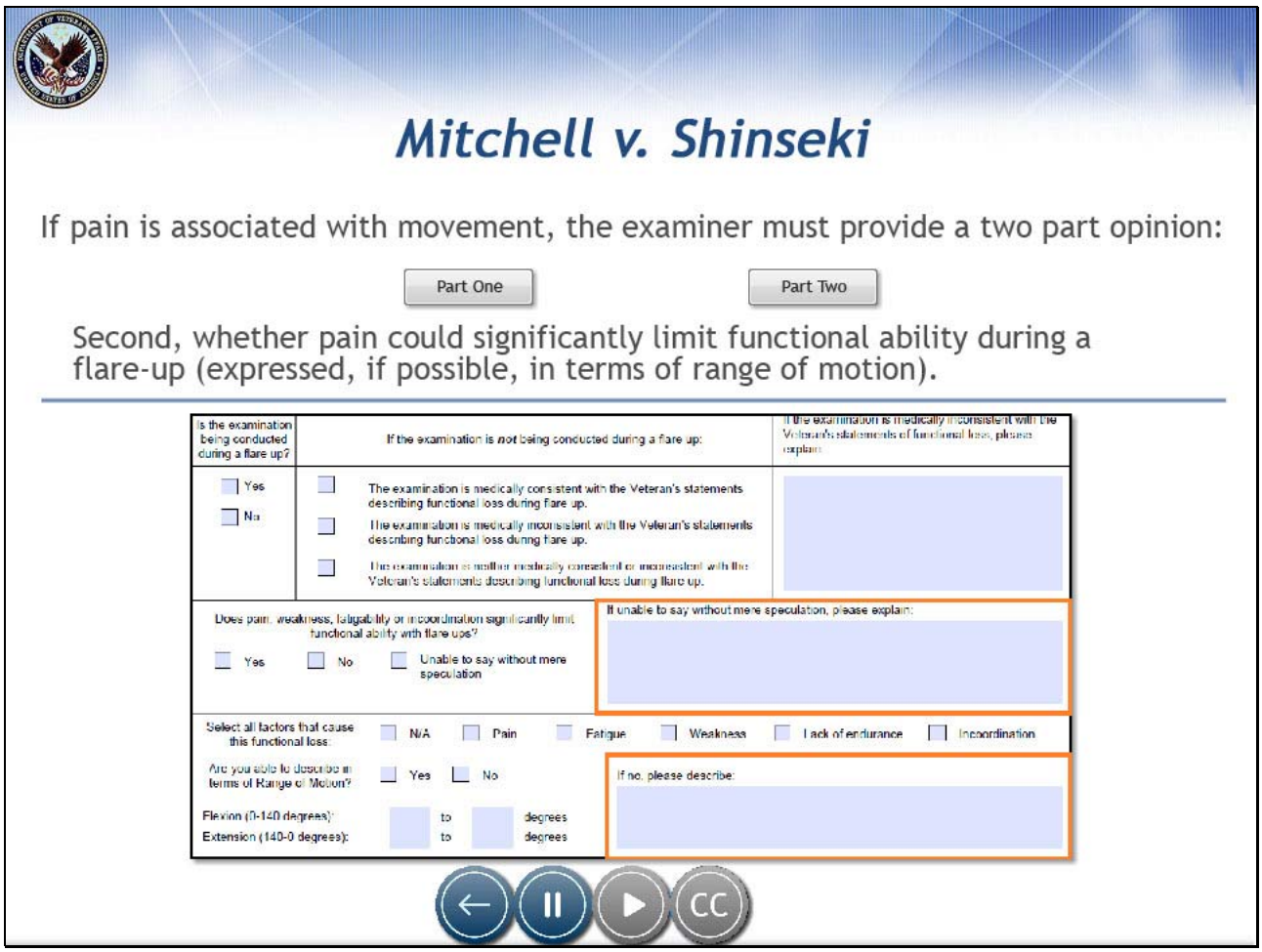
Nate: This is a good time to maybe note that I understand this can be a difficult area because we're asking doctors who are looking at clinical evidence and hard facts to opine on something in a way that's legally justifiable because of certain regulations that we're bound by. But, VA as a whole is simply precluded from making medical findings in any way so we have to rely on the medical community to provide that information for us, and oftentimes, I think from the legal side of it we're not thinking you have to give us exact answers, but what we need is your best guess at what's going on. I think that sometimes the medical community thinks that maybe we want more specific information than they can provide, or maybe to a higher degree of certainty than they can provide.

Andrew: Yeah, I think that's a legitimate question for them to be asking, too, if they can't find something objective, and especially if it's a musculoskeletal examiner. They're probably used to having objective findings, so asking them to give us an estimatation probably goes against their inclination as a medical provider. So, it's a big ask. I think that's a legitimate thing to bring up and worry about.

Nate: Absolutely, and it's also a matter of volume. At VBA, there's just so many claims that need to be done and at the Board we've got, obviously, a fraction of that, and we're maybe going through with a fine-toothed comb at some points trying to find these range of motion findings.

Andrew: (laughing) There's definitely a big difference in the volume of claims, for sure.

Slide 5 - Mitchell Part Two



Slide notes

Andrew: So with that said, let's move on to part two of that *Mitchell* opinion.

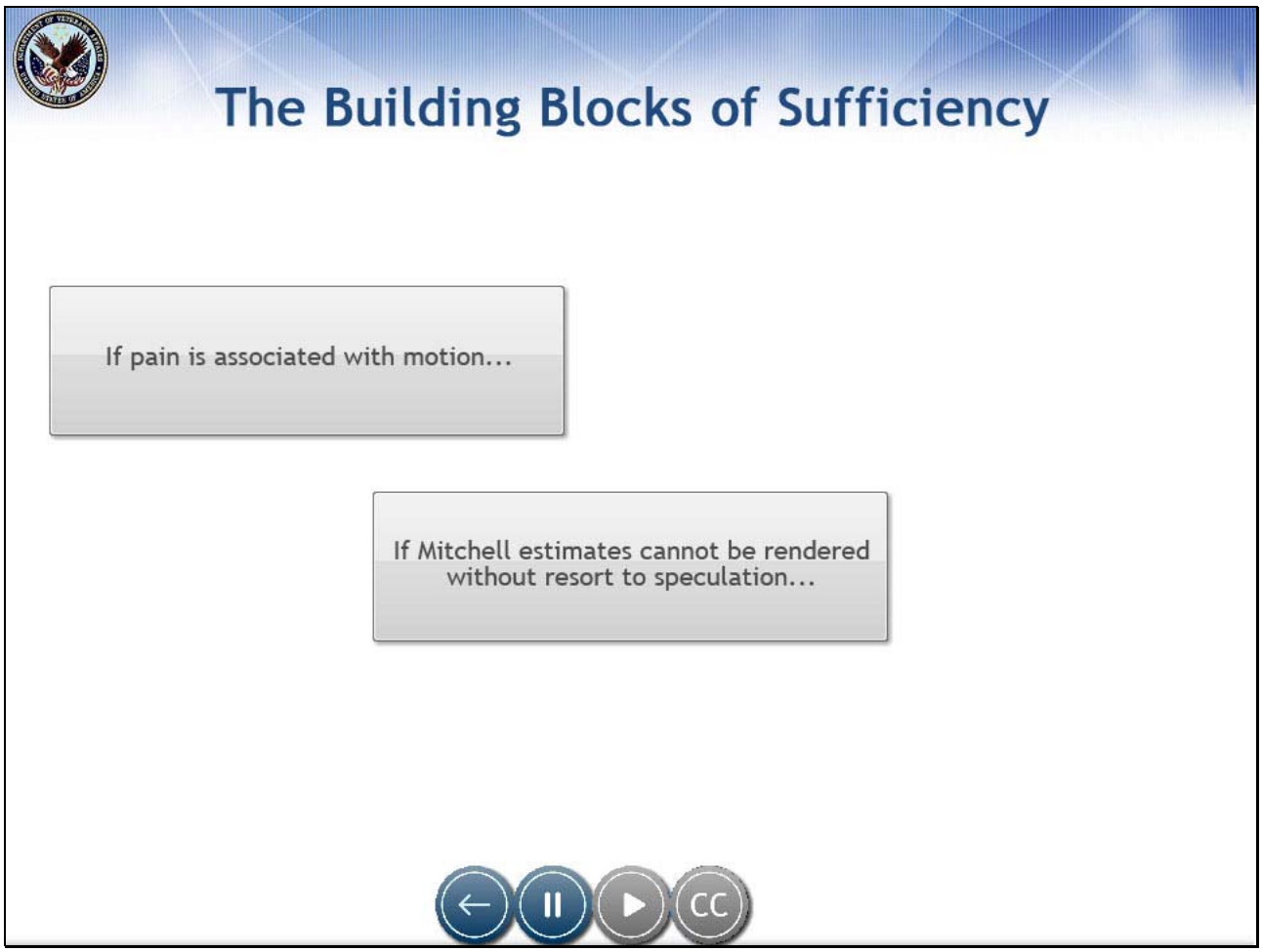
The functional ability over time is very important, but it's also something that we're probably not going to see in an examination finding itself. What there is a possibility of is this part two - whether the pain could significantly limit functional ability during a flare-up. So if we're - and I don't want to say "lucky" enough to examine the Veteran during a flare-up, then we would have those objective findings right in front of us, but the odds of us actually examining the Veteran during a flare-up are pretty slim. One of the findings in *Sharp* they put forward in the actual Court decision assessment document and also in the case itself, that it's unlikely that we'll examine the Veteran during a flare-up, so this is sort of where that testimony and those medical records

come in handy a lot more often than our objective findings.

Nate: Yes, it's very infrequent to see an examination report where the examiner indicates the examination was performed during a flare-up or after repetitive use over time, although it does happen from time to time, and those obviously make the adjudication much easier because we have the actual findings during the flare-up or after repetitive use over time - so we don't have to really speculate, we know what it is.

Andrew: So we know from *Mitchell* that we need to have the examiner give us those findings if the examiner can. We also know that those spots in the disability benefits questionnaire also have spots to say if the examiner can't give us those findings, they can tell us so, but if they can't give us the estimate, and they can't do that without speculating, we do have some requirements for those opinions that are really important, and this brings us to our second building block.

Slide 6 - Building Blocks

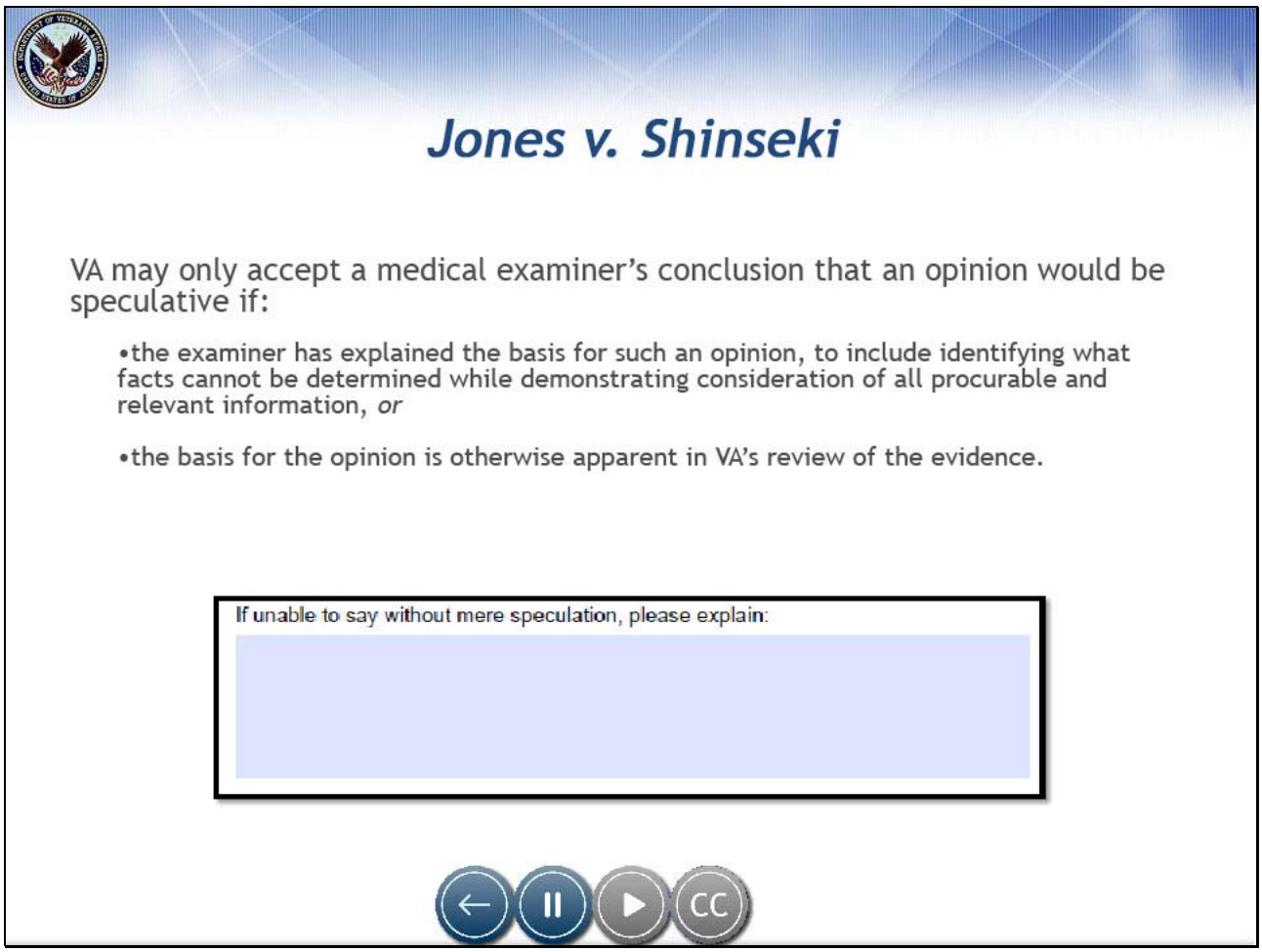


Slide notes

Andrew: We're going to talk a little bit about a case called *Jones v. Shinseki*,

and that deals with opinions in general that can't be given without resort to speculation.

Slide 7 - Jones



Slide notes

Andrew: So again with the visual we just have a block from the

disability benefits questionnaire. If the examiner is unable to say something without

speculation, we can only accept that if they give us the basis for that opinion,

and this has to be a little bit more specific than just saying "well I can't because I can't."

Nate, maybe you'd want to talk a little bit here about what you'd be looking for

from a speculative opinion that would make it sufficient for the Board's purposes,

and also what would make it sufficient for an RVSR's purposes, because these

should be the same thing.

Nate: Sure, and *Jones* is really a theme you see with the Court a lot, which is

"you can deny things, but you have to explain *why*."

Whether they're talking about VA and the Board explaining the basis for their denials,
or in this case the examiner explaining the basis for their opinion,
the Court wants to see something that explains to the reader why they should
accept that fact. I think with explanations about speculation what we should
all be looking for is something that's specific to the case itself and the facts
in that case. I would say that any explanation that could just blanket-apply
to multiple Veterans would probably not be sufficient, such as,
well, and I think we'll talk about this later, but opinions that simply state
"The Veteran was not observed during a flare-up, therefore I can't tell you
what he would be like and what impairment he would have during a
flare-up" is probably not going to work. Even if you get a little more specific,
and state that you simply don't have enough facts, or the medical community
wants more in the way of objective findings before making an opinion -
anything that's general in nature and you could just drop in to a different Veteran
is not going to work. We need more specific things, like "in this case the Veteran
has said X, Y, and Z, about flare-ups; however, this is inconsistent with other statements.
Therefore, I cannot make an opinion because the facts just don't line up, they
contradict each other." Something like that would be more likely to be found sufficient.
But, really, we want the examiners to talk about specific facts in the case, and that
they've considered all of the procurable data in determining that they can't offer
an opinion.

Andrew: Yeah, and I feel like this is a difficult thing to ask of examiners in general,
just because there's a large legal requirement here which isn't really in their
purview of information most of the time. They're making medical judgments,
treatment judgments on how to actually treat a disability, not how to
legally make something sufficient for our adjudicative process, but the
Court has been very insistent that everything, like you said, be based

on specific findings in a Veteran's case. We can't just have a generalized "well there's no empirical basis for this," or "well, the medical community doesn't really like this," or something like that, we need something that says "this Veteran has done this, this Veteran's experience is this, the symptoms are this, and based on all that it would be really speculative for me to estimate what it would be because the evidence itself contradicts." When you read *Jones*, there's that part where - and it really speaks to me - where the Court says that the speculative opinions can't become a mantra that "short-circuit the careful consideration to which each claimant's case is entitled." I think that's really important to be thinking about as a claims adjudicator, that every single claim needs to be considered on its own merits, even if the fact pattern is somewhat similar to other cases.

Nate: Absolutely, and I do recognize that this is a very hard question for medical personnel to address. I do think that one area of improvement with VA is in the beginning part of the examination report there's a section that asks about flare-ups, and oftentimes, in that section I don't see anything about the frequency or duration of the flare-ups. There's maybe something about severity or symptoms, but I think if examiners could fully flesh-out how often the flare-ups happen, how long the flare-ups last, and then how they're affected during the flare-ups, that would give them a little more information to base an opinion about what type of impairment would be present during a flare-up.

Andrew: And that's necessarily case-specific as well, because that'll be a conversation with the Veteran about their specific disability. So that'll make a much more cogent argument later on if they need to base a speculative opinion off of that.

Nate: That also gives the Board an option to, I'll say correct an explanation about not offering an opinion because it would be speculative in nature. In the case law, the examiner can explain why they can't offer an opinion without

speculation, but it's also okay if VA itself - the adjudicators - find that an opinion couldn't be offered without speculation based on their own review of the file.

If the examiner has fully explained the frequency, severity, and duration of the flare-ups, the Board may be able to use that information to say "well, while the examiner didn't fully explain why an opinion couldn't be offered, it's obvious to the Board that an opinion couldn't be offered beause the Veteran has not provided the type of information that could be used for a medical clinician to actually determine what happens during a flare-up."

Andrew: Oh, I see, and that sort of addresses the little second bullet-point on the slide and part of the decision assessment document. So if it's otherwise apparent in our review of the evidence, we're okay to say that it's clearly speculative and it's clearly explained by what they said on the frequency and duration of the flare-ups. That makes a lot of sense.

Nate: Correct, and one way the Board might do that is to say "while the Veteran was asked about his flare-ups, he stated that they only happen once a month for an hour," and we could use that to say that the flare-ups, even if they're extremely severe - I guess I'm getting a little off-topic here, but we can use that to say that even while present, the flare-ups, while severe, don't more nearly approximate a higher rating.

But also, if we don't have the frequency and duration type of information, the Board can't really say...the Board can't make findings that the Veteran has not supplied information if the Veteran is not asked about that information.

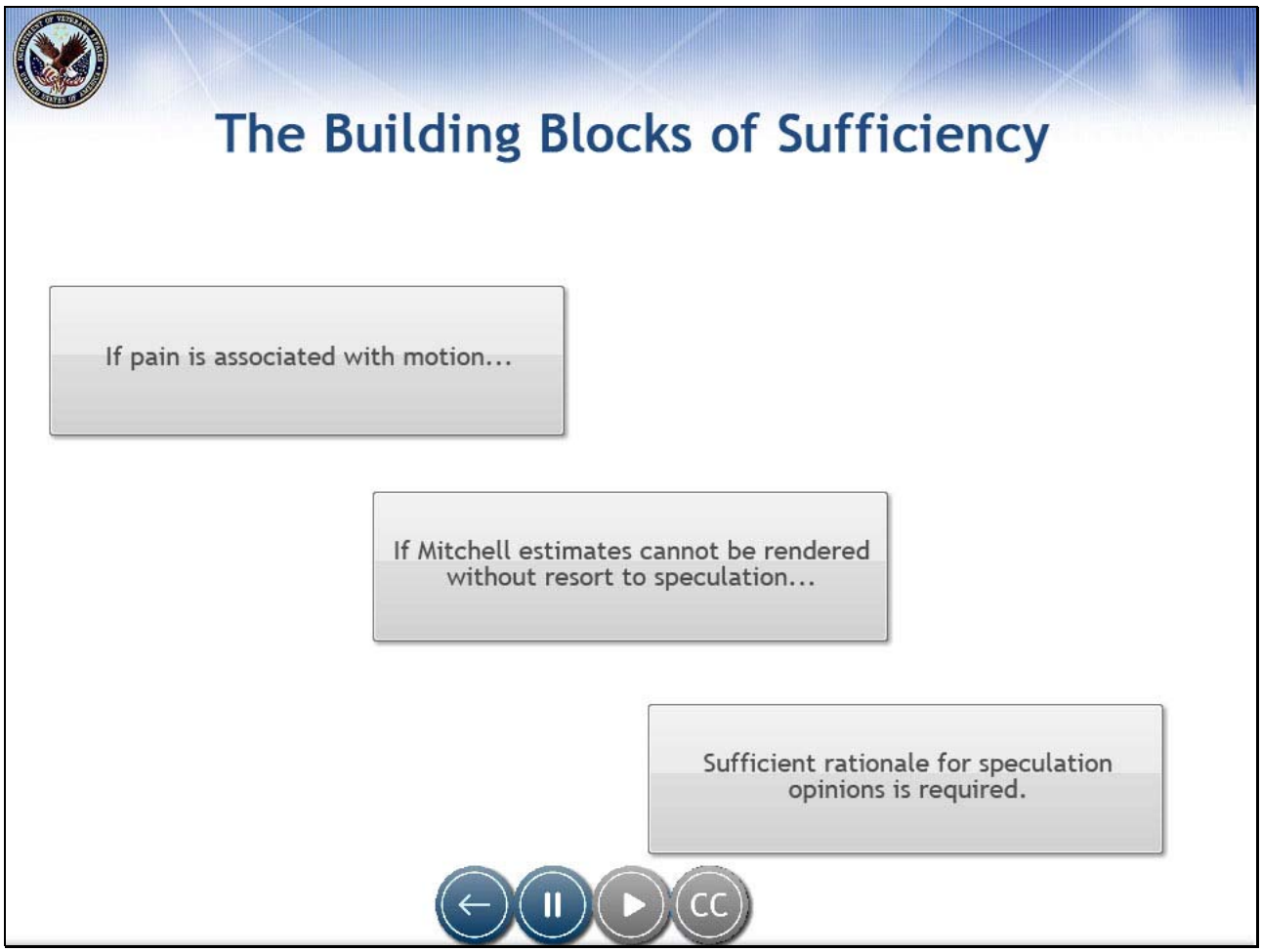
So, if the Veteran is asked about frequency and severity and duration, and the Veteran can't provide a response, and that's clear to the Board, then the Board can say it's otherwise apparent that VA can't offer an opinion about a condition when it's not being observed because the Veteran himself can't even describe how often this happens or the impairment involved.

Andrew: Yeah, and I don't think that's too off-topic, because it really also gives us just a reinforcement of what we've been saying about this slide all along - that everything needs to be based on something that's factual in the record itself, not based on what we "think" might be in there, or what we "think" might be speculative. If it's actually based on what the Veteran could or could not say, and if it's actually based on what's actually shown or isn't shown in the medical evidence of record, that's a real determination. As a former RVSR, that's what I would be basing my decisions on as well - what's actually in the evidence, not what I assume to be there based on what I think about the case or what my personal life experience is or that sort of thing. So that's really important, especially if we're going to conclude that the opinion could not help but be speculative based on our own review of the evidence.

We need to be extra careful to ensure that the evidence itself supports that conclusion, rather than assuming it does so just because the examination says so.

The RVSR should provide clear supporting facts in the narrative if they're determining that an examination is adequate in spite of an examiner not providing an adequate rationale as to why the estimate of range of motion during flare-ups or after repetitive use could not be provided.

Slide 8 - Building Blocks

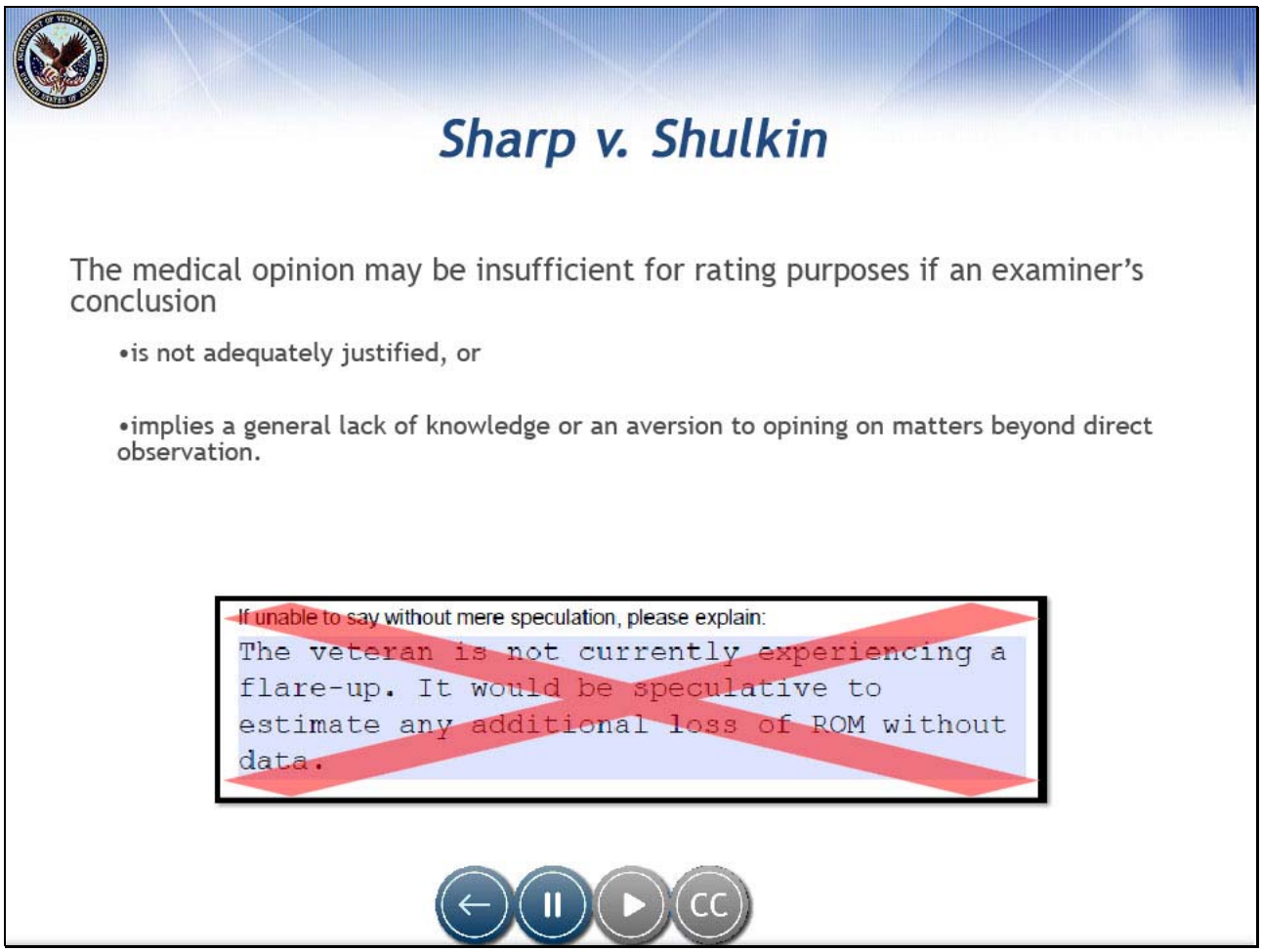


Slide notes

Andrew: Alright, that being said, let's go ahead and move into our third building block - and I feel like this is the real meat of this, really getting into *Sharp* itself.

Having a sufficient rationale for a speculation opinion is something that's coming under a lot of scrutiny right now. Something that the Board identified for us and something that we're also identifying for ourselves is that we really need to have a sufficient rationale and what that actually consists of. We've talked about it a little bit so far, but I do want to give an example of what we can't take and what we could actually use to make something like this sufficient for either our purposes or the Board's purposes.

Slide 9 - Sharp



Slide notes

Nate: Well, I think *Sharp* is just a continuation of *Jones*. In *Jones*, we have to provide an explanation on why we can't offer an opinion without speculating, and *Sharp* takes the next step to say "the explanations you've been offering aren't good enough." Essentially, the biggest take away from *Sharp* is that saying a Veteran is not currently experiencing a flare-up, therefore it would be speculation to determine any additional loss of range of motion is not acceptable. The Court is very clear on that, and that's just something at this point, at least for Board review, is going to be found to not be an adequate explanation for not offering a range of motion finding. I would also note that if a range of motion finding is actually made by the examiner, all these questions of speculation and all of that go away because we have an actual number.

Andrew: Just speaking from an RVSR perspective on this, these opinions where they say the Veteran is not currently experiencing a flare-up, and that it would be speculative because they aren't witnessing the flare-up right in front of them - these are rampant, they are everywhere. I see these all the time; I still see these in current cases, even though the *Sharp* case has happened, even though it's in our procedures manual. It's something that I'm not sure has really penetrated into VHA and into VBA to know that those aren't sufficient, but it's clearly something that's high on the Board's radar when they receive it on appeal, and it's just an automatic "send-it-back," all of a sudden we need this opinion, and now maybe the estimation is even harder because it's not during that examination.

Nate: We see this all the time and it's something that the attorneys will pick up on right away, and it's pretty much an automatic remand if this is the information offered.

It's simply a duty to assist violation because we didn't procure the information that we needed to procure, so it's going to get sent back most of the time.

Andrew: I think that was the claimant's argument in *Sharp*, too, that because they gave an opinion like this that they should be examining the Veteran *during* a flare-up.

The Court thought that was a bit beyond what we could do, just because there's no way to know when a flare-up is going to happen or not and to schedule an examination immediately just doesn't really work from a practical standpoint. There's no way we could actually make it happen, which is why this estimation and this opinion become so important. If we can't physically schedule the examination we still need to have that information, and there is a possibility that we can get it. That's just the basic duty-to-assist - if there's a possibility that we can get more information that might help substantiate that Veteran's claim, we do have a duty to try to get that information, and to do everything that we can. I really feel like that second bullet-point is what *Sharp* really emphasizes in the context of *Jones*, because whether the opinion is adequately justified or not adequatley justified is something that could be argued back and forth as to what is adequate, but if something implies either the general lack of knowledge or the aversion to opining on something that you can't see, that I think is something we can look at the exam, see that

the opinion is clearly based on an aversion to opining on something that the examiner can't see, and that's something that we can just *know* to send back.

Nate: I agree; whenever you see this type of explanation it's in VA's interest to send it back and get clarification.

Andrew: I don't want to downplay the significance of this because this is a big change for how we might process claims in VBA. I know a lot of raters look at musculoskeletal examinations and musculoskeletal claims and think "Well this will probably be a fairly easy case, I can probably make my production points based off a case like this because usually you know we're going to assign something on objective findings or painful motion and it's going to be really straightforward." This kind of throws a wrench into that. It sort of throws a wrench into the idea that any case is simplistic or any case can be an "easy" adjudication. I think that's maybe a mindset that we need to get into a bit more on the VBA side, something that I know we push a lot in training - that we can't look at a claim and think that this is something I can think about for two minutes and then it's gone. We need to carefully consider this and have enough support to have the time to carefully consider all of these opinions before we start making decisions that affect peoples' lives.

If we're going to cut down on the amount of appeals and the amount of remands, this seems to be a pretty easy one that we can just see, know it's not sufficient, and either send it back or make a determination based on the other evidence of record if we can afford the Veteran a higher evaluation or if we have evidence of a flare-up inside the medical records.

Have you seen some of these where (static) oh, go ahead.

Nate: Oh, I was going to say that it's funny that you mention how receiving an increased rating for musculoskeletal conditions is perceived. At the Board, I think when I assign one of these to my attorneys, they think "Oh boy, this is going to be tough," because between cases like Sharp, and Correia, and Jones, it's very hard to decide anything finally that you have any confidence will stick if appealed beyond the Board. Because of these cases, it's so hard to get an adequate examination report - not because the examiners are necessarily doing anything wrong, but the Court has thrown so much at us that needs to be determined that it's hard to get

an adequate opinion so we get these back from the Court all the time.

Andrew: It's a really interesting thing; I sort of expect, from an RVSR perspective, that we're not always thinking about the Court as much as we probably should, but at the same time, you'd have to be living under a rock to not know that so many Court decisions have been rendered based on musculoskeletal just within the last five years alone, things that have completely changed the way we adjudicate these claims at all, and things that we need to adjust to very quickly as soon as they enter our procedures manual and as soon as they enter our actual mindset. It's a very...I don't want to say difficult thing to adjust to because we can definitely do it, but there is definitely a *lot* of it and it's interesting from the Board perspective that you'll adjudicate the case based on the current Court decisions but it might get appealed up to the Court and they might make an entirely different determination and suddenly there's another wrench thrown into the gears of adjudicating musculoskeletal conditions.

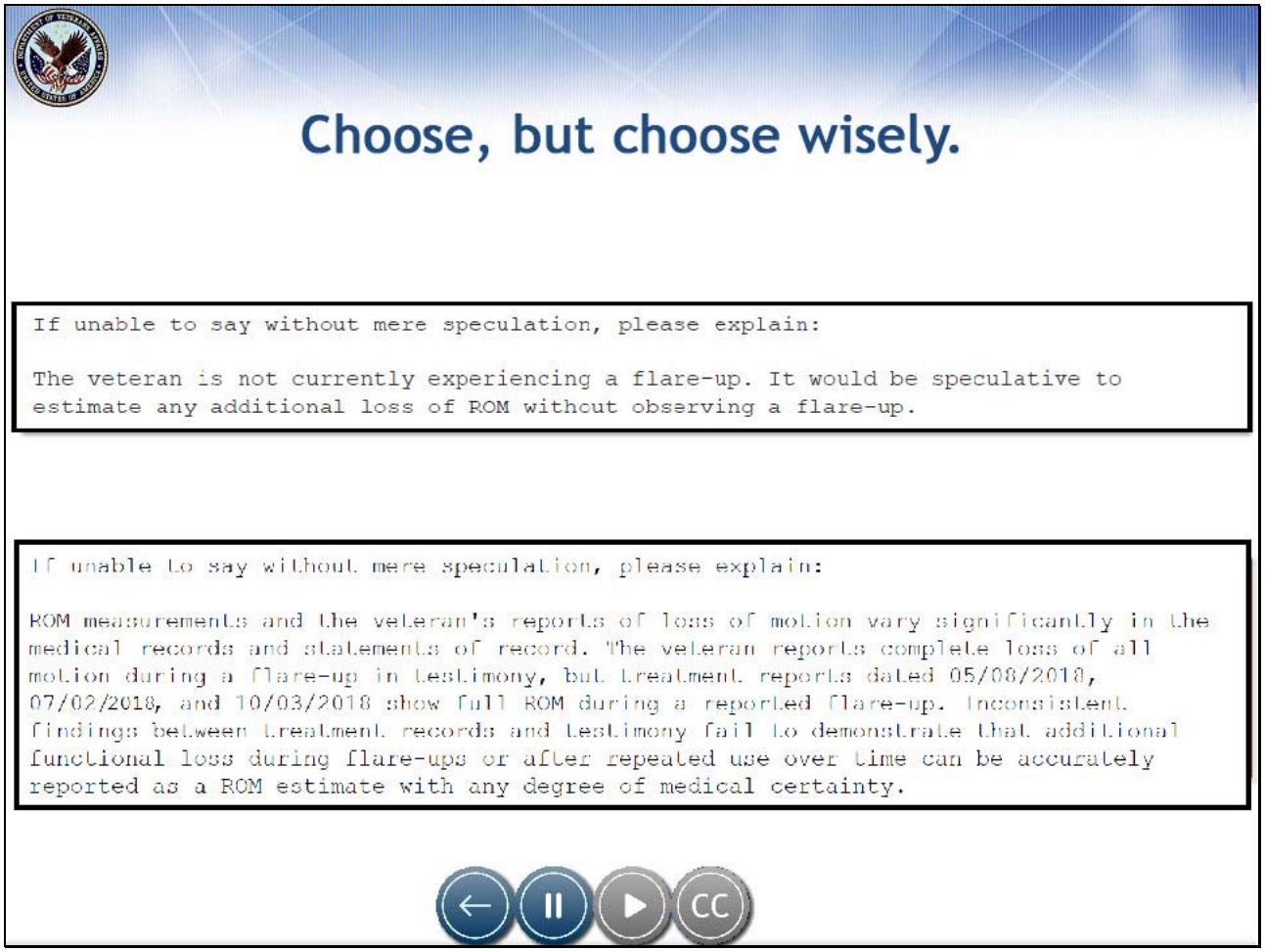
Nate: Absolutely, it seems to have been the worst with the increased ratings for the knees because there's been so much case law about what does and does not constitute pyramiding that it's almost to a point where, if I was writing regulations, I would probably make a general rating formula for rating the knees just to incorporate all of these changes. (laughing) Although I'm not the one who writes the regulations.

Andrew: (laughing) Yeah, I feel like that would be an extremely difficult job to have in the current environment, especially in the musculoskeletal system. I'm interested to see what the final rule is going to look like when that gets its update in the VA Schedule; I've seen the current federal register on it and it looks a little bit...less intense than I thought it would be, but at the same time it is going to change quite a few things.

Nate: Yeah, that will be interesting to see and I would imagine that would get some movement in the near future, that's been a pending regulation for awhile now.

Andrew: Oh absolutely - I would expect that to be finalized in 2019; that would be my guess.

Slide 10 - Exercise



Slide notes

Andrew: Okay. I do want to move on to our next slide, here.

Now, we have two opinions here, and if you're playing along at home

and you're reading these along with us, I think it's fairly clear to see just based on

the way we've been talking about this, which one of these would be sufficient and

which one of them wouldn't, but Nate could you talk specifically about the second

opinion and what makes that better than the first opinion and what makes it something

that we could actually accept?

Nate: Well, I think it goes back to what we were talking about before, in that it's

specific to this case. The examiner's pointing out that the Veteran himself or herself

has given conflicting reports of what happens during a flare-up and that's a perfectly good reason for not being able to offer an opinion. If, on one hand, the information shows thirty degrees and the other shows sixty degrees and the other shows ninety degrees, you can't really find a consensus in the data, so that would be a good reason for not offering an opinion because there's simply no consistent facts that you could use to offer the opinion. But again, it really goes back to "this is very specific to the facts of this case," so any third party looking at this can say "Oh, I get it, you can't tell me an opinion because you just don't have enough information, or you don't have enough consistent information; even though you've asked about this information and you've compiled as much information as you can it just doesn't line up, so you can't give an opinion."

Andrew: Right. I think in this second example, it just clearly shows that we've taken our basis for speculation from evidence, not based on stuff that we don't know, or stuff that we can't know, or stuff that we can't see, but stuff that we've looked at in the medical record and the examiner has said "Well, this just isn't consistent enough for me to confidently tell you that *this* is exactly what happens during a flare-up, and this is what it should be, because the evidence is inconsistent. So, if evidence is inconsistent, of course you couldn't give an opinion without speculation, and that makes a great deal of sense from an adjudicative perspective and a legal perspective.

I think it's much more difficult for the examiners than, say, writing that first opinion, it's definitely going to take more time and a more careful review, but, on the plus side, if we do it this way the first time, then we don't have to do it again, which is kind of a plus for everyone in the adjudicative process - the Veteran won't have to wait quite so long, since, from what I remember, the appeals process is just a little bit on the lengthy side.

Nate: (laughing) Yes, appeals certainly take a long time. I would note that, as kind of a side point that's in the explanation is the fact that we've actually tried to assemble all procurable data as they say in the case law. In this case, we didn't just simply say "the Veteran has some flare-ups, and we can't estimate what's going on," we said "here's information that we've gathered

about flare-ups *and* these are inconsistent." So not only did we gather the data, we reviewed the data and tried to make sense of it and we can't, therefore we can't give you an opinion.

So, I think something like this is VA doing a great job at developing the claim and explaining it.

Andrew: And to be entirely fair to everyone who's listening in to this, I'm sure a lot of you are thinking "this would never happen in real life; there's no way we would have three treatment records during a reported flare-up," and I'm not saying this is going to be every single case. This is a very easy example, and it is also very easy for someone like me to sit here and create a hypothetical example that's sufficient based on a case that doesn't actually exist.

I don't want to downplay that, because I know it's a difficult amount of information to assemble, but you could also take evidence like this from what you were talking about before, Nate, when you were talking about the Veteran's testimony on the frequency and severity of flare-ups. If that's either inconsistent or the Veteran can't give us that information, and there actually is no consistent basis to give that opinion without speculation, would that also be sufficient for the Board's purposes, then?

Nate: I would think in most cases it would be. I agree with you, we have a hypothetical here that we get to pick the facts, and we could pick facts that easily illustrate our point, but that's really what we're trying to do here is give an example of what would be a good explanation. But I think, Andrew, that you're 100 percent correct that what's going to be more common is we're going to look at the examination report itself and if we get that information about the symptom severity, frequency, and duration, we might be able to come up with something like this, because sometimes the Veteran's simply not going to be able to describe his flare-ups and how often they happen and things like that. I've seen this in hearings with Veterans; if you press them on flare-ups - and I don't mean press them in like...trying to push them in a direction - a lot of times you'll get testimony where they simply say oh yeah they get flare-ups of this, and then my next question is "well, how often do you get these flare-ups? How long do they last? What happens during a flare-up?" And oftentimes the Veteran can't answer that, and

I can accept that they don't know the answers to these questions, but then you can't put the onus on VA to have the answers to questions that the Veteran can't provide answers to, so we've kind done our duty there in asking how long do these last, how often do they occur, what happens during them. If the Veteran can't answer that, then we can say we're not going with inconsistent findings as opposed to there's simply not enough information for us to estimate.

Andrew: I think the common point between the two of those is that we need to complete our duty-to-assist as far as trying to get that evidence. Whether we can get the evidence and whether that evidence exists and whether the Veteran can provide it or not is sometimes dependent on the Veteran being able to answer those questions, and those are difficult questions. I mean, I don't remember what I had for breakfast yesterday; I certainly wouldn't remember a flare-up of a knee condition six months ago.

So I don't expect people to just have that information, but if we ask them those questions, then they know what type of information we're looking for if we're going to be basing an opinion or an evaluation off of flare-ups or testimony of use over time.

Then, maybe they'll start keeping a log of that sort of thing on a different claim for increase; maybe they'll provide that evidence because now they know we're looking for it.

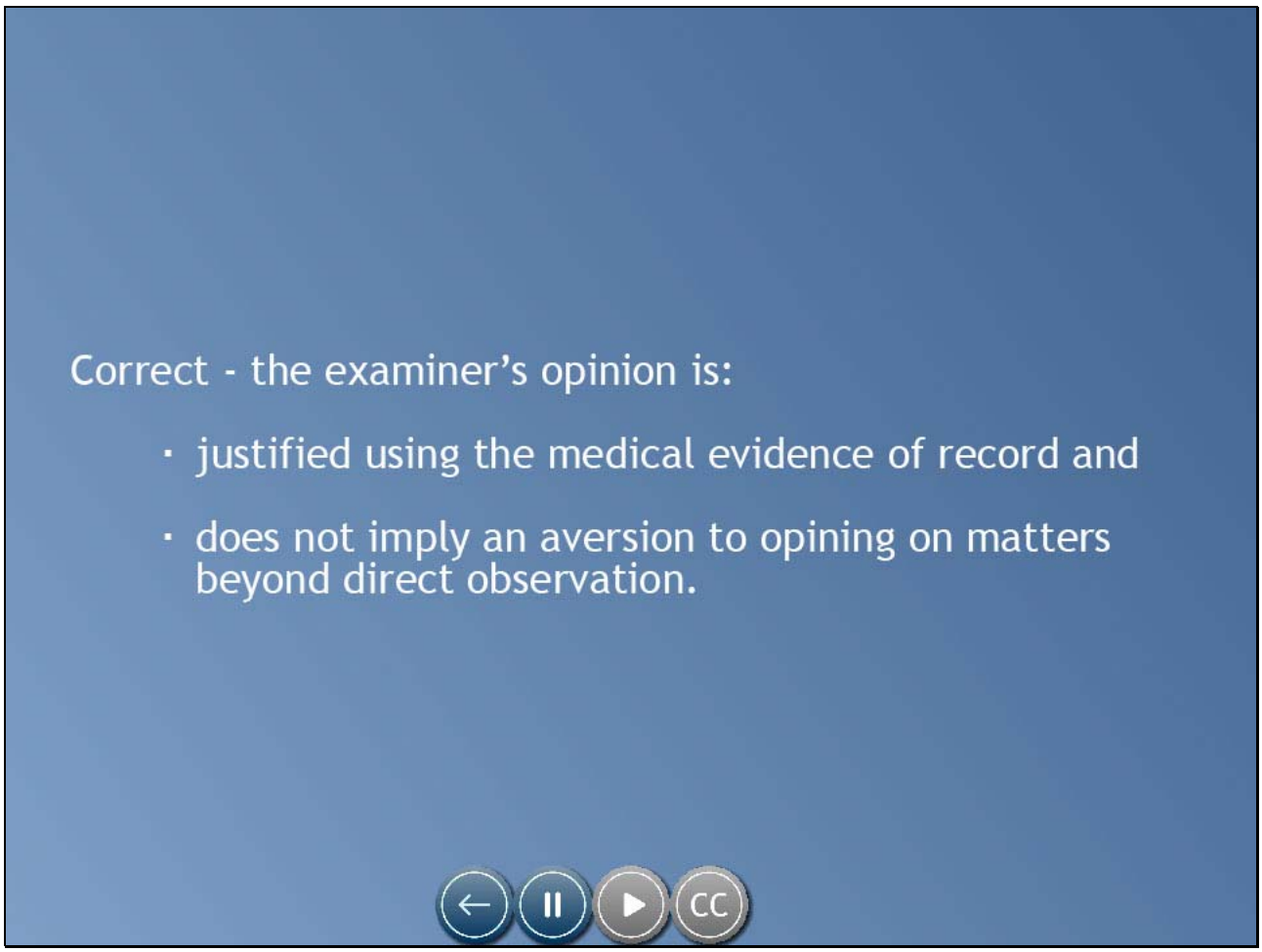
Something I emphasize a lot when we do training on denials of cases is that the best practice and what's procedurally required is that we tell the Veteran what they are *missing* in order to get a grant, so that if they come back on a reopen or a reconsideration, there's the possibility that they can give us that evidence they're missing - because we've told them exactly what that evidence is. So if that evidence exists and it's procurable and they can get it, they can just give it to us and then we can grant. I feel like that's sort of what the Board is looking for, too, correct?

Nate: Certainly, and that's actually what the Court is looking for too, if you look back to cases like *Bryant*, where the Court's explaining what they see as a hearing officer's duties, and it's exactly what you said - to point out evidence that could be submitted to help cover

an area that hasn't been adequately covered, so far. That's probably not the best way to explain it - I think you used the Court terms in there, but basically we want to tell the Veteran what's missing from their case and how they can substantiate their claim, and if we do that, we've taken the first step in getting them in the right direction and then it's kind of on them to come up with that information or evidence.

Andrew: Absolutely.

Slide 11 - Exercise Result



Slide notes

Andrew: I'm going to go ahead and click the correct answer here because we know it's correct and I like being right and I'm sure you do, too. When we do that, we get a nice little summary of the stuff we were talking about - the examiner justified his opinion based on the medical evidence of record, doesn't use the aversion to opining on stuff that the examiner can't see - that's what makes that sufficient for us. They've actually used medical evidence of record, stuff that we can procure and examine and use to justify the fact that this is too inconsistent for me to give you a real estimate here, which is completely acceptable for our purposes and I believe completely for the Board as well.

Nate: Yes, I would agree, and I think, summarizing this, what we're trying to promote is that VA needs to try and procure all the data that it can, including the frequency, severity, and duration of flare-ups, and then, based on that information, either make an estimate on what range of motion findings would be during flare-ups or after repetitive use over time or, if that's not possible, explain why based on that specific information that we've gathered you could not make an opinion.

Andrew: I think if we can get those types of opinions more consistently and more frequently, we're going to see a drastic reduction in both deferrals for clarification of opinions and in remands in general. I think it's a difficult adjustment to make, because I think we're all very used to seeing opinions that are based on that aversion to opining on stuff beyond direct observation, but it is an adjustment that we have to make to make sure that we're fulfilling our duty to assist.

Slide 12 - Questions

Slide notes

Andrew: Just wanted to let you guys know - if you have any questions,

I have a link here for the VA C&P Training mailbox. If you click that, it should

take you directly to an Outlook window; otherwise, you can just type that

web address into your “To” field, and that should take care of it. We welcome

any questions from the field, and feel free to contact us at any time.

Again, I’m Andrew Latham; you also find me on Skype if you want to ask

questions there. We do kind of exist for questions - it’s why they pay us the

medium bucks. Nate, we really appreciate your time here; we’re really glad

you could come and collaborate with us on this. I hope it’s the first of many.

Fingers and toes crossed we’ll have another one for you guys very soon.

Nate: Oh, thank you for having me, and I look forward to the next one.

Andrew: Well our show today was produced by Judge Nathan Kroes and me,

with assistance from the Compensation Service Staff and the Board of Veterans Appeals.

Special thanks to Angie Hiller and Rod Grimm for their assistance with scenarios, and to

Elizabeth Prevatt and Martina Mills for equipment acquisition. Thanks to all of you for listening,

and we hope you'll send us your thoughts and suggestions. Episode ideas are welcome -

this one started as simply as "...uh, why don't you give me a little background on the *Sharp*

case while I lose my mind here."