

**Department of
Veterans Affairs**

Memorandum

Date: August 14, 1998

VAOPGCPREC 9-98

From: Acting General Counsel (022)

Subj: Multiple Ratings for Musculoskeletal Disability and
Applicability of 38 C.F.R. §§ 4.40, 4.45, and 4.59

To: Acting Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

1. When a knee disorder is rated under Diagnostic Code (DC) 5257 (instability of the knee), must the claimant have compensable limitation of motion under DC 5260 or DC 5261 in order to obtain a separate rating for arthritis?
2. Must 38 C.F.R. §§ 4.40, 4.45, and 4.59 be considered when assigning an evaluation for degenerative or traumatic arthritis under DC 5003 or DC 5010, and if so, how?
3. When a disability is rated under a specific diagnostic code that does not appear to involve limitation of motion, must 38 C.F.R. §§ 4.40, 4.45, and 4.59 be considered to determine the applicability of another diagnostic code that does involve limitation of motion?
4. What determines whether a particular diagnostic code is predicated on loss of range of motion so that sections 4.40 and 4.45 apply?
5. Are DC 5259 (removal of the semilunar cartilage) and DC 5284 (foot injuries) based on loss of range of motion, requiring consideration of sections 4.40 and 4.45?

COMMENTS:

1. In VAOPGCPREC 23-97, we held that a claimant who has arthritis and instability of the knee may be rated separately under DC 5003 and DC 5257 "based on additional disability." See VAOPGCPREC 23-97. We indicated that, for a knee disorder already rated under DC 5257, a claimant would have additional disability justifying a separate rating if there is limitation of motion under DC 5260 (limitation of flexion of the leg) or DC 5261 (limitation

of extension of the leg). See *id.*¹ As we stated in the opinion, there would be no additional disability based on limitation of motion if the claimant does not at least meet the criteria for a zero-percent rating under DC 5260 or DC 5261. See *id.*, citing *Degmetich v. Brown*, 104 F.3d 1328, 1331 (Fed. Cir. 1997). Although the limitation of motion must be at least zero-percent disabling, it need not be *compensable*. Therefore, if a claimant has a disability rating under DC 5257 for instability of the knee and there is also X-ray evidence of arthritis and limitation of motion severe enough to warrant a zero-percent rating under DC 5260 or DC 5261, a separate rating is available under DC 5003 or DC 5010.

2. The remaining questions pertain to the applicability of 38 C.F.R. §§ 4.40, 4.45, and 4.59 in rating arthritis and other musculoskeletal disabilities. Section 4.40 provides that, as to the musculoskeletal system, it is "essential that the examination on which ratings are based" adequately portray any "functional loss" which "may be due to pain". The regulation does not require a separate rating for pain, but the impact of pain must be considered in making a rating determination. See *Spurgeon v. Brown*, 10 Vet. App. 194, 196 (1997). Section 4.45(f) states that "[p]ain on movement, swelling, deformity or atrophy of disuse" as well as "[i]nstability of station, disturbance of locomotion, interference with sitting, standing and weight-bearing" are relevant considerations for determination of joint disabilities. Incoordination and excess fatigability are also factors for consideration under section 4.45(d) and (e). Section 4.59 contemplates "at least the minimum compensable rating" for painful motion "with joint or periarticular pathology".

3. As we noted in VAOPGCPREC 36-97, Court of Veterans Appeals (CVA) precedent is unclear as to whether sections 4.40 and 4.45 apply only to diagnostic codes that are based on limitation of motion. See *Johnson v. Brown*, 9 Vet. App. 7, 11 (1996) (sections 4.40 and 4.45, with respect to pain, are not applicable to ratings under DC 5257 because DC 5257 is not predicated on loss of range of motion). *But see Spurgeon*, 10 Vet. App. at 196. Nevertheless, it is clear from the CVA case law that

¹ A separate rating for arthritis could also be based on X-ray findings and painful motion under 38 C.F.R. § 4.59. See *infra*. See generally *Lichtenfels v. Derwinski*, 1 Vet. App. 484, 488 (1991).

diagnostic codes involving disability ratings for limitation of motion of a part of the musculoskeletal system do not subsume sections 4.40 and 4.45. See *DeLuca v. Brown*, 8 Vet. App. 202, 206 (1995). Limitation of motion in the affected joint or joints is a common manifestation of arthritis, and the CVA has indicated that DC 5003 is to be "read in conjunction with" section 4.59 and that DC 5003 is "complemented by" section 4.40. See *Hicks v Brown*, 8 Vet. App. 417, 420-21 (1995). Thus, sections 4.40, 4.45, and 4.59 all appear to be applicable in evaluating arthritis.

4. In applying sections 4.40, 4.45, and 4.59, rating personnel must consider the claimant's functional loss and clearly explain what role the claimant's assertions of pain played in the rating decision. *Smallwood v. Brown*, 10 Vet. App. 93, 99 (1997). See also *Quarles v. Derwinski*, 3 Vet. App. 129, 140 (1992) (section 4.45 requires analysis of effect of pain on the disability). The functional loss due to pain is to be rated at the same level as the functional loss where motion is impeded. *Schafrath v. Derwinski*, 1 Vet. App. 589, 592 (1991). Under section 4.59, painful motion is considered limited motion even though a range of motion is possible beyond the point when pain sets in. *Hicks*, 8 Vet. App. at 421.

5. Subject to the limitations of 38 C.F.R. § 4.14, which prohibits "the evaluation of the same manifestation [of a disability] under different diagnoses", a claimant should be compensated for all manifestations of a disability to the extent authorized under the regulations. If a musculoskeletal disability is rated under a specific diagnostic code that does not appear to involve limitation of motion (e.g., DC 5257) and another diagnostic code predicated upon limitation of motion may be applicable (e.g., DC 5003 or DC 5010), the other diagnostic code must be considered. Cf. VAOPGCPREC 23-97.

6. In a hypothetical situation presented in the request for this opinion, a knee disability is rated under DC 5259 (removal of the semilunar cartilage). For the purposes of the hypothetical, it is assumed that DC 5259 does not involve limitation of motion. The medical evidence shows pain, tenderness, friction, osteoarthritis (presumably established by X-ray), and slight loss of motion in the knee. Given the findings of osteoarthritis (another term for degenerative arthritis), the availability of a separate rating under DC 5003 in light of sections 4.40, 4.45, and

4.59 must be considered. Even if the claimant technically has full range of motion but the motion is inhibited by pain, a compensable rating for arthritis under DC 5003 and section 4.59 would be available. See *Lichtenfels*, 1 Vet. App. at 488. Absent the X-ray findings of arthritis, limitation of motion should be considered under DC 5260 and 5261. The claimant's painful motion may add to the actual limitation of motion so as to warrant a rating under DC 5260 or DC 5261.

7. The opinion request also presents a hypothetical situation "where a veteran has been assigned a compensable rating for degenerative arthritis of the toes under DC 5284 ('Foot injuries, other')". If the disability is rated as arthritis, the rating has presumably been established under DC 5003 (or DC 5010 if, as suggested, the arthritis is the result of foot trauma, rather than a degenerative process). The rating under DC 5003 or DC 5010 must take sections 4.40, 4.45, and 4.59 into account. Those provisions contemplate the veteran's limitation of motion and overall functional loss. The prohibition against "pyramiding" under 38 C.F.R. § 4.14 requires that a separate rating under DC 5284 be based on manifestations other than those compensated under DC 5003/5010 and sections 4.40, 4.45, and 4.59. On the other hand, if the rating is established under DC 5284, the availability of a separate rating under DC 5003/5010 and the applicability of sections 4.40, 4.45, and 4.59 depend upon the manifestations compensated under DC 5284.

8. Since the provisions of sections 4.40 and 4.45 may not apply to diagnostic codes that do not involve limitation of motion, see *supra*, the question arises as to whether limitation of motion is contemplated under a particular diagnostic code, such as DC 5259 or DC 5284. Of course, some diagnostic codes, such as DC 5003, clearly refer to limitation of motion. Others require consideration of the nature of the given disability. In VAOPGCPREC 36-97, for example, we reviewed standard medical authorities and concluded that DC 5293 (intervertebral disc syndrome) involved loss of range of motion and therefore that sections 4.40 and 4.45 should be applied when a veteran's disability is rated under that diagnostic code. We recommend a similar approach to other diagnostic codes.

9. With respect to DC 5259, removal of the semilunar cartilage (or meniscus, see Robert Bruce Salter, *Textbook of Disorders and Injuries of the Musculoskeletal System*

531-32 (2d ed. 1983)), may resolve restriction of movement caused by tears and displacements of the menisci. See Arthur J. Helfet, *Clinical Features of Injuries to the Semilunar Cartilages*, in *Disorders of the Knee* 110 (Arthur J. Helfet ed., 2d ed. 1982). However, the procedure may result in complications such as reflex sympathetic dystrophy, which can produce loss of motion. See Robert H. Miller, III, *Knee Injuries*, in 2 *Campbell's Operative Orthopedics* 1146 (S. Terry Canale ed., 9th ed. 1998). Therefore, limitation of motion is a relevant consideration under DC 5259, and the provisions of sections 4.40 and 4.45 must be considered.

10. DC 5284 is a more general diagnostic code under which a variety of foot injuries may be rated. Trauma to the foot may involve the forefoot and toes, the talus and midfoot, and the os calcis and heel cord. See generally 2 *Disorders of the Foot* 1449-1542 (Melvin H. Jahss ed., 1982). Some of these injuries may affect range of motion. Fractures and dislocations, for example, may limit motion in the subtalar, midtarsal, and metatarsophalangeal joints. See Jesse C. DeLee, *Fractures and dislocations of the foot*, in 2 *Surgery of the Foot* 592 (Roger A. Mann ed., 5th ed. 1986). These joints are important to the biomechanics of the foot. See generally Roger A. Mann, *Biomechanics of the foot and ankle*, in 2 *Surgery of the Foot* 12-18. Other injuries may not affect range of motion, however. Thus, the nature of the particular injury determines whether limitation of motion is involved under DC 5284.

HELD:

1. For a knee disability rated under DC 5257 to warrant a separate rating for arthritis based on X-ray findings and limitation of motion, limitation of motion under DC 5260 or DC 5261 need not be compensable but must at least meet the criteria for a zero-percent rating. A separate rating for arthritis could also be based on X-ray findings and painful motion under 38 C.F.R. § 4.59.

2. The provisions of 38 C.F.R. §§ 4.40, 4.45, and 4.59 must be considered in assigning an evaluation for degenerative or traumatic arthritis under DC 5003 or DC 5010. Rating personnel must consider functional loss and clearly explain the impact of pain upon the disability.

3. If a musculoskeletal disability is rated under a specific diagnostic code that does not involve limitation of motion and another diagnostic code based on limitation of motion may be applicable, the latter diagnostic code must be considered in light of sections 4.40, 4.45, and 4.59.

4. The medical nature of the particular disability to be rated under a given diagnostic code determines whether the diagnostic code is predicated on loss of range of motion. Reference should be made to appropriate medical authorities.

5. DC 5259 requires consideration of sections 4.40 and 4.45 because removal of the semilunar cartilage may result in complications producing loss of motion. Depending on the nature of the foot injury, DC 5284 may involve limitation of motion and therefore require consideration under sections 4.40 and 4.45.

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