

Date: July 1, 1997

VAOPGCPREC 23-97

From: General Counsel (022)

Subj: Multiple Ratings for Knee Disability

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

QUESTION PRESENTED:

Where a claimant has arthritis and instability of the knee, does 38 C.F.R. § 4.71a authorize multiple ratings under diagnostic codes 5003 and 5257?

COMMENTS:

1. This question arises in three cases currently before the Board of Veterans' Appeals (Board) on remand from the United States Court of Veterans Appeals (CVA or court). In two of the appeals, the claimant is rated for instability of the knee under 38 C.F.R. § 4.71a, diagnostic code (DC) 5257, and seeks separate evaluation for arthritis under 38 C.F.R. § 4.71a, DC 5003 (degenerative arthritis) or 5010 (traumatic arthritis, based on the rating criteria under DC 5003). The claimant in the third case is rated "under diagnostic codes 5003-5257 for mild degenerative joint disease, left knee, status post left fibular head [re]section." In *McAdory v. Brown*, No. 96-1172, slip op. at 3 (Vet. App. May 2, 1997), the CVA has directed the Board to consider whether symptomatology for a rating under DC 5257 is duplicative or overlapping with the symptomatology for a rating under DC 5010 and 5003. We know of no formal position taken by the Veterans Benefits Administration on this issue.

2. DC 5257 provides for evaluation of instability of the knee without reference to limitation of motion. The terms of DC 5003, on the other hand, refer not to instability but to X-ray findings and limitation of motion "under the appropriate diagnostic codes for the specific joint or joints involved (DC 5200 etc.)." The reference to "DC 5200 etc." associates DC 5003 with the diagnostic codes involving limitation of motion. Since DC 5257 is not among those codes, it is not thereby associated with DC 5003. Thus, DC 5003 does not appear to allow consideration of instability in the evaluation of arthritis. Although a diagnostic code for a given disability need not include an exhaustive

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list of symptomatology, the use of unspecified criteria for rating purposes could produce inconsistent evaluations due to lack of guidance to rating personnel. Moreover, it can be argued that the inclusion of such symptomatology in a diagnostic code tends to negate any implication that, although unspecified, it is also for consideration in another diagnostic code.

3. The provisions of 38 C.F.R. § 4.14 prohibit the "evaluation of the same disability under various diagnoses [T]he evaluation of the same *manifestation* under different diagnoses [is] to be avoided" (emphasis added). See also 58 Fed. Reg. 4962, 4965 (1993) (preamble to proposed schedule for rating respiratory disabilities) (" . . . separate evaluation of disorders having the same disabling *manifestations* is prohibited as 'pyramiding' under § 4.14"); 57 Fed. Reg. 10,134, 10,135 (1992) (preamble to schedule for rating HIV-related illnesses) ("As a general rating principle, the practice of evaluating *one aspect of a disability* under more than one diagnostic code is prohibited") (emphasis added). Since the plain terms of DC 5257 and 5003 suggest that those codes apply either to different disabilities or to different manifestations of the same disability, the evaluation of knee dysfunction under both codes would not amount to pyramiding under section 4.14.

4. CVA precedent supports the availability of separate ratings under DC 5257 and DC 5003. In *Esteban v. Brown*, 6 Vet. App. 259, 261-62 (1994), the CVA held that residuals of injury to the face should be rated separately under DC 7800 (disfigurement), DC 7804 (painful scars), and DC 5325 (facial muscle damage) because "none of the symptomatology for any one of these three conditions is *duplicative* of or *overlapping* with the symptomatology of the other two conditions."

5. Of course, a separate rating must be based upon additional disability. When a knee disorder is already rated under DC 5257, the veteran must also have limitation of motion under DC 5260 or DC 5261 in order to obtain a separate rating for arthritis. If the veteran does not at least meet the criteria for a zero-percent rating under either of those codes, there is no additional disability for which a rating may be assigned. Cf. *Degmetich v. Brown*, 104 F.3d 1328, 1331 (Fed. Cir. 1997) (assignment of zero-percent

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ratings is consistent with requirement that service con-

nection may be granted only in cases of currently existing disability). Where additional disability is shown, however, a veteran rated under DC 5257 can also be compensated under DC 5003 and vice versa.

HELD:

A claimant who has arthritis and instability of the knee may be rated separately under diagnostic codes 5003 and 5257.

Mary Lou Keener