

**Department of
Veterans Affairs**

Memorandum

Date: June 23, 2006

VAOPGCPREC 3-2006

From: General Counsel (022)

Subj: Multiple Ratings under Former 38 C.F.R. § 4.71a, Diagnostic Code 5285 (2003)

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

QUESTION PRESENTED:

Does former 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5285 (2003), authorize a single 10-percent additional disability rating based on demonstrable deformity of a vertebral body, or does DC 5285 permit multiple 10-percent additional ratings for multiple deformed vertebrae?

DISCUSSION:

1. Former 38 C.F.R. § 4.71a, DC 5285 (2003),¹ provided the schedule of ratings for "Vertebra, fracture of, residuals." Diagnostic Code 5285 prescribed a 100-percent rating for vertebral fracture residuals "[w]ith cord involvement, bedridden, or requiring long leg braces," and a 60-percent rating for residuals "[w]ithout cord involvement; abnormal mobility requiring neck brace." The schedule further stated, "[i]n other cases[,] rate in accordance with definite limited motion or muscle spasm, adding 10 percent for demonstrable deformity of vertebral body." In other words, a veteran who does not meet the schedular criteria for a 100- or 60-percent rating must be evaluated using the schedular criteria set forth under other diagnostic codes for evaluating limited motion or

¹ In this opinion, all references to 38 C.F.R. § 4.71a and diagnostic codes are to the 2003 version of the U.S. Code of Federal Regulations. The regulation has since been amended and DC 5285 removed. 68 Fed. Reg. 51454 (Aug. 27, 2003). Pursuant to VAOPGCPREC 7-2003 and VAOPGCPREC 3-2000, the former criteria may be applied to rating periods predating the effective date of the regulatory revision. We were not asked to decide whether the former criteria apply to the particular veteran's case referenced in the opinion request, and we express no view on that issue.

muscle spasm affecting the spine.² An additional 10 percent may be added to that evaluation if the veteran also suffers “demonstrable deformity of vertebral body.” For ease of reference, we will call this last provision the “10-percent provision.”

2. This opinion was requested in connection with a veteran who suffered an in-service injury to the spine and suffers limited spine mobility. There is no spinal cord involvement and the veteran is not required to wear a neck brace. Thus, the veteran does not meet the DC 5285 criteria for a 100- or 60-percent rating and has been rated in accordance with limited motion. At least two of the veteran’s lumbar vertebrae appear to be demonstrably deformed. The opinion request asks whether the rating assigned in accordance with definite limited motion may be increased by 10 percent for each demonstrably deformed vertebral body or is subject to only one 10-percent increase irrespective of the number of deformed vertebral bodies.

3. A “vertebral body” is “the main portion of a vertebra anterior to the vertebral canal, as distinct from the arches.” Stedman’s Medical Dictionary 221 (27th ed. 2000). Thus, a vertebral body is part of a single vertebra. Although DC 5285 does not refer to “demonstrable deformity of vertebral bodies,” it also does not otherwise modify “demonstrable deformity of vertebral body.” In other words, the regulation does not say that VA will add “10 percent for each demonstrable deformity of vertebral body.” Nor does the regulation say that the 10-percent addition applies “for every demonstrable deformity of vertebral body.” Herein lies the ambiguity in the 10-percent provision.

4. The 10-percent provision appeared in the 1945 Rating Schedule in essentially the same form that it appeared in 38 C.F.R. § 4.71a (2003). Therefore, the provision predates the Administrative Procedure Act, 5 U.S.C. § 553, and we are not aware of any contemporaneous documents explaining VA’s intent when it promulgated the 10-percent provision. However, a November 28, 1955, letter from the Deputy Administrator for Veterans Benefits, in response to an inquiry from the Office of the Judge Advocate General of the Navy, stated that, “under Diagnostic Code 5285 not more than one 10 percent (10%) will be allowed for each segment of the spine involved.” A September 23, 1959, letter from the Acting Assistant Deputy Administrator for Compensation and Pension to the Navy Physical Review Council similarly interpreted the rating schedule, stating that “an additional 10% may be allowed for demonstrable deformity or deformities in each of the segments involved but not more than 10% for each segment.” These letters reflect the view that, if VA assigns separate ratings under DC 5290 through 5292 for limitation of motion in more than one of the three spinal

² Former diagnostic codes 5290-5292 (2003) prescribed ratings for limitation of motion of the cervical, dorsal, and lumbar regions of the spine. Former diagnostic code 5295 (2003) prescribed a 20-percent rating for lumbosacral strain with muscle spasm on extreme forward bending.

segments (cervical, dorsal, and lumbar), the rating for each segment may be increased by 10% if there is definite deformity of a vertebral body or bodies in that segment. However, under this view, no more than one 10-percent increase may be assigned for each segment. Further, a note to DC 5285 provided that, “under ankylosis and limited motion, ratings should not be assigned for more than one segment by reason of involvement of only the first or last vertebrae of an adjacent segment.” Based on this provision, the November 1955 letter indicated that only one 10-percent increase would apply in a case involving demonstrable deformity of the last vertebra of one spinal segment and the first vertebra of an adjacent segment.

5. Until December 13, 2005,³ the Veterans Benefits Administration (VBA) Adjudication Procedures Manual M21-1, Part VI, 11.06f, stated:

If there is any limitation of motion together with deformity (compensable or noncompensable), add 10 percent under hyphenated diagnostic code 5285-5290 (limited motion of the cervical spine), 5285-5291 (limited motion dorsal spine), or 5285-5292 (limited motion lumbar spine). Whenever there is muscle spasm together with deformity and the requirements for a compensable evaluation under diagnostic code 5295 are met, add 10 percent to the assigned evaluation under diagnostic code 5285-5295.

This provision is consistent with the view that a maximum increase of 10 percent for vertebral deformity may be added to the rating assigned to a spinal segment based on limited motion or muscle spasm. Although the Manual M21-1 does not contain substantive rules subject to public notice and comment, it provides institutional guidance to VBA’s adjudicators as to the interpretation and application of VA’s regulations. Indeed, in the veteran’s case discussed in the opinion request, the regional office applied the 10-percent provision only once, consistent with the interpretation discussed above.

6. VBA’s apparent historical interpretation of DC 5285 is reasonable and consistent with the language of that provision. It cannot be said that the plain language of the 10-percent provision compels the addition of more than 10 percent based on multiple deformed vertebral bodies located within the same segment of the spine. Moreover, multiple applications of the 10-percent provision to a single segment of the spine could create odd and seemingly unintended disparities in ratings under DC 5285. DC 5285 provides for 100-percent and 60-percent ratings that are not subject to the 10-percent provision. However, if the disability does not warrant those ratings, DC 5285

³ The Manual M21-1 no longer provides guidance as to the regular application of DC 5285 because, as noted in footnote 1, DC 5285 has been removed from the rating schedule.

provides for ratings based on limitation of motion or muscle spasm, subject to the 10-percent provision. Under DCs 5290-5292 and 5295, those ratings range from 0 to 40 percent and are thus significantly lower than the 100- and 60-percent ratings. If VA were to apply the 10-percent provision multiple times in one case, a veteran could receive a higher rating for a spine fracture residual under the alternate criteria than a veteran whose spine fracture residual meets the schedular criteria established for the 60-percent rating, even if both veterans had an equal number of demonstrably deformed vertebral bodies. If VA had intended deformed vertebral bodies to be such a significant component of the disability rating, the DC 5285 schedular criteria likely would have specifically included deformed vertebral bodies as a primary rating criterion, rather than merely allowing the condition to be considered in connection with a limitation of motion disability and, moreover, likely would have made that criterion applicable to all veterans rated under DC 5285.

7. Multiple 10-percent increases also could be viewed as inconsistent with the statutory purpose of VA disability ratings, which “shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations.” 38 U.S.C. § 1155. If such multiple increases were assigned, a veteran with merely moderate or slight limitation of spinal motion could receive a significantly higher rating, based simply on the number of deformed vertebral bodies, than a veteran with severe limitation of spinal motion or a veteran with abnormal mobility who must wear a neck brace. VBA’s apparent historical interpretation of DC 5285 suggests the seemingly reasonable view that multiple deformities of vertebral bodies do not contribute to impairment of earning capacity to such an extent.

8. Because VA has in the past interpreted the 10-percent provision in DC 5285 in a reasonable manner that is consistent with the language of that provision and with the terms and purpose of the rating schedule as a whole, we believe that interpretation is valid and authoritative. Accordingly, we conclude that DC 5285 authorizes no more than one 10-percent increase for demonstrable deformity of a vertebral body or bodies in each spinal segment.

9. Although the issue is not specifically raised by the question and facts presented by the instant opinion request, we note that, under VBA’s apparent historical interpretation, the 10-percent provision could be applied more than once if the veteran suffers limited motion and vertebral deformity in more than one segment of his spine. The schedule provides separate ratings for the cervical, lumbar, and dorsal segments of the spine and contemplates multiple ratings for a limitation of motion disability if more than the first or last vertebra of an adjacent segment is affected. See DC 5285, Note (separate ratings based on limited motion “should not be assigned for more than one segment by reason of involvement of only the first or last vertebrae of an adjacent segment”). If there is but one rating provided for limitation on range of motion, DC 5285, as historically interpreted and applied by VA, authorizes but one 10-percent increase to that

rating based on demonstrable deformity of vertebral body. However, if more than one segment of the spine is ratable under DCs 5290-5292, 10 percent may be added to the rating assigned to each segment that involves demonstrable deformity of vertebral body, subject to the limitation stated in the note to DC 5285. The application of DC 5285 in this manner would be reasonable because such application is consistent with the general rating policy reflected in the rating schedule of providing separate disability ratings for each segment of the spine.

HELD:

Where residuals of vertebral fracture are rated based on limited motion or muscle spasm, former 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5285 (2003), authorizes no more than a single 10-percent increase for demonstrable deformity of a vertebral body or vertebral bodies in the spinal segment (cervical, dorsal, or lumbar) that is the subject of the rating. Where spine fracture residuals cause limited motion to more than one spinal segment and DC 5285 permits separate ratings for each segment, DC 5285 authorizes a 10-percent increase to the rating assigned to each segment of the spine containing at least one demonstrably deformed vertebral body.

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