

Date: February 24, 1994

O.G.C. Precedent 6-94

From: General Counsel (022)

Subj: Application of Former Rating Schedule Provisions Governing  
Loss of Part of Skull -- Diagnostic Code 5296

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

QUESTIONS PRESENTED:

- a. Prior to March 10, 1976, did Diagnostic Code 5296 contain a system for rating skull loss under which single skull holes were rated exclusively by comparison to coin size and multiple skull holes were rated exclusively based on reference to a specified area in square inches?
- b. If so, what was the rationale for such a system and was it legally supportable?

COMMENTS:

1. You have requested our views regarding the application of rating criteria formerly in Diagnostic Code (DC) 5296 for "[s]kull, loss of part of, both inner and outer tables." The 1945 Schedule for Rating Disabilities provided the following percentage rating criteria in DC 5296:

Skull, loss of part of, both inner and outer tables	
With brain hernia .....	80
Without brain hernia	
Area larger than 2 square inches, or than size of a 50-cent piece.....	50
Area intermediate.....	30
Area smaller than 1 square inch, or than the size of a 25-cent piece.....	10

These criteria were codified at 38 C.F.R. § 4.71a. The face of a 50-cent piece has an area of 1.140 square inches, and the face of a 25-cent piece has an area of 0.716 square inches. Thus, these former provisions of DC 5296 appear to have established two different criteria for entitlement to a 50-percent rating (2 square inches and 1.140 square

inches) and two different criteria for entitlement to a 30-percent rating (1 square inch and 0.716 square inches).

2. Effective March 10, 1976, DC 5296 was revised without explanation to remove the 2-square-inch and 1-square-inch criteria and to provide that ratings for skull loss would be determined solely by reference to the sizes and areas of the 50-cent piece and 25-cent piece. 41 Fed. Reg. 11,291, 11,296 (1976). The amended diagnostic code provides for a 50-percent rating where the area of skull loss is "larger than size of a 50-cent piece or 1.140 in<sup>2</sup> (7.355 cm<sup>2</sup>)," a 30-percent rating for "[a]rea intermediate," and a 10-percent rating for "[a]rea smaller than the size of a 25-cent piece or 0.716 in<sup>2</sup> (4.619 cm<sup>2</sup>)."

3. In the case giving rise to this request for an opinion, the veteran was found to have three separate areas of skull loss, each of which was smaller than a 50-cent piece. The aggregate area of the three holes was greater than the area of a 50-cent piece but less than 2 square inches. The veteran asserted entitlement to a 50-percent rating retroactive to 1950, when a 30-percent rating was originally assigned, because the aggregate area of skull loss was greater than the size of a 50-cent piece. In its May 6, 1992, decision denying the claim for an increased rating, the Board of Veterans' Appeals (BVA) section indicated that the plain meaning of the pre-1976 criteria in DC 5296 would apparently require a 50-percent rating if the area of skull loss was greater than either 2 square inches or 1.140 square inches (the size of a 50-cent piece). The Board section noted that such a result would be contrary to established principles of statutory and regulatory construction because it would render superfluous the 2-square inch criterion. The section therefore concluded that DC 5296 had established a bifurcated system for rating skull loss under which a 50-percent rating could be awarded for a single area of skull loss greater than the size of a 50-cent piece or for two or more areas of skull loss having an aggregate area of more than 2 square inches. The section stated that it is reasonable to conclude that a single larger area of skull loss would be more disabling than two or more separate

smaller areas of skull loss having the same aggregate area as the larger one.

4. The request for opinion refers to a second BVA decision, decided by a different Board section, in which a veteran was found to have a single area of skull loss that was larger than the size of a 25-cent piece but less than 1 square inch. The veteran asserted entitlement to a 30-percent rating retroactive to 1947, the date of the original claim. In its July 21, 1992, decision granting the claimed benefits, the BVA section concluded that the pre-1976 version of DC 5296 by its terms established entitlement to a 30-percent rating where the total amount of skull loss was either greater than 1 square inch or greater than 0.716 square inches (the size of a 25-cent piece). The Board section stated that the pre-1976 rating criteria reflected the long-held, but erroneous, assumption that a 25-cent piece was one square inch in size and a 50-cent piece was 2 square inches in size. The section's conclusion was, therefore, based on a determination that the pre-1976 version of DC 5296 had tried, but failed, to establish a single criterion governing entitlement to a 30-percent rating and a single criterion governing entitlement to a 50-percent rating.

5. Nothing in the language or history of DC 5296 indicates whether it was intended to establish a single criterion for each percentage rating for skull loss or two distinct criteria. In the original VA rating schedule, promulgated in 1933, Diagnostic Code 1833 provided for a 10-percent rating for skull loss of "1 square inch, or size of 25-cent piece" and a 25-percent rating (changed to 30 percent in the second edition of the 1933 schedule) for "[l]arger areas without hernia." That rating code provision did not contain a 2-square-inch or 50-cent-piece criterion. Prior rating schedules employed by the Veterans' Bureau rated skull loss solely on the basis of square inches of loss, with no reference to 25 or 50-cent pieces. The 2-square-inch and 50-cent-piece criteria were added under DC 5296 in the 1945 rating schedule. That provision remained in effect without change until 1976. Our research has revealed no authoritative explanations or interpretations of these rating criteria.

6. In the absence of any authoritative guidance as to the meaning of the rating criteria in former DC 5296, those provisions must be interpreted in accordance with established standards of statutory and regulatory construction. See Rucker v. Wabash R.R., 418 F.2d 146, 149 (7th Cir. 1969) (same rules of interpretation apply to both statutes and regulations). The starting point of this inquiry is the language of the provision. If the plain meaning of the language used is clear, then that meaning is controlling. West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991). However, we do not believe that the former language of DC 5296 evinces a plain meaning. That language provides for a 50-percent rating for skull loss having an "[a]rea larger than 2 square inches, or than size of a 50-cent piece." That language does not clearly indicate whether former DC 5296 was intended to establish a single criterion or two separate criteria for a 50-percent rating. The word "or" is generally used in the disjunctive sense, to indicate alternatives. See, e.g., American Ins. Co. v. First National Bank, 409 F.2d 1387, 1390 (8th Cir. 1969). In this sense, the language at issue could be read as establishing entitlement to a 50-percent rating if a claimant satisfies either the 2-square-inch or the 50-cent-piece requirement. However, "or" is also commonly used to mean "to wit" or "that is to say," indicating an alternative term for the same criterion. Black's Law Dictionary 1095 (6th ed. 1990). In this sense, the language could be read as an attempt to establish a single criterion for a 50-percent rating and provide alternative descriptions of that criterion. In light of these two distinct and common uses of the term "or," we cannot conclude that the terms of former DC 5296 are unambiguous on their face.

7. If the term "or" in former DC 5296 was intended to mean "to wit," then the provision would be based on the mistaken assumption that the area of a 25-cent piece is 1 square inch and the area of a 50-cent piece is 2 square inches. This would be a mistake of significant magnitude, inasmuch as the

area of a 50-cent piece (1.140 square inches) is substantially less than 2 square inches and the area of a 25-cent piece (0.716 square inches) is substantially less than 1 square inch. We have found no evidence that the regulation was based on such an erroneous assumption. In the absence of any such evidence, we may not base our interpretation of former DC 5296 on the mere speculation that the Administrator of Veterans' Affairs, in promulgating a rating schedule of specific diagnostic guidelines and measurements, made such an erroneous factual assumption and failed to subject it to the most rudimentary of proofs, cf. United States v. Ingersoll-Rand Co., 320 F.2d 509, 514 (3d Cir. 1963) ("we may not assume that Congress committed an inadvertent error"); United States v. Blake, 751 F. Supp. 951, 952 (W.D. Ok. 1990) ("Court will not presume Congress made a mistake"), particularly if there is another permissible interpretation of the regulatory provision which would lead to a different conclusion. Further, we cannot conclude that the Administrator made such a significant error on two separate occasions -- first in 1933 in establishing the 1-square-inch and 25-cent-piece criteria, and again in 1945 in continuing those criteria and establishing the 2-square-inch and 50-cent-piece criteria. Accordingly, we must conclude that the term "or" was used in the disjunctive sense in the pre-1976 version of DC 5296 and that the references to square inches and coins were intended to establish separate criteria for determining entitlement to particular ratings for skull loss.

8. Having concluded that former DC 5296 established dual bases for rating partial skull loss at the 30 and 50-percent levels, we must determine how those dual bases are to be applied. The diagnostic code does not explain whether both are applicable to all skull-loss claims or whether each is applicable to a particular type of skull-loss claim. The criteria could be construed as merely establishing, with respect to each rating under former DC 5296, two different aggregate skull-loss area amounts which will satisfy the rating requirements. Under that interpretation, a veteran would be entitled to a 50-percent rating if he or she had an aggregate skull loss of more than 1.140 square inches (the facial surface area of a 50-cent piece) or 2 square inches. Likewise, a veteran would be entitled to a 30-percent rating

if he or she had an aggregate skull loss greater than 0.716 square inches (the facial surface area of a 25-cent piece) or 1 square inch.

9. However, construing former DC 5296 as establishing two separate and alternative aggregate area requirements for each rating would render the 1 and 2-square-inch criteria meaningless. The threshold levels of 0.716 aggregate square inches for a 30-percent rating and 1.140 aggregate square inches for a 50-percent rating would wholly subsume the

1 and 2-square-inch requirements, respectively. "Of course, in the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided." Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976); see also Black & Decker Corp. v. Commissioner, 986 F.2d 60, 65 (4th Cir. 1993). Accordingly, regulations must be construed, if possible, so as to give effect to all of their provisions. See Jay v. Boyd, 351 U.S. 345, 360 (1956); McCuin v. Secretary of Health and Human Services, 817 F.2d 161, 168 (1st Cir. 1987). Therefore, we must determine whether there is a reasonable alternative interpretation that is consistent with the language of DC 5296 and does not render meaningless a part of that regulation.

10. The pre-1976 version of DC 5296 can reasonably be construed as establishing a bifurcated system for adjudicating partial skull-loss claims, whereby a claimant is entitled to a 30-percent rating if he or she has a single area of skull loss greater than the size of a 25-cent piece or two or more areas of skull loss aggregating more than 1 square inch. In like manner, the provision governing assignment of a 50-percent rating can reasonably be construed as providing that a claimant is entitled to a 50-percent rating if he or she has a single area of skull loss greater than the size of a 50-cent piece or two or more areas of skull loss aggregating more than 2 square inches. This interpretation is suggested by the language of former DC 5296, which states that a 50-percent rating is warranted for an "[a]rea" of skull loss that is larger than 2 square inches or larger than the "size" of a 50-cent piece and that a 30-percent

rating is warranted for an "[a]rea" of skull loss that is larger than 1 square inch or larger than the "size" of a 25-cent piece. "Area" may be defined as "any particular extent of space or surface," Webster's Third New International Dictionary 115 (1976), and, when used in connection with a reference to square inches, suggests any grouping aggregating to that degree. The term "size," however, refers to "the actual, characteristic, normal, or relative proportion of a thing." Id. at 2130. By using the term "size," which generally is used in connection with a distinct entity or thing, and referring to a specific entity, a coin, the terms chosen suggest an intention to provide a measurement applicable to a distinct skull-loss injury, rather than the aggregate area of skull loss suffered from a group of injuries. A collection of separate and noncontiguous areas may be considered to have a single aggregate surface area, but generally would not be defined with reference to a single, identifiable entity, i.e., a coin of a particular size.

11. Pursuant to the above interpretation, the pre-1976 version of DC 5296 may be read to provide two alternate modes of skull-loss measurement for rating purposes, permitting a rating to be based either on the aggregate area of skull loss due to separate areas of loss, or on the "size" of a single area of skull loss. This is not the only possible interpretation which the regulatory language will support. However, it is the only permissible interpretation which does not render any part of the regulation superfluous and does not compel the disfavored assumption that the regulation was based on significant mistakes of fact. Accordingly, interpreting former DC 5296 to give effect to all of its provisions, we conclude that, prior to the 1976 revision, DC 5296 established two separate bases for ratings based on skull loss, under which a rating could be assigned based on either the total aggregate area of skull loss, with reference to the 1 and 2-square inch standards, or on the size of a single area of skull loss, with reference to the 25 and 50-cent-piece standards.

12. Because we have found no official explanation or interpretation of the prior provisions of DC 5296, we are unable to determine the precise rationale for establishing such a bifurcated system of evaluation of skull-loss claims. Under Veterans' Regulation No. 3(a), para. I, approved by the President on June 6, 1933, and later codified at former 38 U.S.C. § 355 (now § 1155), the Administrator of Veterans' Affairs was authorized to adopt a schedule of ratings of disabilities to be based, as far as practicable, upon the average impairments of earning capacity resulting from such disabilities in civilian occupations. Because ratings are required to be based on average impairment in earning capacity, those regulatory criteria would necessarily be based upon a finding that a single area of skull loss greater than the size of a 50-cent piece constitutes a greater impairment in earning capacity than do two or more smaller areas whose aggregate area does not exceed 2 square inches. Given the scope of the Administrator's discretion to establish a rating schedule, we are not aware of any reason to conclude that the Administrator's determination in this instance was unreasonable or that the prior provisions of DC 5296 were unlawful.

HELD:

a. Former Diagnostic Code 5296, as in effect prior to March 10, 1976, established a bifurcated system of assigning disability ratings for partial skull loss, under which ratings could be assigned either on the basis of the aggregate of two or more areas of skull loss or on the size of a single area of skull loss. Prior to the 1976 revision, this diagnostic code provided for assignment of a 50-percent rating where: (1) there were two or more areas of skull loss whose aggregate area exceeded 2 square inches, or (2) there was a single area of skull loss which was greater in size than a 50-cent piece. Similarly, the prior provisions of the diagnostic code provided a 30-percent rating where: (1) there were two or more areas of skull loss whose aggregate area exceeded 1 square inch, or (2) there was a single area of skull loss which was greater in size than a 25-cent piece.



b. The establishment of such rating criteria necessarily implies a finding that a single area of skull loss greater than a specified size was considered to represent a greater impairment of earning capacity than two or more smaller areas having a greater aggregate area. We cannot conclude that establishment of such criteria was outside the scope of the Administrator of Veterans' Affairs' discretion under statutory provisions authorizing establishment of a rating schedule.

Mary Lou Keener