

Date: December 12, 1997

VAOPGCPREC 36-97

From: Acting General Counsel (022)

Subj: Applicability of 38 C.F.R. §§ 4.40, 4.45, and 3.321(b)(1) in Rating Disability Under Diagnostic Code 5293 (Intervertebral Disc Syndrome)

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

QUESTIONS PRESENTED:

a. Whether Diagnostic Code (DC) 5293, intervertebral disc syndrome (IDS), is based upon loss of range of motion, and therefore whether 38 C.F.R. §§ 4.40 and 4.45 are applicable in determining the extent of a veteran's disability due to IDS.

b. Whether 38 C.F.R. §§ 4.40 and 4.45 must be considered where a veteran receives less than the maximum schedular rating under DC 5293, but that rating corresponds to the maximum schedular rating under another diagnostic code pertaining to limitation of motion.

c. Whether 38 C.F.R. § 3.321(b) must be considered when a veteran receives less than the maximum rating under DC 5293, irrespective of whether 38 C.F.R. §§ 4.40 and 4.45 must be applied in such a case.

COMMENTS:

Section 4.40 of title 38, Code of Federal Regulations, 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." Section 4.40 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) of title 38, Code of Federal Regulations, states that "[p]ain on movement" is a relevant consideration for determinations of joint disabilities. Section 4.45(f) also states that the cervical, dorsal, and lumbar vertebrae are considered groups of minor joints, and, in particular, the "lumbosacral articulation and both sacroiliac joints are considered to be a group of minor joints, ratable on disturbance of lumbar spine functions." In *Johnson v. Brown*, 9 Vet. App. 7, 11 (1996), the

Court of Veterans Appeals (CVA) held that, since DC 5257, under which the veteran's subluxation of the knee was

<Page 2>

rated, is not predicated on loss of range of motion, 38 C.F.R. §§ 4.40 and 4.45, with respect to pain, are not applicable.¹ In light of this decision, the question has arisen whether DC 5293 is based upon limitation of range of motion and therefore whether 38 C.F.R. §§ 4.40 and 4.45 must be considered when a veteran's back disability is rated under DC 5293.

2. DC 5293, codified at 38 C.F.R. § 4.71a, describes disability due to IDS in terms of "symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable

¹ We question the CVA's apparent conclusion in *Johnson*, 9 Vet. App. at 11, that 38 C.F.R. §§ 4.40 and 4.45 are not applicable to ratings under DC 5257, which governs evaluation of recurrent subluxation or lateral instability of the knee. Authorities indicate that subluxation, which means an incomplete or partial dislocation, may result in abnormal motion of the knee. The Sloane-Dorland Annotated Medical-Legal Dictionary 492 (Supp. 1992); *Fabing v. United States*, 18 Cl. Ct. 769, 771 (1989). Both sections 4.40 and 4.45 refer to interference with normal movements due to a disabling condition. A single-judge opinion, *Green v. Gober*, No. 95-865, 1997 WL 469371 (Vet. App. Aug. 8, 1997), issued subsequent to *Johnson* by a member of the panel which decided *Johnson*, appears to reach a contrary conclusion regarding the applicability of sections 4.40 and 4.45 to ratings under DC 5257.

We also note that other CVA cases involving application of sections 4.40 and 4.45 to disabilities of the musculoskeletal system have not indicated that these sections are only applicable when a diagnostic code is based upon loss of range of motion. *Spurgeon v. Brown*, 10 Vet. App. at 196; *Moore v. Brown*, 8 Vet. App. 214, 1995 WL 510117 at **5 (Vet. App. Aug. 15, 1995) (single-judge decision); *Ferraro v. Derwinski*, 1 Vet. App. 326, 330 (1991). We will assume for purposes of this opinion that, as indicated in *Johnson*, 38 C.F.R. §§ 4.40 and 4.45 only apply to diagnostic codes involving loss of range of motion.

muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc." ² Dorland's <Page 3>

Illustrated Medical Dictionary 1493, 1132 (28th ed. 1994), defines "sciatic" as "pertaining to or located near the sciatic nerve or vein," and "neuropathy" as a "functional disturbance or pathological change in the peripheral nervous system." The clinical features of sciatic neuropathy include lower leg and hamstring weakness, flail foot, loss of ability to flex and extend the foot at the ankle, loss of flexion and extension of the toes, and loss of inversion and eversion of the foot. John Gilroy, M.D., *Basic Neurology* 370 (2d ed. 1990); Arthur K. Asbury, *Diseases of the Peripheral Nervous System*, in 2 *Harrison's Principles of Internal Medicine* 2377 (Kurt J. Isselbacher, M.D. et al. eds., 13th ed. 1994). As a result, a patient may have difficulty walking on his or her heels and the patient's feet may slap when walking. Arthur K. Asbury, *Diseases of the Peripheral Nervous System* at 2376. In addition, sciatica, which refers to pain radiating along the course of the sciatic nerve, most often down the buttock and posterior aspect of the leg to below the knee, may result in motor deficits. See *The Merck Manual* 1363, 1515-16 (16th ed. 1992).

3. The above-referenced authorities indicate that a veteran diagnosed with IDS may suffer a loss of range of motion of the cervical, thoracic, or lumbar vertebrae as a result of pain in the hip or back associated with injury to the sciatic nerve. See also *DeLuca v. Brown*, 8 Vet. App. 202, 205 (1995) (range of motion can be affected by pain); *Ferraro*, 1 Vet. App. at 330 (examining doctor reported veteran suffering from IDS could not walk on his toes or heels or accomplish a deep knee bend because of "'marked low back pain'"). Further, several CVA decisions involving claim-

² VA has proposed to amend the evaluation criteria for DC 5293. 62 Fed. Reg. 8204 (1997). According to the Federal Register notice for the proposed rule, IDS "is a group of signs and symptoms due to nerve root irritation that commonly includes back pain and sciatica (pain along the course of the sciatic nerve) in the case of lumbar disc disease, and neck and arm or hand pain in the case of cervical disc disease. It may also include scoliosis, paravertebral muscle spasm, limitation of motion of the spine, tenderness over the spine, limitation of straight leg raising, and neurologic findings corresponding to the level of the disc." *Id.*

ants diagnosed with IDS indicate that the disability described in DC 5293 involves loss of range of motion. In *Moore*, 1995 WL 510117 at **5; *Clouatre v. Derwinski*, 2 Vet. App. 590, 591 (1992) (single-judge decision); and *Ferraro*, 1 Vet. App. at 330, where the veterans' disabilities were evaluated under DC 5293, the CVA remanded for the Board of Veterans' Appeals (BVA) to further address the veterans' limitation of motion due to pain and to apply section 4.40. Based on the nature of IDS and on the CVA decisions involving DC 5293, we

<Page 4>

conclude that DC 5293 involves loss of range of motion and therefore that, pursuant to *Johnson*, 38 C.F.R. §§ 4.40 and 4.45 should be applied when a veteran's disability is rated under this diagnostic code.

4. The second question presented pertains to *Johnston v. Brown*, 10 Vet. App. 80 (1997), in which the veteran's wrist injury had been evaluated by the BVA at 10% disabling under DC 5215 (limitation of motion of the wrist) and other diagnostic codes. The CVA stated that it was not appropriate to remand the case to consider functional loss due to pain because the veteran's 10% disability rating under DC 5215 was the maximum rating available for limitation of motion of the wrist. 10 Vet. App. at 84-85. This decision gives rise to the question whether 38 C.F.R. §§ 4.40 and 4.45 must be considered when a disability is evaluated at less than the maximum rating under DC 5293, but that rating is the maximum schedular rating under a related diagnostic code based upon limitation of motion. For example, a rating of 40% under DC 5293 is not the maximum schedular rating under that diagnostic code, but is the maximum rating under DC 5292, limitation of motion of the lumbar spine.

5. We believe that, in evaluating a veteran's disability under DC 5293 based upon symptomatology which includes limitation of motion, the rating schedule indicates that consideration must be given to 38 C.F.R. §§ 4.40 and 4.45, notwithstanding the maximum rating available under a different diagnostic code. Section 4.14 of title 38, Code of Federal Regulations, states that the evaluation of the same disability or manifestation under various diagnoses is to be avoided. See also VAOPGCPREC 23-97, para. 3. The CVA has also indicated that the same symptomatology for a particular condition should not be evaluated under more than one diagnostic code. *Esteban v. Brown*, 6 Vet. App. 259, 261-62 (1994). Section 4.7 of title 38, Code of Federal Regulations, states that, "[w]here there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating."

6. As discussed above, we have concluded that DC 5293 involves limitation of range of motion. Therefore, a veteran could not be rated under DC 5293 for IDS based upon limitation of motion, and also be rated under, for example, DC 5292, because to do so would constitute evaluation of an

identical manifestation of the same disability under two different diagnoses. In keeping with 38 C.F.R. § 4.7, the

<Page 5>

disability may be rated under the diagnostic code which produces the higher rating, if that diagnostic code better reflects the extent of the veteran's disability. Further, in considering a rating under DC 5293, the above discussion and the CVA's decisions in the cited cases indicate that 38 C.F.R. §§ 4.40 and 4.45 must be considered in determining a possible rating under DC 5293.

7. The CVA's decision in *Johnston* does not require a different result. In that case, the CVA found that the evidence did not support a rating under the diagnostic code, DC 5214, ankylosis of the wrist, under which a higher rating might have been assigned because medical examinations revealed no evidence of ankylosis. 10 Vet. App. at 84. The CVA therefore concluded that a remand was unnecessary because the claimant was already receiving the maximum available rating for limitation of motion. 10 Vet. App. at 84-85. In the situation presented in the request for opinion, a higher rating may potentially be available under DC 5293, if supported by the evidence. Accordingly, the fact that another diagnostic code provides a lower maximum rating for limitation of motion does not preclude consideration of DC 5293.

8. The third question presented pertains to the applicability of 38 C.F.R. § 3.321(b) when a veteran receives less than the maximum rating under DC 5293, even though that rating is the maximum schedular rating under a related diagnostic code based upon limitation of motion. Congress, in authorizing VA to establish a rating schedule, authorized consideration in rating decisions of factors affecting the individual, where necessary to reflect the true measure of disability. VAOPGCPREC 75-91 (O.G.C. Prec. 75-91), para. 5. Accordingly, VA has promulgated section 3.321(b)(1), which provides for assignment of an extra-schedular disability rating "commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities" in "exceptional cases" when the evaluations in VA's rating schedule are found to be inadequate to compensate for the average loss of earning capacity attributable to specific disabilities. According to section 3.321(b)(1), the "governing norm in these exceptional cases is: A finding that the

case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of regular schedular standards."

<Page 6>

9. Consideration of a claim under the rating schedule and 38 C.F.R. § 3.321(b)(1) are not mutually exclusive because there is a fundamental distinction between the rating schedule and section 3.321(b)(1). As we stated in VAOPGCPREC 6-96, the rating schedule is based upon the average impairment of earning capacity due to disease or injury, and application of the schedule recognizes that the rated disabilities interfere with employment. Section 3.321(b)(1) is "implied only where there is evidence that the disability picture presented by a veteran would, in the average case, produce impairment of earning capacity beyond that reflected in VA's rating schedule or would affect earning capacity in ways not addressed in the schedule." VAOPGCPREC 6-96, para. 8. Thus, section 3.321(b)(1) may be applicable when a veteran has not received the maximum evaluation under DC 5293, even though that rating is the maximum schedular rating under a diagnostic code based upon limitation of motion, if there is evidence of unusual circumstances. As we explained in VAOPGCPREC 6-96, para. 7, "if the schedular ratings for a musculoskeletal disability are based solely on range of motion, but the evidence indicates that the claimant's musculoskeletal disability impairs earning capacity by requiring frequent hospitalization or because medication required for that disability interferes with employment, it may be necessary to address section 3.321(b)(1)." In addition, a rating reflecting section 4.40, as it pertains to greater limitation of motion due to pain on use, or section 4.45, which requires inquiry into weakened movement, excess fatigability, incoordination, and pain on movement, in addition to limitation of motion, also does not take into account the possibility of unusual circumstances such as the effect of the need for hospitalization or medication on earning capacity. We therefore conclude that the BVA must address entitlement to an extra-schedular rating under 38 C.F.R. § 3.321(b)(1) if there is evidence of "exceptional or unusual" circumstances indicating that the rating schedule, including 38 C.F.R.

§§ 4.40, 4.45, and 4.71a, may be inadequate to compensate for the average impairment of earning capacity due to IDS.

HELD:

1. Diagnostic Code (DC) 5293, intervertebral disc syndrome (IDS), involves loss of range of motion because the nerve defects and resulting pain associated with injury to the sciatic nerve may cause limitation of motion of the cervical, thoracic, or lumbar vertebrae. Therefore, pursuant to *Johnson v. Brown*, 9 Vet. App. 7 (1996), 38 C.F.R. §§ 4.40

<Page 7>

and 4.45 must be considered when a disability is evaluated under this diagnostic code.

2. When a veteran has received less than the maximum evaluation under DC 5293 based upon symptomatology which includes limitation of motion, consideration must be given to the extent of the disability under 38 C.F.R. §§ 4.40 and 4.45, even though the rating corresponds to the maximum rating under another diagnostic code pertaining to limitation motion.

3. The BVA must address entitlement to an extraschedular rating under 38 C.F.R. § 3.321(b)(1) if there is evidence of "exceptional or unusual" circumstances indicating that the rating schedule, including 38 C.F.R. §§ 4.40, 4.45, and 4.71a, may be inadequate to compensate for the average impairment of earning capacity due to IDS, regardless of the fact that a veteran may have received the maximum schedular rating under a diagnostic code based upon limitation of motion.

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