

**Department of
Veterans Affairs**

Memorandum

Date: May 22, 2003 VAOPGCPREC 2-2003

From: General Counsel (022)

Subj: Request for Opinion--Application of 38 C.F.R. § 4.87, Diagnostic Code 6260,
Tinnitus Recurrent
XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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

QUESTIONS PRESENTED:

Whether Diagnostic Code (DC) 6260, as in effect prior to June 10, 1999, and as amended as of that date, authorizes a single 10% disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head, or whether separate disability ratings for tinnitus in each ear may be assigned under that or any other diagnostic code?

DISCUSSION:

1. Before 1999, the rating schedule authorized a 10% disability rating for tinnitus incurred as a result of trauma to the head. See generally 38 C.F.R. § 4.87a, DC 6260 (1998) (“Persistent as a symptom of head injury, concussion or acoustic trauma.”). At that time, manifestations of tinnitus that were not the result of head trauma could be rated in association with the underlying cause under the appropriate diagnostic code.¹ In 1999, the Rating Schedule was amended, 64 Fed. Reg. 25,202, 25,210 (1999), to provide service connection for “Tinnitus, recurrent,” regardless of its etiology. 38 C.F.R. § 4.87, DC 6260. Additionally, a note was added in the 1999 amendment instructing raters that: “A separate evaluation for tinnitus may be combined with an evaluation under diagnostic codes 6100, 6200, 6204, or other diagnostic code, except when tinnitus supports

¹ In Wanner v. Principi, 17 Vet. App. 4, 18 (2003), the CAVC invalidated the part of pre-1999 38 C.F.R. § 4.87a, DC 6260, that contained a trauma requirement for a 10% disability rating for tinnitus. As a result, the sole criterion remaining for that regulation was that the tinnitus be “[p]ersistent.” The CAVC did not reach the issue of whether a rating in excess of 10% could be provided for bilateral tinnitus under the modified regulation.

an evaluation under one of those diagnostic codes.” 38 C.F.R. § 4.87, DC 6260. Neither the prior nor the amended regulation contained any language suggesting that a separate tinnitus rating could be awarded for each ear, nor does any other rating schedule provision in effect prior to or after 1999 suggest that such separate ratings may be awarded. For example, 38 C.F.R. § 4.124a, DC 8046, has long provided that, for purposes of rating cerebral arteriosclerosis, “[p]urely subjective complaints such as headache, dizziness, tinnitus, insomnia and irritability . . . will be rated 10 percent and no more under diagnostic code 9305.” In such cases, the condition of tinnitus is taken into account as a rating factor which may give rise to a maximum 10% disability rating without regard to whether the condition is unilateral or bilateral in nature.

2. The Merck Manual states that tinnitus is the perception of sound in the absence of an acoustic stimulus. "The Merck Manual" 665 (17th ed. 1999). VA discussed the nature of tinnitus in a recent notice of proposed rulemaking concerning the rating schedule provision governing tinnitus, 67 Fed. Reg. 59,033 (2002), explaining that:

Tinnitus is classified either as subjective tinnitus (over 95% of cases) or objective tinnitus. In subjective or “true” tinnitus, the sound is audible only to the patient. In the much rarer objective tinnitus (sometimes called extrinsic tinnitus or “pseudo-tinnitus”), the sound is audible to other people, either simply by listening or with a stethoscope. Objective tinnitus commonly has a definite cause that generates the sound, such as vascular or muscular disorders. Objective tinnitus may also be due to such nonpathologic causes as noise from the temporomandibular joints, openings of the eustachian tubes, or repetitive muscle contractions.

Accordingly, objective tinnitus is properly evaluated as part of the underlying condition causing it.

3. The notice of proposed rulemaking went on to explain that:

True (subjective) tinnitus does not originate in the inner ear, although damage to the inner ear may be a precursor of subjective tinnitus. It is theorized that in true tinnitus the brain creates phantom sensations to replace missing inputs from the damaged inner ear, similar to the brain’s creation of phantom pain in amputated limbs (Diseases of the Ear, H. Ludman, and T. Wright, 6th ed., chapter 11; Phantom auditory perception (tinnitus): mechanisms of generation and perception, Neuroscience Research 8:221-2, P. Jasterboff, 1990; and Mechanisms of Tinnitus. Allyn and Bacon, 1995, J. Vernon and A. Moller (Eds.)). The Oregon Tinnitus Data Archive found in a study of 1630 individuals with tinnitus that 63% reported tinnitus in both ears and 11% reported it as filling the head. (<http://www.ohsu.edu/ohrc-otda/95-01/data/08.html>). Therefore, in the

great majority of cases, tinnitus is reported as either bilateral or undefined as to side.

True tinnitus, i.e., the perception of sound in the absence of an external stimulus, appears to arise from the brain rather than the ears.

67 Fed. Reg. at 59,033. As VA's notice of proposed rulemaking made clear, the perception of noise is the disability identified in true tinnitus, and the source of this perceived noise is not in either or both ears. The undifferentiated nature of the source of the noise that is tinnitus is the primary basis for VA's practice, as reflected in the notice of proposed rulemaking, of rating tinnitus as a single disease entity.

4. On May 14, 2003, VA published a final rule adding a note to DC 6260, directing raters to "[a]ssign only a single evaluation for recurrent tinnitus, whether the sound is perceived in one ear, both ears, or in the head." 68 Fed. Reg. 25,822, 25,823 (2003); 38 C.F.R. § 4.87, DC 6260, note (2). The notice also added a note providing that objective tinnitus is to be evaluated as part of the underlying condition, not under DC 6260. 38 C.F.R. § 4.87, DC 6260, note (3). The notice stated that:

This document amends the Department of Veterans Affairs (VA) Schedule for Rating Disabilities to state more explicitly the method of evaluation of tinnitus under diagnostic code 6260 in the portion of the rating schedule that addresses evaluation of disabilities of the ear. The intended effect of this action is to codify current standard VA practice by stating that recurrent tinnitus will be assigned only a single 10-percent evaluation whether it is perceived in one ear, both ears, or somewhere in the head.

68 Fed. Reg. at 25,822. As was stated in the notice of proposed rulemaking: "This amendment involves no substantive change and is consistent with current practice." 67 Fed. Reg. at 59,033. Thus, the amendment restated in more explicit terms the rule reflected in prior VA regulations that only a single 10% rating for tinnitus is authorized regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head.

5. The 1999 amendment to DC 6260 reflected an awareness that tinnitus need not be constant to be disabling and that it can have causes other than head trauma. 59 Fed. Reg. 17,295, 17,297 (1994). The amendment addressed the need to accommodate tinnitus resulting from other causes. Further, the note added to DC 6260 by that amendment reflects the rule, stated in 38 C.F.R. § 4.14, that the disability resulting from tinnitus cannot be rated simultaneously under more than one diagnostic code. The 1999 amendment did not reflect any change in view as to the nature of tinnitus itself. Thus, the most recent amendment DC 6260 definitively stating that only a single 10% disability rating is authorized for tinnitus merely restates the law as it existed both prior to and after

the 1999 amendment. Accordingly, the rule that only a single 10% disability rating is authorized for tinnitus regardless of whether the tinnitus is perceived as unilateral, bilateral, or in the head is for application in cases arising both before and after the 1999 amendment.

HELD:

Diagnostic Code 6260 (currently codified at 38 C.F.R. § 4.87), as in effect prior to June 10, 1999, and as amended as of that date, authorized a single 10% disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head. Separate ratings for tinnitus for each ear may not be assigned under DC 6260 or any other diagnostic code.

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Attachment (claims folders)