



Department of Veterans Affairs
Office of General Counsel
Washington DC 20420

In reply refer to: 027

August 27, 2020

Gregory O. Block
Clerk of the Court
U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW
Washington, DC 20004

Re: Anthony Huerta v. Robert L. Wilkie,
Secretary of Veterans Affairs
Vet. App. No. 19-2805

Dear Mr. Block:

Pursuant to U.S. Vet. App. Rule 30(b), Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, hereby advises the Court of persuasive supplemental authority the undersigned counsel has recalled related to questioning at oral argument on August 20, 2020, in the above-referenced appeal. See Oral Argument (OA) at 24:20-31:30, <http://www.uscourts.cavc.gov/documents/Huerta.MP3>.

The persuasive supplemental authority is a part of the Department of Veterans Affairs (VA) M21-1 Adjudication Procedures Manual that provides evidence of VA's adjudication procedures for osteomyelitis. The relevant part provides that "[c]onstitutional symptoms are a prerequisite to the assignment of either the 100-percent or 60-percent evaluations under 38 CFR 4.71a, DC 5000." M21-1, Part III, iv.4.B.6.a. A copy of the persuasive supplemental authority is attached.

Respectfully,

/s/ Nicholas R. Esterman
NICHOLAS R. ESTERMAN
Counsel for the Secretary

cc: Scott W. MacKay, Esq. w/ attachment

shoulder (major) to 90 degrees.

Arthritis

Evaluated Based on X-Ray Evidence Only and Another Compensable Evaluation

Coded Conclusion:	
1. SC (VE INC)	
5003-5201	Degenerative arthritis, right shoulder (dominant)
20% from 12-14-03	
5257-5003	Degenerative arthritis, right knee
0% from 12-14-03	
5257-5003	Degenerative arthritis, left knee
0% from 12-14-03	
COMB	20% from 12-14-03

Rationale: Since the shoulder condition meets compensable requirements under [38 CFR 4.71a, DCs 5201](#), each knee condition must be evaluated under separate DCs. Based on Note (1) under [38 CFR 4.71a, DC 5003](#), ratings of arthritis based on x-ray findings only (without limited or painful motion or incapacitating exacerbations) **cannot** be combined with ratings of arthritis based on LOM.

6. Osteomyelitis

Introduction

This topic contains information about osteomyelitis, including

- [requiring constitutional symptoms for assignment of a 100-percent or 60-percent evaluation under DC 5000](#)
- [historical evaluations for osteomyelitis](#)
- [assigning historical evaluations for osteomyelitis](#)
- [reasons to discontinue a historical evaluation for osteomyelitis](#)
- [assigning a 10-percent evaluation for active osteomyelitis](#), and
- [application of the amputation rule to evaluations for osteomyelitis](#).

Change Date

May 11, 2015

III.iv.4.B.6.a.
Requiring
Constitutional
Symptoms for
Assignment of a
100-Percent or
60-Percent
Evaluation
Under DC 5000

Constitutional symptoms are a prerequisite to the assignment of either the 100-percent or 60-percent evaluations under [38 CFR 4.71a, DC 5000](#).

Since both the 60- and 100-percent evaluations are based on constitutional symptoms, neither is subject to the amputation rule.

Reference: For more information on the amputation rule, see [38 CFR 4.68](#).

III.iv.4.B.6.b.
Historical
Evaluation for
Osteomyelitis

Both the 10-percent evaluation and that part of the 20-percent evaluation that is based on “other evidence of active infection within the last five years” are

- historical evaluations, and
- based on recurrent episodes of osteomyelitis.

Note: The 20-percent historical evaluation based on evidence of active infection within the past five years *must* be distinguished from the 20-percent evaluation authorized when there is a discharging sinus.

III.iv.4.B.6.c.
Assigning
Historical
Evaluations for
Osteomyelitis

An initial episode of active osteomyelitis is *not* a basis for either of the historical evaluations.

Assign the historical evaluation as follows:

- When the first *recurrent* episode of osteomyelitis is shown
 - assign a 20-percent historical evaluation, and
 - extend the evaluation for five years from the date of examination showing the osteomyelitis to be inactive.
- Assign a closed evaluation at the expiration of the five-year extension.
- Assign the 10-percent historical evaluation only if there have been two or more recurrences of active osteomyelitis following the initial infection.

III.iv.4.B.6.d.
Reasons to
Discontinue a
Historical

Do *not* discontinue the historical evaluation, even if treatment includes saucerization, sequestrectomy, or guttering, because the osteomyelitis is not considered cured.

Exception: If there has been removal or radical resection of the affected bone

Evaluation for Osteomyelitis

- consider osteomyelitis cured, and
- discontinue the historical evaluation.

III.iv.4.B.6.e. Assigning a 10-Percent

When the evaluation for amputation of an extremity or body part affected by osteomyelitis would be zero percent, assign a 10-percent evaluation if there is active osteomyelitis.

Evaluation for Active Osteomyelitis

References: For more information on

- applying the amputation rule to evaluations for active osteomyelitis, see [M21-1, Part III, Subpart iv, 4.B.6.f.](#) and
- evaluating osteomyelitis, see [38 CFR 4.71a, DC 5000.](#)

III.iv.4.B.6.f. Application of the Amputation Rule to Evaluations for Osteomyelitis

Use the following table to determine how the amputation rule affects evaluations assigned for osteomyelitis.

If the osteomyelitis evaluation is ...	Then the amputation rule ...
10 percent based on active osteomyelitis of a body part where the amputation evaluation would normally be zero percent	does not apply.
<ul style="list-style-type: none"> • 10 percent based on active osteomyelitis of a body part where the amputation evaluation would normally be zero percent, or • 30 percent or less under 38 CFR 4.71a, DC 5000, and • the 10-percent evaluation is combined with evaluations for <ul style="list-style-type: none"> • ankylosis • limited motion • nonunion or malunion • shortening, or • other musculoskeletal impairment 	applies to the combined evaluation.
60 percent based on constitutional symptoms of osteomyelitis, per 38 CFR	does not apply since the 60-percent evaluation is based on constitutional

4.71a, DC 5000	symptoms.
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Reference: For more information on the amputation rule, see

- [38 CFR 4.68](#), and
- [M21-1, Part III, Subpart iv, 4.A.8.e](#).

7. Examples of the Proper Rating Procedure for Osteomyelitis

Introduction

This exhibit contains eight examples of the proper procedure for rating osteomyelitis, including an example of evaluating

- [osteomyelitis based on a history of a single active initial episode](#)
- [an active initial episode of osteomyelitis](#)
- [osteomyelitis following review exam for initial active episode](#)
- [osteomyelitis with current discharging sinus](#)
- [osteomyelitis with a historical evaluation following a single recurrence with scheduled reduction due to inactivity](#)
- [a recurrence of osteomyelitis](#)
- [osteomyelitis following second recurrence](#), and
- [osteomyelitis following curative resection of affected bone](#).

Change Date

May 9, 2019

III.iv.4.B.7.a.

Example of Evaluating

Osteomyelitis Based on a History of a Single Active Initial Episode

Situation: The Veteran was diagnosed with osteomyelitis in service with discharging sinus. At separation from service the osteomyelitis was inactive with no involucrum or sequestrum. There is no evidence of recurrence.

Result: As there has been no recurrence of active osteomyelitis following the initial episode in service, the historical evaluation of 20 percent is not for application. The requirements for a 20-percent evaluation based on activity are not met either.

Coded Conclusion:	
1. SC (PTE INC)	

5000	Osteomyelitis, right tibia
0% from 12-2-93	

Note: For the scenarios discussed in [M21-1, Part III, Subpart iv, 4.B.7.a-h](#), when the scenario involves dates, review the scenarios as if the actions are being taken at or near the time of the evidence presented in each scenario. In other words, for the purposes of reviewing these scenarios only, do not apply protection of evaluation under [38 CFR 3.951\(b\)](#).

III.iv.4.B.7.b.
Example of
Evaluating an
Active Initial
Episode of
Osteomyelitis

Situation: Same facts as example shown in [M21-1, Part III, Subpart iv, 4.B.6.a](#), but the Veteran had a discharging sinus at the time of separation from service.

Result: The Veteran meets the criteria for a 20-percent evaluation based on a discharging sinus. Schedule a future examination to ascertain the date of inactivity.

Coded Conclusion:	
1. SC (PTE INC)	
5000	Osteomyelitis, right tibia, active
20% from 12-2-93	

Reference: For more information on the assignment of a 20-percent evaluation when there is a discharging sinus, see [M21-1, Part III, Subpart iv, 4.B.6.b](#) and [c](#).

III.iv.4.B.7.c.
Example of
Evaluating
Osteomyelitis
Following
Review Exam for
Initial Active
Episode

Situation: Same facts as example shown in [M21-1, Part III, Subpart iv, 4.B.7.b](#). Subsequent review examination reveals the sinus tract was healed and there is no other evidence of active infection.

Result: Since the Veteran has not had a recurrent episode of osteomyelitis since service, a historical rating of 20 percent is not for application. Take rating action under [38 CFR 3.105\(e\)](#).

Coded Conclusion:	
1. SC (PTE INC)	
5000	Osteomyelitis, right tibia, inactive
20% from 12-2-93	
0% from 3-1-95	

III.iv.4.B.7.d.
Example of

Situation: Same facts as example shown in [M21-1, Part III, Subpart iv, 4.B.7.b](#). The Veteran is hospitalized July 21, 1996, with active osteomyelitis of the right tibia shown with discharging sinus. There is no involucrum, sequestrum, or

**Evaluating
Osteomyelitis
With Current
Discharging
Sinus**

constitutional symptom. Upon release from the hospital the discharging sinus is still present.

Result: Assign the 20-percent evaluation based on evidence showing draining sinus from the proper effective date. Schedule a future examination to ascertain date of inactivity.

Coded Conclusion:	
1. SC (PTE INC)	
5000	Osteomyelitis, right tibia, active
0% from 3-1-95	
20% from 7-21-96	

Reference: For more information on the assignment of a 20-percent evaluation when there is a discharging sinus, see [M21-1, Part III, Subpart iv, 4.B.6.b](#) and [c](#).

**III.iv.4.B.7.e.
Example of
Evaluating
Osteomyelitis
With a Historical
Evaluation
Following a
Single
Recurrence With
Scheduled
Reduction Due
to Inactivity**

Situation: Same facts as example shown in [M21-1, Part III, Subpart iv, 4.B.7.d](#). A routine future examination was conducted on July 8, 1997, showing the osteomyelitis to be inactive. There was no discharging sinus, no involucrum, sequestrum, or constitutional symptom. The most recent episode of active osteomyelitis (July 21, 1996) constitutes the first “recurrent” episode of active osteomyelitis.

Result: Continue the previously assigned 20-percent evaluation, which was awarded on the basis of discharging sinus as a historical evaluation for five years from the examination showing inactivity. Assign a future ending date for the historical 20-percent evaluation 5 years from the date evidence shows inactivity.

Coded Conclusion:	
1. SC (PTE INC)	
5000	Osteomyelitis, right tibia, inactive
20% from 7-21-96	
0% from 7-8-02	

References: For more information on

- assigning historical evaluations for osteomyelitis, see
 - [M21-1, Part III, Subpart iv, 4.B.6.b](#) and [c](#), and
 - [38 CFR 4.71a, DC 5000, Note 2](#), and
- determining whether recurrent episodes of osteomyelitis have occurred, see [M21-1, Part III, Subpart iv, 4.B.6.c](#).

III.iv.4.B.7.f.
Example of
Evaluating a
Recurrence of
Osteomyelitis

Situation: Same facts as example shown in [M21-1, Part III, Subpart iv, 4.B.7.e.](#)

In October 1999, the Veteran was again found to have active osteomyelitis with a discharging sinus, without involucrum, sequestrum, or constitutional symptoms.

Result: Continue the 20-percent evaluation. Reevaluation is necessary to remove the future reduction to zero percent and to schedule a future examination to establish the date of inactivity.

Coded Conclusion:	
1. SC (PTE INC)	
5000	Osteomyelitis, right tibia, active
20% from 7-21-96	

III.iv.4.B.7.g.
Example of
Evaluating
Osteomyelitis
Following
Second
Recurrence

Situation: Same facts as example shown in [M21-1, Part III, Subpart iv, 4.B.7.f.](#)

A review examination was conducted on April 8, 2000. The examination showed the discharging sinus was inactive, and there was no other evidence of active osteomyelitis. The most recent episode of osteomyelitis (October 1999) constitutes the second "recurrent" episode of active osteomyelitis.

Result: The historical evaluations of 20 and 10 percent both apply. Continue the 20-percent evaluation based on the historical criteria requiring activity within the past 5 years. Assign a future ending date for the 20-percent evaluation 5 years from the date of last activity via assigning the lower 10-percent evaluation based on the historical criteria requiring inactive osteomyelitis following repeated episodes without active infection in the past 5 years.

Coded Conclusion:	
1. SC (PTE INC)	
5000	Osteomyelitis, right tibia, inactive
20% from 7-21-96	
10% from 4-8-05	

References: For more information on

- assigning historical evaluations for osteomyelitis, see
 - [M21-1, Part III, Subpart iv, 4.B.6.b](#) and [c](#), and
 - [38 CFR 4.71a, DC 5000, Note 2](#), and
- determining whether recurrent episodes of osteomyelitis have occurred, see [M21-1, Part III, Subpart iv, 4.B.6.c.](#)

III.iv.4.B.7.h.
Example of
Evaluating
Osteomyelitis
Following
Curative
Resection of
Affected Bone

Situation: Same facts as example shown in [M21-1, Part III, Subpart iv, 4.B.7.g.](#) The Veteran was hospitalized June 10, 2002, with a recurrent episode of active osteomyelitis. A radical resection of the right tibia was performed and at hospital discharge (June 21, 2002), the osteomyelitis was shown to be cured.

Result: Assign a temporary total evaluation of 100 percent under [38 CFR 4.30](#) with a 1-month period of convalescence. Following application of [38 CFR 3.105\(e\)](#), reduce the evaluation for osteomyelitis to zero percent as an evaluation for osteomyelitis will not be applied following cure by removal or radical resection of the affected bone.

Coded Conclusion:	
1. SC (PTE INC)	
5000	Osteomyelitis, right tibia, P.O.
20% from 7-21-96	
100% from 6-10-02 (Par. 30)	
20% from 8-1-02	
0% from 10-1-02	

8. Muscle Injuries

Introduction

This topic contains information about rating muscle injuries, including

- [types of muscle injuries](#)
- [standard muscle strength grading system for examinations](#)
- [identification of muscle groups \(MGs\) in examination reports](#)
- [general criteria for muscle evaluations](#)
- [fractures associated with gunshot wound \(GSW\) and shell fragment wounds \(SFW\)](#)
- [determining whether 38 CFR 4.55 applies to muscle injuries](#)
- [applying 38 CFR 4.55 to muscle injuries](#)
- [evaluating joint manifestations and muscle damage acting on the same joint](#)
- [evaluating damage to multiple muscles within the same MG](#)