

CHISHOLM CHISHOLM & KILPATRICK LLP
321 S Main St., #200
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 FAX



March 17, 2022

Gregory O. Block
Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, D.C. 20004-2950

Re: *Walleman v. McDonough*, No. 20-7299
Supplemental Citation of Authority

Dear Mr. Block:

Pursuant to U.S. Vet. App. R. 30(b), Appellant cites to VA's M21-1, *Adjudication Procedures Manual*, Part V, Subpart iii, Chapter 1, Section B, Topic 4.d, as supplemental authority. *See* Exhibit 1.

This M21-1 provision came to the attention of the undersigned counsel while preparing for oral argument. *See* Rule 30(b). It provides,

A meniscal disability may be rated separately under 38 CFR 4.71a, DC 5258/5259 apart from

- 38 C.F.R. § 4.71a, DC 5257 for manifestations of the knee disability other than recurrent subluxation and instability, and/or
- 38 C.F.R. § 4.71a, DC 5260/5261 if a manifestation of the meniscal disability did not result in an elevation of the disability evaluation warranted under 38 C.F.R. § 4.71a, DC 5260/5261 via application of 38 C.F.R. § 4.40 and 38 C.F.R. § 4.45 pursuant to *DeLuca v. Brown*, 8 Vet.App. 202 (1995).

Separate Evaluation of Meniscal Disabilities, M21-1, Pt. V, subpt. iii, ch. 1, § B, topic 4.d (punctuation corrected).

As noted in the opening brief, the Appellant is service connected with separate 10 percent ratings for his left knee meniscal disability under DC 5260 and DC 5259. Appellant's Br. at 9. The cited M21 provision pertains to the following points in the parties' pleadings. In the Veteran's opening brief, he argued that "[t]he ratings under DCs 5260 and 5259 do not compensate the Veteran for his acknowledged instability" and that "the Board incorrectly determined that it was precluded from assigning a separate rating under DC 5257 for the Veteran's instability because doing so 'would compensate the Veteran twice for the same symptomatology, here instability.'" *Id.*

In the Secretary's brief, he argued "diagnostic code 5259 does not identify any specific manifestations of the removal of semilunar cartilage and its plain language makes clear that it contemplates any symptomatic residuals of the removal of semilunar cartilage." *Id.* at 11 n.9. He also argued the "Board specifically found that separate ratings could not be assigned under both diagnostic codes 5257 and 5259 'in this case.'" which was "entirely consistent with the view that Appellant's reported history of slight left knee instability was a manifestation of the residuals of his meniscectomy." *Id.* at 11.

On reply, the Appellant argued, "The fact that instability *may* be contemplated under DC 5259 does not mean that it cannot be rated separately under DC 5257, as long as the instability symptom is not compensated twice, because the Board has an affirmative duty to maximize a veteran's benefits." Reply Br. at 2 (emphasis in original). He also argued that "VA may separately rate the distinct manifestations of a single disability under multiple diagnostic codes without pyramiding." *Id.* at 2. Therefore, "the Board's interpretation of DC 5259 as encompassing all manifestations of the Veteran's left knee disability, and thus precluding the assignment of a separate rating for his instability, violated the longstanding principle that VA must maximize potential benefits, warranting remand." *Id.* at 4.

Very truly yours,

Christian A. McTarnaghan

VIA CM/ECF SYSTEM

EXHIBIT 1

4. Evaluating Musculoskeletal Disabilities of the Legs

Introduction

This topic contains information on evaluating musculoskeletal disabilities of the lower extremities (not including the feet), including

- evaluating noncompensable knee conditions
- definition of instability and subluxation of the knee
- separate evaluations
 - for knee instability and LOM, and
 - of meniscal disabilities
- examples of evaluating meniscal disabilities
- separate evaluations – genu recurvatum
- conservative therapy for shin splints
- evaluating pain associated with shin splints, and
- ankle instability.

Change Date

May 10, 2021

V.iii.1.B.4.a.

Evaluating

Noncompensable

Knee Conditions

Evaluate a noncompensable knee condition by analogy to 38 CFR 4.71a, DC 5257 if

- there is no associated arthritis
- the schedular criteria for a noncompensable evaluation under 38 CFR 4.71a, DC 5260 or DC 5261 are not met, *and*
- the condition cannot be appropriately evaluated under 38 CFR 4.71a, DC 5258, 5259, 5262, or 5263.

References: For more information on

- using analogous DCs, see 38 CFR 4.20, and
- when to assign a 0-percent evaluation, see 38 CFR 4.31.

V.iii.1.B.4.b.

Definitions:

Instability and

Subluxation of the

Knee

Instability, as referred to in 38 CFR 4.71a, DC 5257, includes

- patellar instability due to recurrent patellar subluxation or patellar dislocation, and/or
- any other instability or laxity of the knee that involves other stabilizing structure of the knee such as the collateral or cruciate ligaments.

Subluxation refers to partial or incomplete dislocation of the knee joint (*tibiofemoral* dislocation/subluxation) or tendency for the patella to dislocate from its track (*patellar* dislocation/subluxation).

Evaluations under 38 CFR 4.71a, DC 5257 may be assigned based on the requirement for assistive device(s) and/or bracing. The assistive device or bracing must be prescribed by a medical provider and there must be objective evidence of the prescription in the evidentiary record.

V.iii.1.B.4.c.

Separate
Evaluations for
Knee Instability
and LOM

A separate evaluation for knee instability may be assigned in addition to any evaluation(s) assigned based on limitation of knee motion. The Office of General Counsel has issued precedent opinions that an evaluation under 38 CFR 4.71a, DC 5257, does not pyramid with evaluations based on LOM.

References: For more information on

- pyramiding and separating individual findings in a rating decision, see M21-1, Part V, Subpart ii, 3.D.2.b
- separate evaluation of knee instability, see
 - VAOPGCPREC 23-1997, and
 - VAOPGCPREC 9-1998, and
- evaluation of joint replacement or resurfacing, see M21-1, Part V, Subpart iii, 1.A.3.h-j.

V.iii.1.B.4.d.

Separate
Evaluation of
Meniscal
Disabilities

Evaluation of a knee disability under 38 CFR 4.71a, DC 5257, DC 5260, or 5261 does not, as a matter of law, preclude separate evaluation of a meniscal disability of the same knee under

- 38 CFR 4.71a, DC 5258 (dislocated semilunar cartilage), or
- 38 CFR 4.71a, DC 5259 (symptomatic removal of semilunar cartilage).

A meniscal disability may be rated separately under 38 CFR 4.71a, DC 5258/5259 apart from

- 38 CFR 4.71a, DC 5257 for manifestations of the knee disability other than recurrent subluxation and instability, and/or
- 38 CFR 4.71a, DC 5260/5261 if a manifestation of the meniscal disability did not result in an elevation of the disability evaluation warranted under 38 CFR 4.71a, DC 5260/5261 via application of 38 CFR 4.40 and 38 CFR 4.45 pursuant to *DeLuca v. Brown*, 8 Vet.App. 202 (1995).

Important:

- A repaired meniscal tear (s/p partial meniscectomy) is not directly synonymous with either 38 CFR 4.71a, DC 5258 or 38 CFR 4.71a, DC 5259. Therefore, it is most appropriate to rate the disability analogous to whichever code most closely approximates the current symptoms.
- Entitlement to a separate evaluation for the meniscal disability depends on whether the manifestations are utilized to assign an evaluation under a different DC. Evaluation of the same manifestation under multiple diagnoses is prohibited under 38 CFR 4.14. Thus, when all the symptoms of the meniscal disability are used to support elevation of an evaluation under 38 CFR 4.71a, DC 5260/5261 or assignment of an evaluation under 38 CFR 4.71a, DC 5257, a separate evaluation cannot be assigned under 38 CFR 4.71a, DC 5258/5259.
- When considering applicability of 38 CFR 4.59 for meniscal disabilities,

- when *only* a meniscal disability is present, utilize the procedures at M21-1, Part V, Subpart iii, 1.A.1.m, and
 - when multiple knee disabilities are present and the painful motion is attributable to a knee disability other than the meniscal condition, assign separate evaluations when otherwise warranted under 38 CFR 4.14.
- The policy and procedures identified in this block reflect a change in policy resulting from the holding in *Lyles v. Shulkin*, 29 Vet.App. 107 (2017), effective November 29, 2017. Prior to the *Lyles* holding, separate evaluations for meniscal disabilities under 38 CFR 4.71a, DC 5258 or DC 5259 and other knee evaluations under 38 CFR 4.71a, DC 5257, 5260, or DC 5261 were prohibited. This is not considered a liberalizing change.

References: For more information on

- evaluation of meniscal disabilities, see *Lyles v. Shulkin*, 29 Vet.App. 107 (2017), and
- examples of evaluation of meniscal disabilities, see M21-1, Part V, Subpart iii, 1.B.4.e.

V.iii.1.B.4.e.
Examples--
Evaluating
Meniscal
Disabilities

Example 1: A Veteran's left knee disability, which includes a meniscal condition, is evaluated as 30-percent disabling on the basis of limitation of extension under 38 CFR 4.71a, DC 5261. The knee also manifests pain, swelling, popping, locking, and grinding due to the meniscus disability. These symptoms, which are consistent with the manifestations identified under 38 CFR 4.40 and 38 CFR 4.45, were considered and did not result in a higher evaluation under 38 CFR 4.71a, DC 5261. Therefore, they may be considered for assignment of a separate evaluation under 38 CFR 4.71a, DC 5258/5259.

Example 2: The evaluations and fact pattern for Example 1 are the same *except* that the VA examiner indicates that the pain, swelling, popping, locking, and grinding of the knee, which results from the meniscal disability, result in additional limitation of extension to 30 degrees during flare-ups or with repeated use over a period of time, which warrants an elevation of the rating to 40-percent under 38 CFR 4.71a, DC 5261. A separate evaluation under 38 CFR 4.71a, DC 5258/5259 is not warranted for the symptoms of pain, swelling, popping, locking, and grinding since these symptoms were considered under 38 CFR 4.40 and 38 CFR 4.45 in accordance with the *DeLuca* holding to elevate the evaluation to 40-percent under 38 CFR 4.71a, DC 5261. Assignment of a separate evaluation under 38 CFR 4.71a, DC 5258/5259 would constitute pyramiding.

Example 3: A Veteran's left knee disability, which includes meniscal impairment, is evaluated as 30-percent disabling on the basis of limitation of extension under 38 CFR 4.71a, DC 5261. Pain is present due to the meniscus disability. A VA

examiner indicated that pain during repetitive motion testing as well as functional loss due to pain during flare-ups additionally limit extension to 30 degrees, which results in elevation of the 30-percent evaluation under 38 CFR 4.71a, DC 5261 to 40-percent. A separate evaluation under 38 CFR 4.71a, DC 5258/5259 is not warranted for the symptoms of pain since it was considered under 38 CFR 4.40 and 38 CFR 4.45 in accordance with the *DeLuca* holding to elevate the evaluation to 40-percent under 38 CFR 4.71a, DC 5261. Assignment of a separate evaluation under 38 CFR 4.71a, DC 5258/5259 would constitute pyramiding.

Example 4: A Veteran's right knee disability is evaluated as 20-percent disabling on the basis of limitation of extension. This disability includes arthritis of the joint and a post-operative meniscal condition. The knee also manifests pain, swelling, popping, locking, and grinding due to both arthritis and the meniscal condition. A VA examiner found that repetitive motion testing additionally limited extension by five degrees, from 15 to 20 degrees, due to pain. The consideration of pain on motion, which is a manifestation identified under 38 CFR 4.40 and 38 CFR 4.45, results in elevation of the evaluation under 38 CFR 4.71a, DC 5261 to 30-percent. Since the swelling, popping, locking, and grinding, which were at least in part due to the meniscal condition, were not considered in awarding a higher evaluation under 38 CFR 4.71a, DC 5261 with application of 38 CFR 4.40 and 38 CFR 4.45, a separate evaluation may be awarded for the meniscus removal.

Example 5: Examination of the left knee disability reveals an unrepaired incomplete ligament tear that results in persistent instability. The Veteran's physician has prescribed a brace and a cane for ambulation. Additionally, the Veteran has a history of meniscectomy with residual symptoms of stiffness, crepitus, and pain without effusion or locking. ROM is full with no additional functional impairment following repeated ROM testing. Since the stiffness, crepitus, and pain are separate symptoms and not used to support an evaluation under 38 CFR 4.71a, DC 5257/5260/5261 and the persistent instability is not used to support an evaluation for the meniscal symptoms, a 20-percent evaluation is warranted under 38 CFR 4.71a, DC 5257 with a separate 10-percent evaluation assigned under 38 CFR 4.71a, DC 5259.
