

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

EMILIO ESTEVEZ,

Appellant,

v.

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

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Vet.App. No. 20-8637

SECRETARY’S MEMORANDUM OF LAW

Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully responds to the Court’s August 30, 2022, Order, that he file and serve on Appellant a supplemental memorandum of law addressing the effect, if any, of *Walleman v. McDonough*, 35 Vet.App. 294, (2022) on his position as to the left knee claim on appeal.

I. Pain and Painful Motion are Not Distinct Manifestations of Appellant’s Left Knee Meniscus Disability

This case turns on whether Appellant’s pain and painful motion are distinct manifestations of his left knee meniscal disability warranting separate ratings under 38 C.F.R. § 4.71a, Diagnostic Codes (DC) 5258 and 5261. Appellant’s meniscal disability causes pain and that pain causes painful motion. Therefore, there is only one manifestation of Appellant’s disability — pain. In his principal brief, the Secretary argued that Appellant failed to show the Board’s determination that Appellant’s painful motion due to his meniscal disability was contemplated by, and formed the basis, for his 20% rating under DC 5258, was arbitrary or capricious. See Sec’y’s Br. at 9–14.

In short, Appellant may be compensated for the pain due to his meniscal disability under either DC 5258 or 5261, but not both. The Court's holding in *Wallemann* does not change the Secretary's position. In *Wallemann*, the Court held "that an assignment of a disability rating under 5259, for symptoms that do not include lateral instability, does not preclude as a matter of law a separate evaluation under DC 5257 for lateral instability of the same knee." *Wallemann v. McDonough*, No. 20-7299, 2022 U.S. App. Vet. Claims LEXIS 904, at *2–3 (Ct. App. Vet. Claims June 9, 2022). The Court explained that "[t]he key consideration that precludes separate ratings is whether the ratings are compensating the same manifestation or symptom." *Wallemann*, U.S. App. Vet. Claims LEXIS 904, at *18. Applying this reasoning to the facts in *Wallemann*, the Court reasoned that, "if an assignment of an evaluation under DC 5259 is supported with residuals that do not include lateral instability, a claimant may also be entitled to an evaluation under DC 5257 for lateral instability because that symptom is a distinct manifestation that does not overlap with any other residuals of a meniscectomy." *Id.* The Court stressed that "this way of approaching the situation is not rating individual symptoms, but instead is evaluating distinct manifestations from the same injury." *Id.*

The Board recognized these rating principles in its analysis, noting that "the critical element in permitting the assignment of several ratings under various DCs is that none of the symptomatology for any one of the conditions is duplicative or overlapping with the symptomatology of the condition." R. at 9 (5–30) (citing *Esteban v. Brown*, 6 Vet.App. 259, 261–62 (1994), *Lyles v. Shulkin*, 29 Vet.App. 107 (2017)). The Board also acknowledged that 38 C.F.R. § 4.40 "allows for consideration of

functional loss due to pain and weakness causing additional disability beyond that reflect on range of motion measurements,” and that “38 C.F.R. § 4.45 provides that consideration also be given to decreased movement, weakened movement, excess fatigability, incoordination, and pain on movement, swelling, and deformity or atrophy of disuse.” *Id.*

Appellant’s pain is a single manifestation of his meniscal disability. Appellant experiences pain due to his meniscal disability, and he receives a 20% rating under DC 5258, which contemplates dislocated semilunar cartilage “with frequent episodes of ‘locking,’ *pain*, and effusion into the joint.” 38 C.F.R. § 4.71a, DC 5258 (emphasis added). The Board found, “when considering whether repetitive motion and/or flare-ups resulted in additional functional loss due to symptoms such as pain, weakness, fatigue, and lack of endurance . . . that [Appellant’s] left knee disability has not resulted in a level of functional loss not already contemplated by the assigned rating.” R. at 18 (5–32) (citing *DeLuca v. Brown*, 8 Vet.App. 202 206 (1995)). The Board also acknowledged that Appellant’s left knee pain caused functional loss and limited functional ability with repeated use over time. *Id.* However, the Board found that Appellant’s “symptoms and noted functional loss have been considered under the assigned rating under DC 5258 which codifies symptoms of frequent episodes of ‘locking,’ pain, and effusion into the joint,” and that those “symptoms, amongst others documented during this period on appeal, form the basis for the already assigned 20[%] rating.” *Id.*

Unlike in *Walleman*, where the veteran experienced lateral instability and other

manifestations of his meniscectomy, Appellant in this case has a single manifestation from his meniscal disability—pain. While that pain may impact Appellant differently in various circumstances such as walking or running, it remains a single manifestation for which he may receive compensation only once. This approach is consistent with *Wallemann*. There, the Court noted that the goal is “not rating individual symptoms,” but instead “evaluating distinct manifestations from the same injury.” *Wallemann*, 2022 U.S. App. Vet. Claims LEXIS 904 at *19. The regulatory scheme and relevant caselaw supports the conclusion that Appellant’s painful motion and pain are not distinct manifestations of his disability. As the United States Court of Appeals for the Federal Circuit has explained, 38 C.F.R. § 4.40 “makes clear that functional loss may be due to pain and that pain may render a part seriously disabled.” *Thompson v. McDonald*, 815 F.3d 781, 786 (Fed. Cir. 2016). In *Saunders v. Wilkie*, the Federal Circuit held that “pain is a form of functional impairment,” and explained that “[p]ain is an impairment because it diminishes the body’s ability to function.” 886 F.3d 1356, 1364–65 (Fed. Cir. 2018). On review, it found that “VA’s disability rating regulations also treat pain as a form of functional impairment,” noting regulations that “account for pain in determining the nature of a veteran’s disability,” to include pain on movement, in 38 C.F.R. §§ 4.40 and 4.45. *Id.*

Appellant experiences pain because of his meniscal disability. Appellant’s functional loss, to include limitation of extension, is caused by pain. And that pain is squarely contemplated by the plain language of DC 5258. Consistent with *Wallemann*, a separate rating for painful motion under DC 5261 would compensate Appellant for

the same manifestation of pain as DC 5258, which is prohibited by the rule against pyramiding in 38 C.F.R. § 4.14. In sum, Appellant experiences a single manifestation of his meniscal disability—pain. Because pain and painful motion are not distinct manifestations of Appellant’s left knee meniscus disability, the Court’s holding in *Wallemann* does not change the Secretary’s position, and accordingly, the Court should find that a separate rating under DC 5261, in addition to DC 5258, is not warranted.

CONCLUSION

Based on the above law and discussion, the Secretary responds to the Court’s August 30, 2022, Order.

Respectfully submitted,

CATHERINE C. MITRANO
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

/s/ Timothy G. Joseph
TIMOTHY G. JOSEPH
Appellate Attorney
Office of General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-4347
Timothy.Joseph3@va.gov

Attorneys for Appellee
Secretary of Veterans Affairs

