ENSURING THE VA PROPERLY RATES KNEE DISABILITIES

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AGENDA

- Duty to Maximize Benefits
- Recent Changes
- Diagnostic Codes of the Knee
- Other Rating Considerations
- VA Exams
- Hypos

DUTY TO MAXIMIZE BENEFITS

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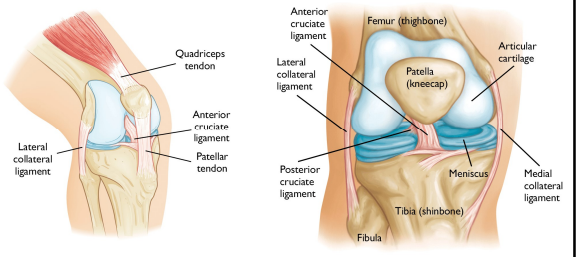
THE KNEE



https://orthoinfo.aaos.org/en/diseases--conditions/common-knee-injuries/

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VA'S DUTY TO MAXIMIZE BENEFITS

- VA must "render a decision which grants every benefit that can be supported in law"
  - 38 C.F.R. § 3.103(a)
- All disabilities arising from a single disease (or injury) are to be rated separately
  - 38 C.F.R. § 4.25(b)

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RULE AGAINST PYRAMIDING

- Vet can't be compensated more than once for the same disability
  - 38 C.F.R. § 4.14
- So how do you reconcile duty to maximize benefits with rule against pyramiding?
  - Separate ratings awarded for each disabling condition even if they have same etiology
    - *Esteban v. Brown*, 6 Vet. App. 259 (1994)

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RULE AGAINST PYRAMIDING

- Nothing precludes assignment of separate disability ratings for different conditions where none of the symptoms of the conditions overlap
- Examples:
  - Limitation of motion
  - Instability
  - Associated neurological conditions
  - Associated muscle disabilities

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SEPARATE RATINGS – KNEE

- A knee disability can be rated under multiple DCs
  - Limitation of flexion (DC 5260)
  - Limitation of extension (DC 5261)
  - Instability / recurrent subluxation (DC 5257)
    - VA OGC Precedential Opinion 23-97
  - Meniscal condition (DC 5258/5259)
    - *Lyles v. Shulkin*, 29 Vet. App. 207 (2017)

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RECENT CHANGES

RECENT CHANGES

- 11/30/2020: VA published final rule making several changes to the rating schedule for the musculoskeletal system (38 C.F.R. §4.71a)
  - Purpose to remove obsolete DCs, modernize names of some DCs, revise descriptions and criteria, add new DCs
- Feb. 7, 2021: Rule went into effect

SUMMARY OF CHANGES

- Knee DCs with substantive changes include:
  - 5257 – Knee, other impairment of
  - 5262 – Tibia and fibula, impairment of
  - 5055 – Knee Replacement

APPLICABILITY

- New rules apply to all claims filed on or after 2/7/2021
  - If Vet rated under old criteria, VA can only reduce rating under new criteria if disability has improved
    - 38 U.S.C. § 1155
  - If Vet's disability warrants reduction under old criteria, only then can VA apply new criteria, even if it would result in a greater reduction than under the old criteria
    - VA Gen. Coun. Prec. 19-92 (Sept. 29, 1992)

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APPLICABILITY

- If SC/IR claim filed prior to, but pending on 2/7/2021:
  - VA must determine if new or old regs are more favorable
  - If the old rating criteria is more favorable, the old criteria will be applied for the entire claim period, even on and after 2/7/2021
  - If new rating criteria more favorable, it can be applied only as of 2/7/2021

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DIAGNOSTIC CODES OF THE KNEE

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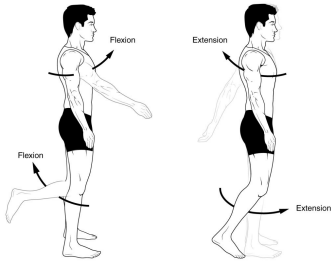
FLEXION VS. EXTENSION



Normal range of motion of the knee is 0 to 140 degrees

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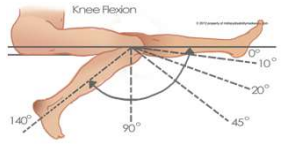
DC 5260: LIMITATION OF FLEXION

Flexion limited to 15°..... 30%
Flexion limited to 30°..... 20%
Flexion limited to 45°..... 10%
Flexion limited to 60°..... 0%



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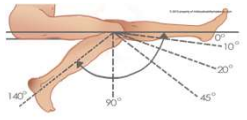
DC 5261: LIMITATION OF EXTENSION

Extension limited to 45° 50%
Extension limited to 30° 40%
Extension limited to 20° 30%
Extension limited to 15° 20%
Extension limited to 10° 10%
Extension limited to 5° 0%



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FLEXION AND EXTENSION

- A Vet **<u>can be</u>** rated **<u>separately</u>** for limitation of both flexion and extension, even if both are from the same disease or injury
  - VA OGC Precedential Opinion 9-2004
- This does **<u>NOT</u>** violate the Rule Against Pyramiding because flexion and extension are different manifestations / symptoms

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DC 5003: DEGENERATIVE ARTHRITIS

- Old Name – Prior to 2/7/2021:
  Arthritis, Degenerative (Hypertropic or Osteoarthritis)
- New Name – On or After 2/7/2021:
  Degenerative Arthritis, Other Than Post-Traumatic
- No change to rating criteria!

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DC 5003: DEGENERATIVE ARTHRITIS

- Arthritis established by X-ray is rated on the basis of limitation of motion under the appropriate DCs for the joint involved
  - Arthritis **<u>MUST</u>** be established by imaging
  - Degenerative Joint Disease ("DJD") is another term for arthritis
    - *Greyzck v. West*, 12 Vet. App. 288 (1999)
  - If it limits knee motion to a compensable level under DC 5260 and/or 5261, VA should apply those DCs

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DC 5003: DEGENERATIVE ARTHRITIS

- If limitation of motion is noncompensable, a rating of 10% is for application for each major joint or group of minor joints affected by limitation of motion
- DC 5003 does not require a "0%" rating, but only a "noncompensable" rating
  - Ex: Knee flexion limited to 70° is a noncompensable rating, even though it does not meet the level of a 0% rating under DC 5260 (which requires 60° flexion)

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LIMITATION OF MOTION

- VA must consider not only actual limitation of motion when rating a joint disability, but also painful motion and functional loss.

Description of pain (select best response):
Pain noted on exam and causes functional loss

If noted on exam, which ROM exhibited pain (select all that apply)?
Flexion, Extension

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FUNCTIONAL LOSS

- Functional loss = The inability to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance.
  - 38 C.F.R. § 4.40
- The most common errors related to VA's rating of joint disabilities is failing to properly address functional loss
  - Inadequate VA exams
  - Failure of VA adjudicators to properly address

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FUNCTIONAL LOSS

- Functional loss is:
  - Decreased or abnormal movement
  - Decreased or abnormal strength
  - Decreased or abnormal speed
  - Decreased or abnormal coordination
  - Decreased or abnormal endurance
- In layman's terms, functional loss is the inability to use a joint normally

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FUNCTIONAL LOSS

- Functional loss may be due to:
  - Absence of part, or all, of the necessary bones, joints and muscles, or associated structures
  - Deformity, adhesions, defective innervation, or other pathology
  - **Pain**, supported by adequate pathology and evidenced by the visible behavior or the Vet
    - 38 C.F.R. § 4.40

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FUNCTIONAL LOSS

- Painful motion alone is NOT limitation of motion
  - Pain throughout ROM does not mean Vet entitled to max rating
    - But, sufficient to support minimum compensable rating for joint under 38 C.F.R. § 4.59
  - If Vet does not have actual limitation of motion for rating higher than 10%, pain must cause sufficient functional loss to get more than the minimum compensable rating under § 4.59

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FUNCTIONAL LOSS

- When rating the knee under DCs 5260 and 5261, which are based on limitation of motion, VA is supposed to rate the knee where functional loss (or abnormal movement) **BEGINS**
  - Ex: if Vet has full flexion, but has weakness of movement that begins at 30 degrees of flexion, VA should rate the knee as if it were limited to 30 degrees of flexion
  - If Vet is unable to complete repetitive use test (3 reps) on VA exam, max rating for ROM loss should be assigned
    - Demonstrates complete functional loss

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FUNCTIONAL LOSS

- When rating joint disabilities, VA is required to consider limitation of motion **during flare-ups of pain** and **after repeated use over time**
  - *DeLuca v. Brown*, 8 Vet. App. 202, 206 (1995)
  - *Mitchell v. Shinseki*, 25 Vet. App. 32, 44 (2011)

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FUNCTIONAL LOSS

- When painful motion on repeated use over time or during a flare-up results in additional loss of ROM, then the condition should be evaluated based on the additional loss of ROM
  - Ex: If Vet's SC knee disability *normally* limits flexion to 60°, but during *flare-ups* flexion is limited to 30°, Vet entitled to a 20% rating under DC 5260
    - Manual M21-1, V.iii.1.A.1.e (change date Sept. 15, 2021)

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SURVEY #1

- If Vet has full ROM, but pain in the joint, what rating is warranted?
  - A. 0%
  - B. The minimum compensable rating for the joint
  - C. It depends if the DC is based on ROM
  - D. Not sure

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PAINFUL MOTION

- "It is the intention to recognize **actually painful**, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint."
  - 38 C.F.R. § 4.59
- Painful joint = 10% rating for *most* joints

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PAINFUL MOTION

- Even if Vet has full ROM, Vet entitled to minimum compensable rating for joint
- § 4.59 applies to all joint disabilities, not just arthritis
- Not a *separate* rating if Vet already has a compensable rating under a DC related to the joint, but ensures Vet gets the minimum compensable rating for joint, even with no symptoms other than pain

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PAINFUL MOTION

- 38 C.F.R. § 4.59 is potentially applicable to the evaluation of musculoskeletal disabilities involving joints that are painful, whether or not evaluated under a DC predicated on ROM measurements
  - *Southall-Norman v. McDonald*, 28 Vet. App. 346 (2016)

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PAINFUL MOTION

- Although § 4.59 does not require "objective" evidence of painful motion to assign the minimum compensable rating (it only requires "actually" painful motion), DCs for arthritis, including DC 5003, require "objective" evidence
  - Objective evidence = evidence perceptible to persons other than the affected individual

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PAINFUL MOTION

- If VA says painful motion may only be "objectively" established by VA examiner's findings on ROM testing, they are wrong!
  - *Petitti v. McDonald*, 27 Vet. App. 415 (2015)
    - "Objective" means "perceptible to persons other than an affected individual"
    - "To confirm" means "to give new assurance of the truth or validity of; CORROBORATE"

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PAINFUL MOTION

- If Vet rated under DC that requires "objective" evidence of pain, such as DC 5003, as long as one person other than Vet (doctor or lay person) has observed that Vet has a painful knee, Vet should receive a 10% rating for knee, even if no other evidence supports a compensable evaluation
  - Corroborating lay statement must be found credible

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ADVOCACY ADVICE

- Have Vet's family and friends prepare statements detailing what they OBSERVE about Vet's knee pain
  - Vet's facial expressions and wincing
  - Complaints, grunts, and groans
  - Seeing Vet take pain medication
  - Slower than normal movement (to avoid pain)
  - Abnormal movement (due to pain)

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DC 5256: ANKYLOSIS OF THE KNEE

- Ankylosis is an immobility of the joint; it is frozen in place due to disease, injury, or surgical procedure
- This is more than just limitation of motion. It is a symptom of disability that usually must be found by a medical expert.

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DC 5256: ANKYLOSIS OF THE KNEE

- Extremely unfavorable, in flexion at an angle of 45° or more..... 60%
- In flexion between 20° and 45°..... 50%
- In flexion between 10° and 20°..... 40%
- Favorable angle in full extension, or in slight flexion between 0° and 10°..... 30%
  - If the Vet has extremely unfavorable complete ankylosis of the knee, consider arguing for SMC(k) for loss of use under 38 C.F.R. § 3.350(a)(2)(i)(a)

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CHAVIS V. MCDONOUGH 34 Vet. App. 1 (2021)

- Issue:
  - Whether the requirement of ankylosis in the criteria for a joint disability rating can be met with evidence of the "functional equivalent" of ankylosis

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CHAVIS V. MCDONOUGH

- CAVC held:
  - Rating criteria of ankylosis can be met if functional loss is equivalent to ankylosis
    - Functional equivalence of ankylosis can be shown on flare-up
    - "Ankylosis" is not a diagnosis, but an objective finding as to immobility of a joint

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CHAVIS V. MCDONOUGH

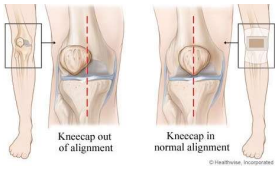
- Takeaways:
  - If ankylosis is in the rating criteria for a joint, it can be met with evidence of the inability to move the joint during flare-ups or after repeated use over time
    - Lay statements may discuss inability to move
  - Likely limited to cases in which Vet is not receiving highest rating under the assigned DC
  - Unclear if holding applicable to cases in which the DC is specifically for ankylosis, such as DC 5256 for ankylosis of the knee, but argue that it does apply if it would get Vet a higher rating

DC 5257

- Old Rating Criteria: Prior to 2/7/2021:
  Recurrent Subluxation or Lateral Instability
- New Rating Criteria: On or After 2/7/2021:
  Knee, Other Impairment Of

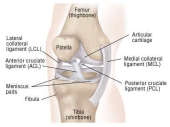
DC 5257

- Subluxation is a dislocation of the patella (kneecap)



DC 5257

- Lateral instability is characterized by a feeling of "giving way," and is generally caused by damage to the ligaments (such as the ACL, MCL, LCL, or PCL).
- "Medial instability" is a direction of lateral instability, and is also rated under DC 5257



DC 5257: RECURRENT SUBLUXATION OR LATERAL INSTABILITY (PRE-2/7/2021)

- Severe 30%
- Moderate 20%
- Slight 10%

DC 5257: RECURRENT SUBLUXATION OR LATERAL INSTABILITY (PRE-2/7/2021)

- Although DC applies to "lateral" instability, VA applied DC to any type of knee instability or laxity
- The terms "mild," "moderate," and "severe" are **NOT** defined in the Rating Schedule
- VA is required to evaluate all the evidence, and come to a decision that is "equitable and just"
  - 38 C.F.R. § 4.6
- An examiner's use of the term "mild," "moderate," or "severe" is not supposed to be controlling, but rather one piece of evidence considered by VA
  - But practically speaking, if a doctor says the instability is "mild," VA raters generally rely on this

DC 5257: KNEE, OTHER IMPAIRMENT OF

- Recurrent subluxation or instability:
  - Unrepaired or failed repair of complete ligament tear causing persistent instability, and a medical provider prescribes both an assistive device (e.g., cane(s), crutch(es), walker) and bracing for ambulation 30%

DC 5257: KNEE, OTHER IMPAIRMENT OF

- Recurrent subluxation or instability (cont'd):
  - One of the following: 20%
    a) Sprain, incomplete ligament tear, or repaired complete ligament tear causing persistent instability, and a medical provider prescribes a brace and/or assistive device (e.g., cane(s), crutch(es), walker) for ambulation
    b) Unrepaired or failed repair of complete ligament tear causing persistent instability, and a medical provider prescribes either an assistive device (e.g., cane(s), crutch(es), or a walker) or bracing for ambulation

DC 5257: KNEE, OTHER IMPAIRMENT OF

- Recurrent subluxation or instability (cont'd):
  - Sprain, incomplete ligament tear, or complete ligament tear (repaired, unrepaired, or failed repair) causing persistent instability, without a prescription from a medical provider for an assistive device (e.g., cane(s), crutch(es), walker) or bracing for ambulation 10%

DC 5257: KNEE, OTHER IMPAIRMENT OF

- Patellar instability:
  - A diagnosed condition involving the patellofemoral complex with recurrent instability after surgical repair that requires a prescription by a medical provider for a brace and either a cane or walker 30%
  - A diagnosed condition involving the patellofemoral complex with recurrent instability after surgical repair that requires a prescription by a medical provider for one of the following: a brace, cane, or walker 20%
  - A diagnosed condition involving the patellofemoral complex with recurrent instability (with or without history of surgical repair) that does not require a prescription from a medical provider for a brace, cane, or walker 10%

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DC 5257: KNEE, OTHER IMPAIRMENT OF

- Note (1): For patellar instability, the patellofemoral complex consists of the quadriceps tendon, the patella, and the patellar tendon.
- Note (2): A surgical procedure that does not involve repair of one or more patellofemoral components that contribute to the underlying instability shall not qualify as surgical repair for patellar instability (including, but not limited to, arthroscopy to remove loose bodies and joint aspiration).

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DC 5257 CHANGES AS OF 2/7/2021

- "Lateral" removed from before "instability," so that DC covers other forms of knee instability or laxity
  - Reflects past VA practice of rating any instability or laxity under DC 5257
- Patellar instability given its own criteria
- Note (2) specifies what constitutes surgical repair of patellar instability
  - Must involve actual anatomical structure repair
  - Excludes procedures not designed to repair instability or subluxation

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DC 5257 CHANGES AS OF 2/7/2021

- Criteria:
  - Incorporate functional loss elements
    - Assistive devices, bracing
  - Incorporate diagnostic elements
    - Sprain, incomplete ligament tear, complete ligament tear
  - Reflect current medical standards and, according to VA, serve as accurate proxies for functional loss of the magnitude that negatively impacts earnings
  - Are easily observed and measured

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DC 5257 CHANGES AS OF 2/7/2021

- Reasons for changes
  - Old criteria subjective and terminology vague, resulting in VA assigning inconsistent ratings
  - Severity of functional impairment can generally be determined by
    - Presence or absence of anatomic abnormalities (damage to patellofemoral ligament complex, flake fractures, etc.), and
    - Whether conservative treatment prevents recurrent instability

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ENGLISH V. WILKIE 30 VET. APP. 347 (2018)

- Objective medical evidence (i.e., a finding of instability on testing during a medical exam) is not required to establish a rating based on instability under DC *5257*
- Objective medical evidence is not *categorically* more probative than lay evidence of instability under DC *5257*
- Nothing in DC *5257* provides that objective medical evidence of instability is required or is to be favored over lay evidence

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ENGLISH V. WILKIE 30 VET. APP. 347 (2018)

- Takeaways:
  - Vet *may* be able to establish entitlement to rating under DC 5257 solely with lay evidence of feelings of instability, giving way, etc.
  - CAVC addressed pre-2021 version of DC 5257, but principles could apply to current version
    - Lay evidence of instability could support a 10% rating under new criteria, if Vet has appropriate medical diagnosis of underlying condition

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SEPARATE RATINGS

- A Vet **CAN** get separate ratings for limitation of motion under DCs 5260 and 5261, and a separate rating under DC 5257
  - VA OGC Precedential Opinion 23-97

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DC 5258: DISLOCATED SEMILUNAR CARTILAGE

- Semilunar Cartilage
  - "Semilunar cartilage of the knee joint, internal" is defined as the "meniscus medialis articulationis genus"
  - "Semilunar cartilage of the knee joint, external" is defined as the "meniscus lateralis articulationis genus"
- Essentially: Semilunar cartilage = Meniscus

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DC 5258: DISLOCATED SEMILUNAR CARTILAGE

- Cartilage, semilunar, dislocated, with frequent episodes of "locking," pain, and effusion into the joint 20%
  - "Dislocated" includes "torn"
  - Practice tip: "frequent" is not defined, so you should argue that multiple manifestations of these symptoms are "frequent"

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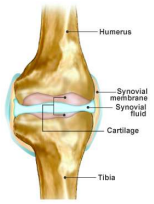
DC 5258: DISLOCATED SEMILUNAR CARTILAGE

- "Effusion" is the escape of fluid into the tissue or body cavity, and it causes swelling in the knee



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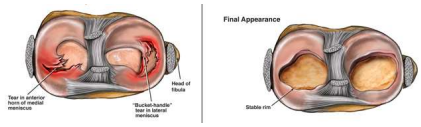
DC 5259: SYMPTOMATIC REMOVAL OF SEMILUNAR CARTILAGE

- Cartilage, semilunar, removal of, symptomatic ...10%
  - "Removal of semilunar cartilage" = Meniscectomy



  - "Debridement" is the removal of damaged tissue, so if you see this word in relation to a meniscus, argue that DC 5259 should be applied

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DC 5259: SYMPTOMATIC REMOVAL OF SEMILUNAR CARTILAGE

- If there is a record of a meniscectomy, you should argue that any and all symptoms not associated with other diagnostic codes should be rated under DC 5259, such as:
  - Pain
  - Weakness
  - Locking
  - Swelling
  - Tenderness to palpation
  - Crepitus

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PARTIAL MENISCECTOMY

- DC 5259 can be used to rate both total and partial meniscectomies
  - DC 5259 does not use term "total" removal of semilunar cartilage
- VA guidance to adjudicators states:
  - "A repaired meniscal tear (s/p partial meniscectomy) is not directly synonymous with either [] DC 5258 or [] DC 5259. Therefore, it is most appropriate to rate the disability analogous to whichever code most closely approximates the current symptoms."
    - Manual M21-1, V.iii.1.B.4.e (change date Apr. 25, 2022)

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LYLES V. SHULKIN 29 VET. APP. 107 (2017)

- Vets can get separate ratings under DC 5258 or 5259, and DCs 5260, 5261, and/or 5257, as long as there are symptoms related to the meniscus other than limitation of motion (DCs 5260, 5261) or lateral instability/recurrent subluxation (old DC 5257)

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LYLES V. SHULKIN

- If manifestations of musculoskeletal disability causing additional functional limitation have not resulted in elevation of the rating under *DeLuca*, those manifestations have not been compensated for separate evaluation and pyramiding purposes
  - Ex. 1: If normal ROM would warrant a 20% rating under DC 5261, but when considering flare-ups results in 30% rating, the symptom of pain CANNOT also be considered under DC 5258 or 5259
  - Ex. 2: If normal ROM would warrant a 20% rating under DC 5261, and flare-ups cause additional loss of motion, but not enough to warrant a 30% rating, the symptom of pain CAN be considered under DC 5258 or 5259

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WALLEMAN V. MCDONOUGH 35 VET. APP. 294 (2022)

- Issue:
  - Does assignment of a disability rating under DC 5259 for symptoms of a meniscectomy other than lateral instability preclude a separate evaluation under DC 5257 for lateral instability of the same knee?

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WALLEMAN V. MCDONOUGH

- Facts
  - 2013: Vet granted SC for left knee torn meniscus status post-meniscectomy, and assigned a 10% rating under DC 5259-5260 for painful motion and symptomatic removal of semilunar cartilage
  - 11/2019 VA exam: Vet diagnosed w/ left knee meniscal tear, osteoarthritis, and instability. He experienced antalgic gait when weight bearing.

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WALLEMAN V. MCDONOUGH

- Facts (cont'd)
  - 8/2020 BVA decision:
    - Knee symptoms were painful motion, tenderness to palpation, stiffness, swelling, achiness, popping, locking, clicking, grating, effusion, crepitus, antalgic gait, slight instability, and a genu varus
    - Assigned 10% rating under DC 5260 for limited flexion of knee due to pain
    - Assigned 10% rating under DC 5259 based on left knee meniscectomy symptoms of swelling, popping, locking, stiffness, grating, and clicking

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WALLEMAN V. MCDONOUGH

- Facts (cont'd)
  - 8/2020 BVA decision (cont'd):
    - Acknowledged slight instability of knee, but declined to award a10% rating under DC 5257, because knee instability was contemplated by the rating criteria under both DCs 5257 and 5259, with instability as a symptomatic residual of the meniscectomy
    - Concluded that assigning a disability rating under DC 5257 under these circumstances would violate the rule against pyramiding

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WALLEMAN V. MCDONOUGH

- Vet's Arguments at CAVC
  - Merely because lateral instability may be contemplated under DC 5259, that doesn't mean it can't be rated separately under DC 5257—as long as such lateral instability is not compensated twice
  - Pooling all manifestations of the left knee disability under DC 5259, even though certain manifestations can independently support entitlement to compensation under another DC, is contrary to VA's duty to maximize benefits

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WALLEMAN V. MCDONOUGH

- VA's Argument at CAVC
  - DCs 5259 and 5257 contemplate distinct disabilities that involve distinct components of the knee, and where a claimant exhibits instability as a residual of a meniscectomy, that represents a distinct component of the knee that is only compensable under DC 5259

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WALLEMAN V. MCDONOUGH

- Court's holdings
  - Rule against pyramiding doesn't categorically preclude a separate rating under DC 5257 for lateral instability, simply because claimant is also in receipt of a rating under DC 5259
  - There is no limit on the symptoms of a meniscectomy that may support an evaluation under DC 5259

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WALLEMAN V. MCDONOUGH

- Court's holdings
  - DC 5257 is the appropriate DC under which to evaluate lateral instability of the knee, even if it is caused by a meniscectomy
  - If assignment of an evaluation under DC 5259 is supported with residuals that don't 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 doesn't overlap with any *other* residuals of a meniscectomy

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WALLEMAN V. MCDONOUGH

- Advocacy Advice
  - If Vet has SC knee disability with a meniscectomy, and has instability and ***any other*** residuals of the meniscectomy, no matter how minor, argue for ratings under both DCs *5257 and* 5259 (and DC 5260, if there is limitation of flexion, and DC 5261 if there is limitation of extension)

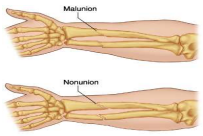
SURVEY #2

- Does arthroscopic surgery for a meniscus condition equate to removal?
  - A. Yes
  - B. No
  - C. Not sure

ANSWER

DC 5262: IMPAIRMENT OF THE TIBIA AND FIBULA

- Malunion is a fractured bone that has healed in the incorrect position, such as bent at a right angle



- Nonunion is a fractured bone that is unable to heal

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DC 5262: IMPAIRMENT OF THE TIBIA AND FIBULA (PRE-2/7/2021)

- Nonunion of, with loose motion, requiring brace …….. 40%
- Malunion of:
  - With marked knee or ankle disability …….. 30%
  - With moderate knee or ankle disability…… 20%
  - With slight knee or ankle disability ……... 10%

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DC 5262: IMPAIRMENT OF THE TIBIA AND FIBULA (ON/AFTER 2/7/2021)

- Nonunion of, with loose motion, requiring brace…….. 40%
- Malunion of:
  - Evaluate under DCs 5256, 5257, 5260, or 5261 for the knee, or 5270 or 5271 for the ankle, whichever results in the highest evaluation

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DC 5262: IMPAIRMENT OF THE TIBIA AND FIBULA (ON/AFTER 2/7/2021)

- **Medial tibial stress syndrome (MTSS) or shin splints:**
  - **Requiring treatment for no less than 12 consecutive months, and unresponsive to surgery and either shoe orthotics or other conservative treatment, both lower extremities 30%**
  - **Requiring treatment for no less than 12 consecutive months, and unresponsive to surgery and either shoe orthotics or other conservative treatment, one lower extremity 20%**
  - **Requiring treatment for no less than 12 consecutive months, and unresponsive to either shoe orthotics or other conservative treatment, one or both lower extremities 10%**
  - **Treatment less than 12 consecutive months, one or both lower extremities 0%**

DC 5263: GENU RECURVATUM

- Deformity of the knee, so that the knee bends backwards
- Also called "knee hyperextension" or "back knee"
- Must also have weakness and insecurity in weight-bearing, objectively demonstrated

DC 5263: GENU RECURVATUM

- Genu recurvatum (acquired, traumatic, with weakness and insecurity in weight-bearing objectively demonstrated) 10%

DC 5055

- Old Rating Criteria: Prior to 2/7/2021
  - Knee Replacement Prosthesis
- New Rating Criteria: On or after 2/7/2021
  - Knee, **Resurfacing** or Replacement (Prosthesis)

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DC 5055: KNEE REPLACEMENT (PROSTHESIS) (Pre-2/7/2021)

- Prosthetic replacement of knee joint:
  - For 1 year following implantation of prosthesis …. 100%
  - With chronic residuals consisting of severe painful motion or weakness in the affected extremity …… 60%
  - With intermediate degrees of residual weakness, pain or limitation of motion rate by analogy to diagnostic codes 5256, 5261, or 5262.
  - Minimum rating ……..…… 30%

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DC 5055: KNEE, RESURFACING OR REPLACEMENT (PROSTHESIS) (ON/AFTER 2/7/2021)

- For **4 months** following implantation of prosthesis or resurfacing ……..100%
- Prosthetic replacement of knee joint:
  - With chronic residuals consisting of severe painful motion or weakness in the affected extremity …… 60%
  - With intermediate degrees of residual weakness, pain or limitation of motion rate by analogy to diagnostic codes 5256, 5261, or 5262.
  - Minimum evaluation, total replacement only …….. 30%
    - **NOTE:** At the conclusion of the 100 percent evaluation period, evaluate resurfacing under diagnostic codes 5256 through 5262; there is no minimum evaluation for resurfacing

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INTRODUCTORY NOTES APPLICABLE TO NEW DC 5055

- Note (1): When an evaluation is assigned for joint resurfacing or the prosthetic replacement of a joint [DC 5055], an additional rating under 38 C.F.R. § 4.71a may **not** also be assigned for that joint, unless otherwise directed.
  - Clarifies current practice and ensures consistent application by raters
- Note (2): Only evaluate a revision procedure in the same manner as the original procedure under [DC 5055] if all the original components are replaced.
- Note (3): The term "prosthetic replacement" in [DC 5055] means a **total replacement** of the named joint.

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INTRODUCTORY NOTES APPLICABLE TO NEW DC 5055

- Note (5): The 100 percent rating for 4 months following implantation of prosthesis or resurfacing under [DC 5055] will commence after the initial grant of the 1-month total rating assigned under § 4.30 following hospital discharge.
- Note (6): Special monthly compensation is assignable during the 100 percent rating period the earliest date permanent use of crutches is established.

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2/7/2021 CHANGES TO DC 5055

- Name change – DC 5055 now also contemplates resurfacing
  - Before change, VA did not compensate for disability associated with resurfacing, despite the similar impact on earning capacity as prosthetic replacement
- 100% convalescence period reduced from 1 year to 4 months
  - Based on studies showing avg time to return to work 8 to 12 weeks for knee arthroplasty

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2/7/2021 CHANGES TO DC 5055

- Following 100% convalescence period for resurfacing, rating based on knee limitation of motion, instability, etc. under DCs 5256-5262
  - Less of an expectation of residual disability with resurfacing
  - If Vet has worse than expected residuals or the need for more convalescence, Vet can submit claim (with pertinent treatment records) for increased rating or additional convalescence

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SURVEY #3

- Can a Vet be rated under pre-2/7/2021 DC 5055 for a **partial** knee replacement?
  - A. Yes
  - B. No
  - C. Not Sure

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National Organization of Veterans' Advocates, Inc., v. Secretary of Veterans Affairs 48 F.4th 1307 (2022)

- In 2016, Fed. Cir. held that partial knee replacements could be rated under DC 5055
  - *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016)
- Shortly before *Hudgens*, VA published "Knee Replacement Guidance" in Federal Register, stating it would be adding a note to 38 C.F.R. § 4.71a explaining that the term "prosthetic replacement" meant a **total** replacement of the joint
  - VA also changed Manual M21-1 in accordance with guidance
- Fed. Cir. found that VA's interpretation of DC 5055 was arbitrary and capricious, and vacated the Knee Replacement Guidance

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., V. SECRETARY OF VETERANS AFFAIRS

- Takeaways:
  - Under the **pre-2/7/2021** rating criteria, partial knee replacements **CAN be rated under** DC 5055
  - Under the **NEW** rating criteria, **partial knee replacements CANNOT be rated under DC 5055**, because VA amended the rating criteria with proper notice and comment

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SEPARATE RATINGS SUMMARY

- Knee disabilities may be rated under all of the following DCs, as long as the same symptom isn't considered under multiple DCs
  - Limitation of flexion (DC 5260)
  - Limitation of extension (DC 5261)
  - Instability / recurrent subluxation (DC 5257)
  - Meniscal condition (DC 5258/5259)

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AMPUTATION RULE

- Although a Vet may be entitled to separate ratings for a knee disability under multiple DCs, the combined rating for musculoskeletal disabilities of the knee cannot exceed the rating for the amputation at the elective level, were the amputation to be performed, which is **60%**
  - 38 C.F.R. § 4.68
- Use "VA math" (the table of combined ratings in 38 C.F.R. § 4.25); don't just add the percentages

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Other Considerations When Rating Knee Disabilities

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38 C.F.R. § 4.30

- Under certain circumstances, a temporary total (100 %) disability rating will be assigned for a SC knee disability when a medical report establishes that the Vet needs time to convalesce following hospital discharge or outpatient release

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38 C.F.R. § 4.30

- What is "convalescence"?
  - Not defined in the regulation
  - CAVC adopted the definition commonly used in the medical community:
    - "The act of regaining or returning to a normal or healthy state" after a surgical operation or injury
      - *Felden v. West*, 11 Vet. App. 527 (1998)
  - There is no requirement that the Vet be confined to home

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38 C.F.R. § 4.30

- Three circumstances under which a convalescence rating will be issued:
  - Vet has undergone surgery that requires at least one month convalescence;
  - Vet has undergone surgery that has resulted in severe postoperative residuals; or
  - A major joint (including knee) is immobilized by a cast
- Medical evidence is required for this rating
  - Ex: a doctor's note that Vet cannot return to work for 8 weeks

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38 C.F.R. § 4.30

- Convalescent Ratings are assigned for 1, 2, or 3 months, depending on the facts
  - Vet can receive extensions for a total duration of up to 6 months (in increments of 1, 2, or 3 months)
  - After the initial 6 months, Vet can receive extensions of 1 to 6 months if he suffers from "severe postoperative residuals" or has a "major joint immobilized by a cast"
- Therefore, Vet can have up to 1 year of convalescence ratings

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38 C.F.R. § 4.30

- Effective dates for convalescent ratings:
  - The rating begins on the first day of the month following a hospital discharge or outpatient release
  - If Vet is hospitalized near the end of the month, and released the beginning of the next month, the convalescent rating begins the date of hospital admission until the end of the following month

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38 C.F.R. § 4.30

- **Advocacy Advice**:
  - If Vet will undergo surgery for a knee disability, make sure Vet asks his doctor for a note regarding the period of convalescence
  - If claim for initial or increased rating is pending at time of convalescence, notify VA of convalescence and provide evidence to support rating under § 4.30
  - If no claim pending, file claim for increased rating based on convalescence within one year of surgery necessitating convalescence, to maximize benefits

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SCARS

- Often, Vets have scars associated with knee disabilities
  - From the original injury
  - From surgery to treat the injury/ disability
- Ensure that scars associated with knee disabilities are assigned appropriate separate disability ratings
  - DC 7801: Scars not of the head, face, or neck, that are associated with underlying soft tissue damage
  - DC 7802: Scars not of the head, face, or neck, that are not associated with underlying soft tissue damage
  - DC 7804 Scars, unstable or painful

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SCARS

- ADVOCACY ADVICE:
  - If Vet has a scar, expressly request SC for the scar as secondary to knee disability, even though it should be considered within the scope of the claim as a complication of the claimed knee disability if it is reasonably raised by the evidence of record
    - 38 C.F.R. § 3.155(d)(2)
  - If Vet has had surgery or an injury that resulted in a scar, make sure to ask if the scar is painful. If so, submit a statement from the Vet discussing the pain.

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VA EXAMINATIONS

VA EXAMINATIONS

- To be adequate, a VA knee exam must include:
  - ROM (flexion and extension) measurements with a goniometer
  - Notation of if and when incoordination, weakened movement, and/or excess fatigability sets in
    - *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011)
  - Whether there is pain on motion, and if so, when pain sets in and whether it causes functional loss
    - *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011)
  - All of the above following repetitive motion
    - *Deluca v. Brown*, 8 Vet. App. 202 (1995)

VA EXAMINATIONS

- To be adequate, a VA knee exam must include (cont'd):
  - Whether Vet has flare-ups of pain; if so, whether there is any additional limitation of motion or functional loss during flares; if so, where on the ROM additional functional loss occurs
    - *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011); *Deluca v. Brown*, 8 Vet. App. 202 (1995)
  - Whether Vet has any additional limitation of motion or functional loss after repeated use over time; if so, where on the ROM the additional functional loss occurs
    - *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011); *Deluca v. Brown*, 8 Vet. App. 202 (1995)

VA EXAMINATIONS

- To be adequate, a VA knee exam must include (cont'd):
  - ROM testing in both weight-bearing and non-weight bearing position
    - 38 C.F.R. § 4.59; *Correia v. McDonald*, 28 Vet. App. 158 (2016)
  - ROM testing pain in active and passive motion
    - 38 C.F.R. § 4.59; *Correia v. McDonald*, 28 Vet. App. 158 (2016)
  - Testing of ROM of the opposite, undamaged knee
    - 38 C.F.R. § 4.59; *Correia v. McDonald*, 28 Vet. App. 158 (2016)

PREPARING FOR VA EXAM

- In order to maximize the probability of obtaining an adequate VA exam with respect to functional loss, advocates should take several actions prior to the exam

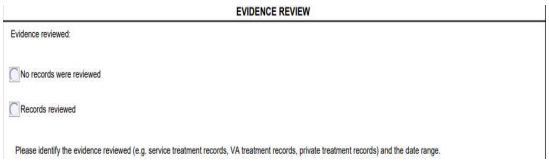
PREPARING FOR VA EXAM

- Help Vet, family, and friends prepare statement re functional loss during flare-ups/after repeated use
  - Frequency
  - Duration
  - Causes
  - How much Vet can move the knee
    - Use percentages ("I lose 50% of my range of motion.")
    - Use other observable markers
    - "I am completely unable to move my knee."

PREPARING FOR VA EXAM

- Tell Vet, when undergoing exam, to:
  - Show examiner how little he or she can bend the knee during a flare-up and after use over a long period and ask the examiner to measure that limitation with a goniometer in order to quantify the loss of motion in terms of degrees
  - Describe flare-ups to the examiner in as much detail as possible (similar to the written statement)

EVIDENCE REVIEWED



EVIDENCE REVIEW

Evidence reviewed:

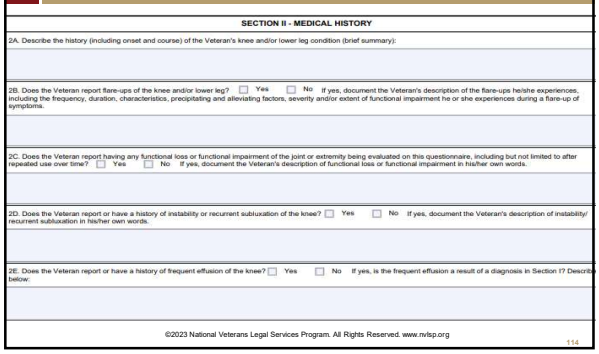
☐ No records were reviewed

☐ Records reviewed

Please identify the evidence reviewed (e.g. service treatment records, VA treatment records, private treatment records) and the date range.

- Ensure examiner notes any relevant:
  - VA/private treatment records
  - Lay statements
  - Prior VA exams

SECTION II MEDICAL HISTORY



SECTION II - MEDICAL HISTORY

2A. Describe the history (including onset and course) of the Veteran's knee and/or lower leg condition (brief summary):

2B. Does the Veteran report flare-ups of the knee and/or lower leg? ☐ Yes ☐ No If yes, document the Veteran's description of the flare-ups he/she experiences, including the frequency, duration, characteristics, precipitating and alleviating factors, severity and/or extent of functional impairment he or she experiences during a flare-up of symptoms.

2C. Does the Veteran report having any functional loss or functional impairment of the joint or extremity being evaluated on this questionnaire, including but not limited to after repeated use over time? ☐ Yes ☐ No If yes, document the Veteran's description of functional loss or functional impairment in his/her own words.

2D. Does the Veteran report or have a history of instability or recurrent subluxation of the knee? ☐ Yes ☐ No If yes, document the Veteran's description of instability/ recurrent subluxation in his/her own words.

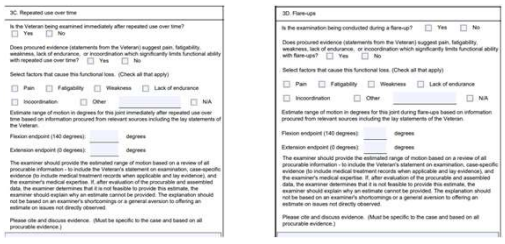
2E. Does the Veteran report or have a history of frequent effusion of the knee? ☐ Yes ☐ No If yes, is the frequent effusion a result of a diagnosis in Section I? Describe below:

SECTION II – MEDICAL HISTORY

- History section may provide descriptions of symptoms of functional loss or other info that could be relevant in assigning the proper rating
  - Descriptions of flare-ups offered by Vet or elicited by VA examiner should be in these subsections
  - Compare w/ what Vet told you he/she reported to examiner
  - Ensure descriptions are consistent with examiner's discussion of functional impairment in Section III

SECTION III – ROM AND FUNCTIONAL LIMITATION

- In addition to initial ROM and ROM after 3 reps, this section provides assessment of Vet's functional limitations after repeated use over time and during flare-ups:


3C. Repeated use over time

Is the Veteran being examined immediately after repeated use over time? ☐ Yes ☐ No

Does procured evidence (statements from the Veteran) suggest pain, fatigability, weakness, lack of endurance, or incoordination which significantly limits functional ability with repeated use over time? ☐ Yes ☐ No

Select factors that cause this functional loss. (Check all that apply)

☐ Pain ☐ Fatigability ☐ Weakness ☐ Lack of endurance

☐ Incoordination ☐ Other _____ ☐ N/A

Estimate range of motion in degrees for this joint immediately after repeated use over time based on information procured from relevant sources including the lay statements of the Veteran.

Flexion endpoint (140 degrees): _____ degrees

Extension endpoint (0 degrees): _____ degrees

The examiner should provide the estimated range of motion based on a review of all procurable information - to include the Veteran's statement on examination, case-specific evidence (to include medical treatment records when applicable and lay evidence), and the examiner's medical expertise. If, after evaluation of the procurable and assembled data, the examiner determines that it is not feasible to provide this estimate, the examiner should explain why an estimate cannot be provided. The explanation should not be based on an examiner's shortcomings or a general aversion to offering an estimate on issues not directly observed.

Please cite and discuss evidence. (Must be specific to the case and based on all procurable evidence.)

3D. Flare-ups

Is the examination being conducted during a flare-up? ☐ Yes ☐ No

Does procured evidence (statements from the Veteran) suggest pain, fatigability, weakness, lack of endurance, or incoordination which significantly limits functional ability with flare-ups? ☐ Yes ☐ No

Select factors that cause this functional loss. (Check all that apply)

☐ Pain ☐ Fatigability ☐ Weakness ☐ Lack of endurance

☐ Incoordination ☐ Other _____ ☐ N/A

Estimate range of motion in degrees for this joint during flare-ups based on information procured from relevant sources including the lay statements of the Veteran.

Flexion endpoint (140 degrees): _____ degrees

Extension endpoint (0 degrees): _____ degrees

The examiner should provide the estimated range of motion based on a review of all procurable information - to include the Veteran's statement on examination, case-specific evidence (to include medical treatment records when applicable and lay evidence), and the examiner's medical expertise. If, after evaluation of the procurable and assembled data, the examiner determines that it is not feasible to provide this estimate, the examiner should explain why an estimate cannot be provided. The explanation should not be based on an examiner's shortcomings or a general aversion to offering an estimate on issues not directly observed.

Please cite and discuss evidence. (Must be specific to the case and based on all procurable evidence.)

MERE SPECULATION

Does pain, weakness, fatigability or incoordination significantly limit functional ability with repeated use over a period of time?
[ ] Yes [ ] No [X] Unable to say w/o mere speculation
If unable to say w/o mere speculation, please explain:
Flare-up of the Veteran's XXXX condition was not present at the time of examination. In absence of the Veteran's flare-up at examination, or after repeated use over time, it would be mere speculation to express in terms of the degrees of additional ROM loss due to pain, weakness, fatigability, or incoordination.

SURVEY #4

- Would this notation make a VA exam report inadequate?
  - A. Yes
  - B. No
  - C. Maybe

MERE SPECULATION

- VA examiner's statement that he/she can't offer an opinion without resorting to speculation usually inadequate
  - It must be clear on the record that the inability to opine … is not the first impression of an uninformed examiner, but rather an assessment arrived at after all due diligence in seeking relevant medical information that may have bearing on the requested opinion
    - *Jones v. Shinseki*, 23 Vet. App. 382 (2010)

MERE SPECULATION

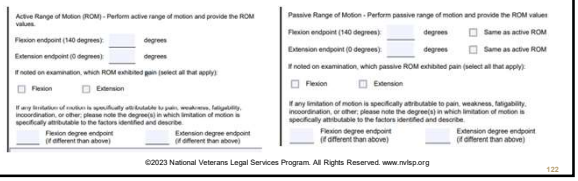
- Vet not suffering from a flare-up at the time of exam is inadequate rationale for finding it would be speculative to offer an opinion on whether there would be functional loss and to quantify any such functional loss
  - *Sharp v. Shulkin*, 29 Vet. App. 26 (2017)
- Vet not being observed after repeated use of a joint over a period of time is inadequate rationale for finding it would be speculative to offer an opinion on whether there would be functional loss and to quantify any such functional loss
  - *Lyles v. Shulkin*, 29 Vet. App. 207 (2017)

MERE SPECULATION

- Examiner must ascertain adequate info—such as frequency, duration, characteristics, severity, or functional loss—regarding flares by alternative means, such as asking Vet to describe additional functional loss suffered during flares and then estimate Vet's functional loss based on all the evidence of record—including the Vet's lay information—or explain why unable to do so
  - *Sharp v. Shulkin*
- Same applies to repeated use over time
  - *Lyles v. Shulkin*

CORREIA / § 4.59 ROM TESTING

- A VA knee exam is inadequate if the report indicates that any of the *Correia*/§ 4.59 ROM tests (active, passive, weight bearing, non-weight bearing, opposite knee) were not conducted (and doesn't indicate that they could not be conducted)



Active Range of Motion (ROM) - Perform active range of motion and provide the ROM values.

Flexion endpoint (140 degrees): ____ degrees

Extension endpoint (0 degrees): ____ degrees

If noted on examination, which ROM exhibited pain (select all that apply):

☐ Flexion ☐ Extension

If any limitation of motion is specifically attributable to pain, weakness, fatigability, incoordination, or other; please note the degree(s) in which limitation of motion is specifically attributable to the factors identified and describe.

____ Flexion degree endpoint (if different than above) ____ Extension degree endpoint (if different than above)

Passive Range of Motion - Perform passive range of motion and provide the ROM values

Flexion endpoint (140 degrees): ____ degrees ☐ Same as active ROM

Extension endpoint (0 degrees): ____ degrees ☐ Same as active ROM

If noted on examination, which passive ROM exhibited pain (select all that apply):

☐ Flexion ☐ Extension

If any limitation of motion is specifically attributable to pain, weakness, fatigability, incoordination, or other; please note the degree(s) in which limitation of motion is specifically attributable to the factors identified and describe.

____ Flexion degree endpoint (if different than above) ____ Extension degree endpoint (if different than above)

HYPOS

HYPO #1

- Vet has right knee DJD, confirmed by X-ray, flexion limited to 45 degrees, and extension to 0 degrees. How should he be rated?

HYPO #1

10% under DC 5003-5260
(Arthritis and limitation of flexion)

45 degrees = 10% under 5260

HYPO #2

- Vet has right knee DJD, confirmed by X-ray, flexion limited to 45 degrees, and extension limited to 10 degrees. How should he be rated?

HYPO #2

10% under DC 5003-5260
45 degrees = 10%

10% under DC 5003-5261
10 degrees = 10%

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HYPO #3

- Vet had a meniscectomy. She now has knee swelling, knee pain, and flexion limited to 45 degrees. How should she be rated?

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HYPO #3

10% under DC 5260
for limitation of flexion

10% under DC 5259
for pain and swelling

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SURVEY #5

- Vet has had a SC knee disability effective since 2020, status post meniscectomy, with symptoms of slight instability, pain, swelling, flexion limited to 40°, and extension limited to 10°. What DCs/ratings should be assigned?
  - A. 10% under old DC 5257 for slight instability
  - B. 10% under DC 5260 for limited flexion
  - C. 10% under DC 5261 for limited extension
  - D. 10% under DC 5259 for pain and swelling
  - E. All of the above

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ANSWER

ALL

- 10% under pre-2/7/2021 DC 5257 for slight instability
- 10% under DC 5260 for limited flexion
- 10% under DC 5261 for limited extension
- 10% under DC 5259 for pain and swelling

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NVLSP VA Benefit Identifier App

- **Questionnaire/App:** Helps Vets and advocates figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- **3 WAYS to Access:**

NVLSP Website

Download on the App Store

ANDROID APP ON Google play

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NVLSP Training Opportunities

- NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at richard@nvlsp.org

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