



**DEPARTMENT OF VETERANS AFFAIRS**

**8320-01**

**38 CFR Part 4**

**RIN 2900-AP16**

**Schedule for Rating Disabilities; The Genitourinary Diseases and Conditions**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The Department of Veterans Affairs (VA) is withdrawing a document published in the *Federal Register* on July 28, 2017, proposing to amend the portion of its Schedule for Rating Disabilities that addresses the genitourinary system.

**DATES:** The proposed rule published at 82 FR 35140 on July 28, 2017, is withdrawn as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The docket for this action is available at [www.regulations.gov](http://www.regulations.gov) or at the Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1064, Washington, DC 20420.

**FOR FURTHER INFORMATION CONTACT:** Ioulia Vvedenskaya, M.D., M.B.A., Medical Officer, Regulations Staff (211D), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-9700 (This is not a toll-free telephone number).

**SUPPLEMENTARY INFORMATION:** On July 28, 2017, VA published in the Federal Register the proposed rule for Schedule for Rating Disabilities; The Genitourinary Diseases and Conditions. See 82 FR 35140. During the internal review process of the final rule, VA found that an erroneous value and unit of measure were inadvertently included in the albumin/creatinine ratio (ACR) in the renal dysfunction rating criteria

under proposed 38 CFR 4.115a. The erroneous proposed value would have resulted in erroneous disability evaluations for multiple renal disabilities. Accordingly, VA is withdrawing the proposal and is developing a new proposal, to include correct ACR values, which VA intends to publish at a later date.

During the 60-day comment period for the proposed rule, VA received six comments. VA appreciates the comments submitted in response to the proposed rule. As stated above, VA is withdrawing the proposed rule to develop a new proposal; however, we have summarized the comments received on the proposed rule below and provided an analysis or response to the comments.

#### I. Comments of General Support

One commenter supported multiple changes to 38 CFR 4.115a, to include using the glomerular filtration rate (GFR) to evaluate both renal dysfunction and urinary tract infections. The commenter also welcomed the introduction of new diagnostic codes (DCs) 7543 and 7544. The same commenter supported new allowances for Special Monthly Compensation (SMC) under DCs 7520-7522, but was concerned that these positive changes were based on a narrow view of what might influence earning capacity. VA has addressed those concerns below.

#### II. Diagnostic Codes 7508 and 7510

Two commenters disagreed with VA's proposal to no longer provide a 30-percent rating for nephrolithiasis and ureterolithiasis that requires diet or drug therapy under DCs 7508 and 7510. One commenter specifically cited Mayo Clinic dietary

recommendations for prevention of kidney stone formation and suggestions for medications in order to help passing of a kidney stone. But diet or drug therapies are widely recommended for the majority of medical diseases and conditions; and the remaining requirement for a 30-percent rating under DC 7508 (invasive or non-invasive procedures more than two times/year) better encapsulates, for these conditions, the long-term impairment of earning capacity corresponding to a 30-percent rating. We do not plan to make any changes based on these comments.

### III. Diagnostic Codes 7520 Through 7522

VA received several comments regarding its proposed changes to DCs 7520 through 7522.

One commenter was concerned that the proposed rating criteria for erectile dysfunction (ED) do not compensate adequately veterans who are sperm donors. VA provides compensation for the *average* impairment in earning capacity due to a disability; there is no requirement that the rating schedule address unique scenarios such as the possibility of supplemental income from sperm donorship. See 38 CFR 4.1.

The same commenter suggested that VA should include guidance regarding retrograde ejaculation without ED from VA's Adjudication Procedures Manual (M21-1) into this regulation for clarity. This section of the M21-1 addresses retrograde ejaculation as it relates to treatment for benign prostatic hypertrophy (BPH), which is evaluated under DC 7527. See M21-1, Part III, Subpart iv, Chapter 4, Section I, Topic 2, Paragraph a., available at [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/cust](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/cust)

omer/locale/en-US/portal/55440000001018/content/554400000014202/M21-1-Part-III-Subpart-iv-Chapter-4-Section-I-Genitourinary-Disabilities. This procedural guidance is intended to provide supplementary information that might be useful to VA rating personnel about what “can” result from BPH treatment, but is not appropriate for inclusion in regulation. We do not plan to make any changes based on these comments.

Another commenter asked VA to provide rationale for its decision to remove the provision that permitted rating removal of the penis or glans (DCs 7520 and 7521) under 38 CFR 4.115a (specifically, voiding dysfunction). Under most circumstances, the removal of the penis or glans does not result in voiding dysfunction. Most commonly, the loss of penis or glans will affect the ability to void while standing, but that is not considered compensable functional impairment under 38 CFR 4.115a, voiding dysfunction. Santucci, R. et al., “Penile Fracture and Trauma” (updated Dec. 30, 2015), Medscape <https://emedicine.medscape.com/article/456305-overview> (last accessed Jan. 15, 2019). Furthermore, if, in the course of penis or glans surgical removal, there is associated urethral trauma resulting in voiding dysfunction, it should be separately rated under DC 7518, Urethra, stricture of. For these reasons, VA does not find it appropriate to direct rating personnel to consider 38 CFR 4.115a when evaluating DCs 7520 and 7521.

Two commenters asked VA to provide a rationale for its decision to exclude Peyronie’s disease from ratable conditions. The commenters expressed concern that Peyronie’s disease may be caused by trauma as a result of an in-service injury and, in some cases, prevent a veteran from having sexual intercourse or make it difficult to get

or maintain an erection. One commenter proposed to rate Peyronie's disease analogously to ED under DC 7522.

The etiology of Peyronie's disease remains unclear. More recently, Peyronie's disease has been thought to result from vascular trauma or injury to the penis that causes scarring and deformity of the penis. Lizza, E. et al., "Peyronie Disease" (updated July 25, 2018), Medscape <https://emedicine.medscape.com/article/456574-overview#a7> (last visited Jan. 15, 2019). VA appreciates commenter's statement that penile trauma as a result of an in-service injury should be recognized under DC 7522 and intends to address this issue in the new proposed rule.

One of the above commenters further asked if VA would sever service connection for previously established Peyronie's disease. VA will sever service connection only where the evidence establishes that the award of service connection was clearly and unmistakably erroneous, and only after providing the veteran with proper notification and due process. 38 CFR 3.105(d). Moreover, 38 CFR 3.957 protects an award of service connection that has been in effect for ten years or longer (unless the original grant was based on fraud).

#### IV. Diagnostic Code 7542

One commenter expressed concern with VA's proposal to rate neurogenic bladder as voiding dysfunction or urinary tract infection, whichever is predominant under the proposed DC 7542, Neurogenic bladder. The commenter believed that such a proposal would not adequately compensate a veteran who suffers from both voiding dysfunction and urinary tract infection. Historically, 38 CFR 4.115a has recognized that

“[d]iseases of the genitourinary system generally result in disabilities related to renal or voiding dysfunction, infections, or a combination of these.” Further, § 4.115a directs rating personnel to evaluate such disabilities on the “predominant area of dysfunction.” VA’s instruction for proposed DC 7542 to evaluate on the basis of voiding dysfunction or urinary tract infection is similar to how all genitourinary disabilities are currently evaluated. We do not plan to make any changes based on this comment.

#### V. Diagnostic Code 7543

One commenter had several questions about proposed DC 7543, Varicocele. The first question was whether VA will assign a single evaluation for both unilateral or bilateral involvement. VA’s position is that a single evaluation would be assigned. To the extent the commenter is insinuating that the bilateral factor described by 38 CFR 4.26 should be applied to proposed DC 7543, it would not—because proposed DC 7543 would not pertain to extremities or paired skeletal muscles.

The second question was whether two evaluations would be assigned in case of a left varicocele with right hydrocele. VA would assign a single evaluation regardless of whether there is varicocele or hydrocele. Both conditions affect the same organ and have similar disabling effects. Evaluating these conditions separately would create pyramiding. See 38 CFR 4.14 (stating that the evaluation of the same disability under various diagnoses is to be avoided). Lastly, while these conditions may cause a decrease in fertility, or the existence of infertility, neither cause a reduction in earning capacity. While varicocele or hydrocele may be associated with infertility, infertility does

not impair earning capacity and is not in itself a disability for VA rating purposes. See 38 CFR 4.1.

Finally, the same commenter asked whether separate multiple zero-percent evaluations under proposed DC 7543 could warrant compensation. As noted above, VA would not assign multiple zero-percent evaluations under proposed DC 7543. Moreover, 38 CFR 3.324, Multiple Noncompensable Service-connected Disabilities, would not apply to DC 7543 because the regulation requires disabilities “of such character as clearly to interfere with normal employability.” In most cases, for the reasons stated above, the condition evaluated under DC 7543 would not interfere with employability. We do not plan to make any changes based on these comments.

## VI. Comments Beyond the Scope of This Rulemaking

### A. Mental Distress, Mental Disorders, and Genitourinary Disorders

Two commenters requested changes to 38 CFR 4.130 in their public comments. One commenter disagreed with the proposed removal of a 20-percent rating for ED under DC 7522 and pointed to mental distress caused by ED. The commenter recommended expanding 38 CFR 4.130 to include mental distress caused by ED. The other commenter disagreed with the noncompensable evaluation for decrease/loss of fertility under proposed DC 7543 and recommended expanding 38 CFR 4.130 to include mental distress caused by decreased/lost fertility.

Initially, VA notes that the proposed rulemaking concerned 38 CFR 4.115b, not § 4.130; thus, this comment is beyond the scope of this rulemaking. Nevertheless, as stated in the preamble to the proposed rule, erectile dysfunction and decrease or loss of

fertility do not result in impairment of earning capacity and therefore do not warrant compensable evaluations under the VA schedule for rating disabilities (VASRD). 82 FR at 35143; see *also* 38 CFR 4.1 (stating that the purpose of the rating schedule is to represent the average impairment in earning capacity resulting from diseases and injuries in civil occupations). VA notes that, despite proposing no compensation for these conditions through VASRD, its regulations do provide compensation for the impact on a veteran's ability to procreate through the assignment of SMC for loss or loss of use of a creative organ. See 38 U.S.C. 1114(k).

Another commenter appeared to provide a response to the above comments related to expanding 38 CFR 4.130 to include ED as a symptom of a mental health diagnosis. The commenter examined several case scenarios where a veteran might claim a mental health disorder secondary to service-connected ED. VA agrees with the commenter's assessment that any mental disorder related to ED would be a separate claim and would require its own diagnosis, service connection, and disability evaluation under 38 CFR 4.130.

#### B. 38 CFR 4.14, Co-Morbidities, and Pyramiding

One commenter suggested that an example of pyramiding (38 CFR 4.14) is always helpful. The commenter wanted to examine a case scenario where a veteran with service-connected bladder cancer also has a separate service-connected primary prostate cancer. The commenter asked what would be an example of non-overlapping symptomatology warranting separate evaluations. The rating schedule evaluates bladder and prostate cancer under DC 7528, entitled Malignant Neoplasms of the

Genitourinary System. VA did not propose to change the rating criteria for DC 7528. Therefore, this issue is not within the scope of this rulemaking.

The same commenter asked how VA would rate a surgical resection for a necrotic penis in end stage renal disease involving less than one half of the penis. VA assigns evaluations for service-connected disabilities in accordance with the rating schedule and based on the individual facts and medical evidence of record. As such, it cannot comment on how disabilities in particular hypothetical circumstances would be rated and finds this comment outside the scope of this rulemaking.

The same commenter also had several questions regarding the proposed transplant list provision in 38 CFR 4.115a. The commenter wanted to examine a case scenario where a veteran with hepatitis C and alcohol-related cirrhosis was placed on the transplant list but later was service-connected for kidney cancer due to Camp Lejeune service and then receives a transplant. The commenter wanted to know how the rater would determine if the transplant was due to the non-service-connected conditions and not the presumptive cancer given overlapping symptoms. Cirrhosis and kidney cancer involve two separate body systems. Cirrhosis is a liver condition, which is part of the digestive system, whereas kidney cancer is part of the genitourinary system. To the extent the commenter is describing a scenario in which a veteran was on both liver and kidney transplant lists, separation of symptomology for two or more conditions for evaluation purposes is made on a case-by-case in accordance with the evidence of record. VA is not proposing to change the way two separate body systems' conditions are rated. Therefore, this issue is not within the scope of this proposed rulemaking.

### C. Incorrect Rulemaking

One commenter submitted a comment to the ED-2015-OSERS-001-1167 regulation published by the Office of Special Education & Rehabilitative Services in error.

### VII. Comment Regarding Public Access

One commenter suggested that VA should provide transcripts, minutes, or other materials obtained from subject matter experts and the public gathered during a public forum held on January 27-28, 2011.

In the preamble to the proposed rule, VA included a general summary provision referencing the public forum in January 2011. See 82 FR at 35140. The goals of the forum were to improve and update VASRD criteria, and invite public participation; this process included presentations on areas of expertise and interaction with the public. (A transcript of this public forum is on file and available for public inspection in the Office of Regulation and Policy Management. Contact information for that office is noted in the ADDRESSES section of the proposed rule. See 82 FR at 35140.) The public forum and working group process served as an initial call to various subject matter experts and Veterans Service Organizations to provide a preliminary review of the VASRD from both internal and external stakeholders.

VA emphasizes that this review of the VASRD was not an opportunity for external stakeholders to participate in the deliberative rulemaking process; the public forum discussed the general topic of the VASRD body system and provided feedback on the areas that were subject to advances since the last major revision of the body

system. To this end, VA notes that, where changes to the scientific and/or medical nature of a given condition were made in the proposed rule, VA cited the published, publicly-available source for each change. Not only does this provide the public with access to the source for a given proposed change, it also ensures that VA relied upon peer-reviewed scientific and medical information to support a given change. While similar information may have been presented at the public forum, VA relied upon the published document(s) as the primary source for a change and included such sources in the administrative record for this rulemaking. VA did not propose scientific and/or medical changes to the VASRD in the absence of publicly available, peer-reviewed sources.

Accordingly, any references in the proposed rule to the working group phase, to include the public forum, serve as an explanatory background and introduction to the VASRD rewrite project; the changes made by this rulemaking are not a reflection of any presenter or work group member. All proposed changes based on scientific and/or medical information are a reflection of cited, published materials which are available to the public. VA has made all deliberative materials available (via citation in the rulemaking) and is providing access to materials from the public forum available for public inspection at the Office of Regulation Policy and Management.

#### Signing Authority

The Secretary of Veterans Affairs approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for

publication electronically as an official document of the Department of Veterans Affairs.

Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on February 13, 2019, for publication.

Dated: February 26, 2019.

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