DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900-AR51

Exceptions to Applying the Bilateral Factor in VA Disability Calculations

AGENCY: Department of Veterans Affairs.

ACTION: Final Rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final, without changes, an interim final rule that amended the regulation governing the bilateral factor for diseases and injuries of both arms, both legs, or paired skeletal muscles.

DATES: Effective Date: This rule is effective December 27, 2023.

FOR FURTHER INFORMATION CONTACT: Howard McCuien, Jr., Regulations Analyst, VA Schedule for Rating Disabilities (VASRD) Regulations Staff (218A), Compensation Service, Veteran 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 April 14, 2023, VA published the interim final rule in the Federal Register to allow VA adjudicators to exclude certain disabilities that would be calculated using the bilateral factor to determine the combined evaluation if, by their exclusion, a higher combined evaluation can be achieved. See 88 FR 22914. VA received one comment during the 60-day public comment period. The commenter agreed with VA's amendment but offered two considerations for how VA implements it.

I. Limiting Application of Regulation

The commenter expressed concern that application of the bilateral factor rule may fail to maximize benefits at the 80 percent combined evaluation level (in addition to the 90 percent level) and, in support of this assessment, cited the decision of the United States Court of Appeals

for Veterans Claims (CAVC) in Wilburn v. McDonough, No. 22-5577, 2023 WL 5217853 (Ct. Vet. App. Aug. 15, 2023). This commenter suggested that since VA cannot guarantee that the anomaly described in the interim final rule is limited to the 90 percent to 100 percent range, VA should apply this systemic fix to all cases where the bilateral factor has been or will be considered to ensure it has complied with the duty to maximize benefits as described in Wilburn.

VA agrees that the application of the bilateral factor rule should not be limited to 90 percent combined evaluations. While the interim final rule stated that "it is only at the low 90-percent level where it may reduce a combined evaluation," VA has since determined that there are limited scenarios where a combined 80-percent evaluation could be increased to 90 percent. Nevertheless, the regulatory text of the bilateral factor rule does not limit its application to only 90 percent combined evaluations but will apply whenever "the combined evaluation is lower than what could be achieved by not including one or more bilateral disabilities in the bilateral factor calculation." See 38 CFR 4.26(d). Therefore, no changes to the regulatory text are necessary, and the regulatory impact analysis of this final rule reflects the additional Veterans who are eligible for increased combined evaluations based on its application to Veterans at all possible combination levels.

II. Liberalizing Law

The commenter also suggested that VA should retroactively apply this regulatory amendment back to the original applicable effective date for each Veteran rather than the effective date of the rulemaking amending 38 CFR 4.26, which is April 16, 2023. Specifically, the commenter contended that this regulatory amendment is not a "liberalizing law" because it does not bring about a substantive change that creates a new or different entitlement as defined by Spencer v. Brown, 17 F.3d 368, 372 (Fed. Cir. 1994). Instead, the commenter asserted that this amendment merely clarifies the proper application of the bilateral factor to both more accurately account for the full disability picture and to comply with VA's duty to maximize benefits. The commenter further asserted that any instance in the past in which VA did not

properly apply the bilateral factor (based on its now clarified application) and did not maximize benefits was a clear and unmistakable error; therefore, VA should correct this error back to the date it originally occurred.

VA disagrees that this regulatory amendment merely clarified the proper application of the bilateral factor rule and that previous decisions were in error. The instructions for applying "old" 38 CFR 4.26 (hereinafter referred to as the "prior bilateral factor rule") were unambiguously clear, and no clarification was necessary for applying them. The prior bilateral factor rule stated that whenever there was a partial disability or disabilities that affected both arms, both legs, or paired skeletal muscles, those partial disabilities "will be combined as usual, and 10 percent of this value will be added (i.e., not combined) before proceeding with further combinations, or converting to degree of disability." The prior bilateral factor rule had no exceptions or other caveats that would have allowed claims processers to forego combining all partial disabilities, and it used the term "will," indicating an obligation to perform. Additionally, the prior bilateral factor rule did not include any provisions to disregard its instructions if a higher evaluation could be assigned. Conversely, there are many examples in 38 CFR part 4 of provisions that allow claims processors to apply or disregard an instruction if doing so results in a higher evaluation. One such example is note 2 of 38 CFR 4.118, DC 7801, Burn scar(s) or scar(s) due to other causes, not of the head, face, or neck, that are associated with underlying soft tissue damage. The note directs the claims processor to separately evaluate each affected zone of the body and then combine each evaluation. However, it also states that the claims processor may combine all of the zones into a single evaluation if that would result in a higher evaluation.

As such, this regulatory amendment was necessary to create an exception to the application of the prior bilateral factor rule. Because a regulatory amendment was necessary, retroactive application of its provisions is limited by 38 U.S.C. 5110(g), which states, in part, that "the effective date of such award or increase (pursuant to any Act or administrative issue)

shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue."

In addition to the public comment, a different organization identified the problem of certain Veterans receiving lower combined evaluations due to the application of the prior bilateral factor rule and brought it to VA's attention before VA published the interim final rule on April 14, 2023. VA informed the organization that it was aware of this problem and was drafting a regulation to address it. During that discussion, the organization also inquired about whether VA could employ equitable relief as a basis for retroactive application of this regulatory amendment. VA has determined that it cannot apply equitable relief based on the application of the prior bilateral factor rule. Equitable relief provisions under 38 U.S.C. 503 only apply in cases where VA has made an administrative error or an erroneous determination. Since VA has always interpreted the use of the prior bilateral factor rule as mandatory without exception, previous evaluations using the prior bilateral factor rule were not in error. Therefore, 38 U.S.C. 503 is not applicable. Furthermore, a clear and unmistakable error finding likewise would not be authorized with regard to claims already finally decided under the prior bilateral factor rule because VA's decision would have been in accordance with the law as it existed at the time the claim was decided.

While VA is committed to ensuring benefits are maximized to the full extent of the law, retroactive application is not authorized in this instance, as it is limited by statute and regulation. Accordingly, VA makes no changes based on this comment.

Since VA makes no changes based on the comment received, this document adopts as a final rule the interim final rule published in the Federal Register on April 14, 2023, 88 FR 22914.

Administrative Procedure Act

VA has considered all relevant input and information contained in the comment submitted in response to the interim final rule (88 FR 22914) and, for the reasons set forth above, has concluded that no changes to the interim final rule are warranted. Accordingly, based upon

the authorities and reasons set forth in the interim final rule, as supplemented by the additional reasons provided in this document in response to the comment received, VA is adopting the provisions of the interim final rule at 88 FR 22914 as a final rule without changes.

Executive Orders 12866, 13563 and 14094

Executive Order (E.O.) 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. E.O. 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12866 of September 30, 1993 (Regulatory Planning and Review), and E.O. 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under E.O. 12866, as amended by E.O. 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act, 5 U.S.C. 601-612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector,

of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act (PRA)

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 4

Disability benefits.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on December 18, 2023, 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.

Luvenia Potts,

Regulation Development Coordinator,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, VA adopts as final the interim final rule published on April 14, 2023, at 88 FR 22914.

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