



38 CFR Part 4

RIN 2900-AR51

Exceptions to Applying the Bilateral Factor in VA Disability Calculations

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this interim final rule to amend the regulation governing the bilateral factor for diseases and injuries of both arms, both legs, or paired skeletal muscles. More specifically, this interim final rule will 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.

DATES: Effective date: This interim final rule is effective April 16, 2023.

Comment date: Comments must be received on or before [**insert date 60 days after date of publication in the FEDERAL REGISTER**].

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <https://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any

public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Olumayowa Famakinwa, Chief, VA Schedule for Rating Disabilities (VASRD) Implementation Staff (218B), Compensation Service (21C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

I. The Need for Updating Bilateral Factor Policy

VA conducted claims data analysis and determined that, in very limited circumstances, an unintended negative impact can result based on VA's "bilateral factor" calculation, which is applied when disabilities involving paired extremities are service connected. Specifically, adding an extremity to a veteran's total combined (100 percent) evaluation in some cases can result in a less favorable 90 percent evaluation. To remedy this unintended negative impact, VA is amending its regulation regarding the bilateral factor to ensure affected veterans receive the appropriate level of compensation that their disabilities warrant.

A. How Combined Evaluations Are Calculated

By statute, VA assigns a combined evaluation for all service-connected disabilities using a schedule of 10 grades—10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent and 100 percent (sometimes referred to as "total"). See 38 U.S.C. 1155. This combined evaluation serves as the basis for a veteran's monthly compensation. Id. Instructions for combining evaluations for multiple service-connected disabilities are found in 38 CFR 4.25. Specifically, § 4.25 states that combinations must be done by order of severity (larger numbers first, smaller numbers last) and that, for example, "a person having a 60 percent disability is considered 40 percent efficient. Proceeding from this 40 percent

efficiency, the effect of a further 30 percent disability is to leave only 70 percent of the efficiency remaining after consideration of the first disability, or 28 percent efficiency altogether. The individual is thus 72 percent disabled[.]”

Paragraph (a) of 38 CFR 4.25 further states that “[t]his combined value will then be converted to the nearest number divisible by 10, and combined values ending in 5 will be adjusted upward.” Therefore, the individual who is 72 percent disabled in the example would receive a 70 percent combined evaluation. This paragraph also provides instructions for combining more than two disabilities. Using the example of combining disabilities evaluated at 60 percent, 40 percent and 20 percent, the result is 80.8 percent; however, because the combination result is a decimal, it is converted to a whole number, and decimals of .5 or higher are adjusted upward. The result is an 81 percent evaluation that is converted to the nearest degree divisible by 10, or 80 percent.

B. How the Bilateral Factor Is Applied

Section 4.26 of title 38, CFR, provides that when a partial disability results from disease or injury of both arms, or of both legs, or of paired skeletal muscles, the ratings for the disabilities of the right and left sides 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 bilateral factor will be applied to such bilateral disabilities before other combinations are carried out and the rating for such disabilities including the bilateral factor in § 4.26 will be treated as 1 disability for the purpose of arranging in order of severity and for all further combinations.

C. How the Bilateral Factor Lowers Evaluations In Isolated Cases

The bilateral factor calculation does two things: (1) it combines bilateral disability evaluations together and (2) adds 10 percent of that total value to those combined bilateral disabilities, with a potential to increase the overall combined evaluation. However, the closer the combined evaluation approaches 100 percent, the smaller the

effect of the additional disability on the combined rating, and, in limited cases, the bilateral factor yields a lower evaluation than if it were not applied to some or all of a particular veteran's bilateral disability evaluations.

An example of this is when there are multiple disabilities that combine to 93 percent, plus two other 10-percent evaluations. Applying the bilateral factor, 10 and 10 first combine to 19, and 1.9 (representing 10 percent of 19) is added (not combined) to the 19, resulting in 20.9. This is rounded to 21 (the nearest whole number) and combined with 93 percent. 93 percent and 21 percent combine to 94.47, which is rounded to 94 and then adjusted downward to a final combined rating of 90 percent. However, if the bilateral factor is not applied, 93 and 10 combine to 93.7, which is rounded to 94, then 94 and 10 combine to 94.6, which is rounded to 95. This is then adjusted upward to a final combined rating of 100 percent. Thus, in this example, not applying the bilateral factor results in a greater benefit to the veteran.

This effect can also be observed when combining 92 percent and 31 percent, where 31 percent is the result of two bilateral disabilities at 20 percent and 10 percent, compared to combining 92 percent with 20 percent and 10 percent separately. Applying the bilateral factor, 92 percent and 31 percent combine to 94.48, which is rounded to 94 and then adjusted downward to a final combined rating of 90 percent. If the bilateral factor is not applied, 92 percent and 20 percent combine to 93.6, which is rounded to 94, and 94 percent and 10 percent combine to 94.6, which is rounded to 95. This is then adjusted upward to a final combined rating of 100 percent.

II. The Solution

VA considered several solutions to arrive at one that resolves this issue without creating new ones. First, it is important to note that the bilateral factor increases combined evaluations in many cases or at least results in the same evaluation that could be obtained without it in almost every case. It is only at the low 90-percent level

where it may reduce a combined evaluation; therefore, VA determined that simply eliminating the bilateral factor regulation would not be beneficial to veterans. VA also rejected other potential solutions that would have revised combination results less than 90 percent, as those would have overcorrected for the problem.

Instead, VA determined that the most appropriate solution is simply to allow disabilities that affect extremities but also cause the bilateral factor calculation to lower the combined evaluation to be excluded from the bilateral factor calculation. VA will make the necessary system changes so that when a combined evaluation equals 90 percent and the bilateral factor has been applied, VA's claims processing system will perform calculations to determine if a 100 percent rating can be achieved if a bilateral disability or multiple bilateral disabilities are excluded. If so, the system will assign a 100 percent combined evaluation.

To implement this change, VA is adding an exception to the requirement in 38 CFR 4.26 that all bilateral disabilities must be combined as usual and 10 percent of the combined value added before proceeding with further combinations or converting to degree of disability. The exception will allow VA to avoid applying the bilateral factor calculation for a given bilateral disability or disabilities if excluding that disability or disabilities will allow for a higher combined evaluation when combined separately.

III. Converting Cases Based on VA's Own Initiative

This rulemaking, to amend § 4.26 to enable a veteran to receive an increased evaluation, is considered a liberalizing VA issue within the meaning of 38 U.S.C. 5110(g) and 38 CFR 3.114 because it would result in higher ratings for impacted veterans than would currently result under § 4.26. Section 3.114 also provides authority for VA to review claims on its own initiative after a liberalizing VA issue has become effective. In this well-defined, limited situation, VA can identify all veterans who would benefit from the application of this bilateral factor exception. Therefore, VA will adjust all

the affected combined evaluations running on the effective date of this rulemaking without requiring a claim from affected veterans or their authorized representatives. VA will also provide notice of this adjustment to affected veterans and their representatives in accordance with 38 U.S.C. 5104. Advance notice is not required because it would have no adverse impact on the affected veterans. Finally, the provisions of 38 U.S.C. 5110(g) and 38 CFR 3.114 will apply if a veteran requests a review based on this liberalizing issue. Under those provisions, the effective date of an increased evaluation based on this liberalizing VA issue may be authorized from the effective date of this issue if the claim is received within one year of that date. If the claim is received more than one year from the effective date of this liberalizing VA issue, then the effective date of the increased evaluation may be authorized for a period of one year prior to the date the claim is received.

IV. Regulatory Amendments

For the reasons discussed above, VA is amending 38 CFR 4.26 as follows:

VA is amending the introductory paragraph by adding “Except as provided in paragraph (d) of this section,” to the first sentence and replacing “10’s” with “10 percent evaluations” in the penultimate sentence.

VA is adding new paragraph (d) to provide the exception to the application of the bilateral factor.

Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause, under the provisions of 5 U.S.C. 553(b)(B), that advance notice and opportunity for public comment is contrary to the public interest, particularly to veterans with bilateral disability evaluations. This interim final rule enables VA to provide higher evaluations for a number of veterans that will entitle them to additional benefits from VA and other Federal and state government agencies.

It would have been contrary to the public interest to provide opportunity for prior notice and comment for this rulemaking because a delay in implementation would have required VA rating officials to continue to apply the bilateral factor even where it results in a lower rating for impacted veterans. Moreover, this rule will not negatively impact any veterans but rather will only serve to provide higher ratings where feasible. Lastly, a delay in implementation would have denied veterans timely access to benefits based on the appropriate combined rating warranted by their disabilities.

For the same reasons, VA finds that there is good cause under 5 U.S.C. 553(d)(3) to make this rule effective upon the date of publication.

For the above reasons, VA is issuing this rule as an interim final rule with immediate effect. However, VA will consider and address comments that are received within 60 days of the date this interim final rule is published in the Federal Register.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct 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). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

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 interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

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

Congressional Review Act

Pursuant to 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, approved this document on June 6, 2022, 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.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, VA amends 38 CFR part 4 as set forth below:

PART 4 – SCHEDULE FOR RATING DISABILITIES

1. The authority citation for part 4 continues to read as follows:

Authority: 38 U.S.C. 1155, unless otherwise noted.

2. Amend § 4.26 by:

- a. Revising the introductory text;
- b. Adding headings to paragraphs (a) through (c); and
- c. Adding paragraph (d).

The revision and additions read as follows:

§ 4.26 Bilateral factor.

Except as provided in paragraph (d) of this section, when a partial disability results from disease or injury of both arms, or of both legs, or of paired skeletal muscles, the ratings for the disabilities of the right and left sides 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 bilateral factor will be applied to such bilateral disabilities before other combinations are carried out and the rating for such disabilities including the bilateral factor in this section will be treated as one disability for the purpose of arranging in order of severity and for all further combinations. For example, with disabilities evaluated at 60 percent, 20 percent, 10 percent and 10 percent (with the two 10 percent evaluations being bilateral disabilities), the order of severity would be 60, 21 and 20. The 60 and 21 combine to 68 percent and the 68 and 20 combine to 74 percent, converted to 70 percent as the final degree of disability.

(a) *Definitions.* * * *

(b) *Procedure for four affected extremities.* * * *

(c) *Applicability.* * * *

(d) *Exception.* In cases where the combined evaluation is lower than what could be achieved by not including one or more bilateral disabilities in the bilateral factor calculation, those bilateral disabilities will be removed from the bilateral factor calculation and combined separately, to achieve the combined evaluation most favorable to the veteran.

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