Federal Circuit Finds DC 5257 Is Not a "Catch-All" Provision

by Melissa Dess

Reporting on *Delisle v. McDonald*, No. 14-7084, ___ F.3d ___, 2015 WL 3772659 (Fed. Cir. June 18, 2015)

In *Delisle v. McDonald*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) considered whether 38 C.F.R. § 4.71a, diagnostic code (DC) 5257 is a "catch-all provision."

In 1978, the Department of Veterans Affairs Regional Office (RO) granted Mr. Delisle entitlement to service connection for degenerative disease of the right knee. He was assigned a 10 percent disability rating under 38 C.F.R. § 4.71a, DC 5003. In 2009, Mr. Delisle filed a claim for an increased disability rating, which the RO denied. During the course of his appeal to the Board of Veterans' Appeals (Board), Mr. Delisle underwent a total right knee replacement. The RO subsequently awarded him a temporary 100 percent disability rating for the period from April 6, 2010 to May 31, 2011. From June 1, 2011, he was assigned a 60 percent rating and granted entitlement to a total disability rating based on individual employability thereafter. In his appeal to the Board, Mr. Delisle challenged the RO's determination to the extent that it found that he was not entitled to a disability rating greater than 10 percent from June 30, 2009 to April 6, 2010. In June 2010, the Board found that a rating in excess of 10 percent was not warranted.

On appeal to the Court of Appeals for Veterans Claims (CAVC), Mr. Delisle argued that the Board failed to properly consider whether his right knee disability should be separately compensated under 38 C.F.R. § 4.71a, DC 5257. He asserted that DC 5257 should be read as a "catch-all" provision that covered all knee disabilities not expressly contemplated by other DCs. To read DC 5257 otherwise would render the title of the regulation, "Knee, other impairment of" essentially meaningless. The CAVC affirmed the Board's denial of an increased rating. It first determined that Mr. Delisle failed to identify symptoms not contemplated by the diagnostic codes of the knee. Thus, a "catch-all" provision was not necessary in this case. It further held that even if "DC 5257 could be applied as a 'catch-all' provision, [Mr. Delisle] has not demonstrated that the Board erred by failing to use DC 5257 in such a manner." In other words, the CAVC found that the Board correctly rated Mr. Delisle's symptoms under a diagnostic code other than DC 5257. The CAVC also held that the Board did not commit clear error in denying Mr. Delisle a rating under the express terms of DC 5257 – a determination that was based on a VA contract examiner's finding that there was no subluxation or instability. Mr. Delisle appealed the CAVC's decision.

As an initial matter, the Federal Circuit held that it did not have jurisdiction to review the CAVC's application of law to the facts. Specifically, the CAVC's determination that Mr. Delisle's right knee symptoms were contemplated by diagnostic codes other than DC 5257 and thus, regardless of whether DC 5257 could be interpreted as a "catch-all" provision, "there was nothing in this case for it to catch."

DC 5257 *continued on page 9.*

DC 5257 ***continued from page 8.***

The Federal Circuit then explained that even if it reached the merits of Mr. Delisle's claim, he would not prevail. Mr. Delisle argued that DC 5257 was a "catch-all" rule and was therefore not limited to cases involving subluxation and instability. The Secretary of Veterans Affairs responded that DC 5257's language pertaining to subluxation and instability would be irrelevant if DC 5257 were interpreted as a "catch-all" provision.

The Federal Circuit found that DC 5257 was not a "catch-all" provision. It explained that the plain language of DC 5257 limits compensation to those veterans experiencing knee impairments "other than those enumerated elsewhere in the relevant regulations, that cause symptoms of recurrent subluxation or lateral instability." This reading of DC 5257 "gives meaning to both the title and the language specifically identifying the covered symptomatology." In contrast, the Federal Circuit pointed to 38 C.F.R. § 4.71a, DC 5284, related to foot disabilities, as an example of a true "catch-all" provision. Unlike DC 5276, also related to the foot, DC 5284 does not identify specific symptoms but refers to "Foot injuries, other" that are "severe," "moderately severe," or "moderate." The Federal Circuit dismissed the appeal.

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