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DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 4

RIN 2900-AP38

Agency Interpretation of Prosthetic Replacement of a Joint

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs is publishing interpretive guidance for diagnostic codes (DC) 5051 through 5056, which establish rating criteria for prosthetic implant replacements of joints of the musculoskeletal system. The Schedule for Rating Disabilities under these DCs allows for a 1-year, 100-percent disability evaluation upon prosthetic replacement of a joint. This final rule clarifies that VA's longstanding interpretation of DCs 5051 through 5056 is that a 100-percent evaluation will be in place for a period of one year when the total joint, rather than the partial joint, has been replaced by a prosthetic implant.

DATES: Effective Date: This final rule is effective [insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Stephanie Li, Chief, Regulations Staff (211D), Compensation Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: Diagnostic codes (DCs) 5051 through 5056, under 38 CFR 4.71a, govern the Schedule for Rating Disabilities (Rating Schedule) for prosthetic replacement of joints under the musculoskeletal system. These DCs state that a 100-percent evaluation will be sustained for 1 year following the prosthetic replacement of the named joint. This period of total disability evaluation is designed to provide temporary convalescence for major surgery, such as total joint replacement. Following the convalescent period, a Department of Veterans Affairs (VA) or VA-approved examination is conducted to determine any residual disability, and a new rating evaluation is assigned based on such residuals.

The field of orthopedic medicine has progressed to such a degree that total prosthetic replacement of a joint is not always necessary. Surgical procedures, sometimes referred to generally as "joint replacements," may only require partial replacement of the disabled joint.<sup>1</sup> Partial replacement has the

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<sup>1</sup> "Patients with osteoarthritis that is limited to just one part of the knee may be candidates for unicompartmental knee replacement (also called a 'partial' knee replacement)." "Unicompartmental Knee Replacement," AMERICAN ACADEMY OF ORTHOPEDIC SURGEONS, ORTHO INFO, 1 (June 2010), <http://orthoinfo.aaos.org/topic.cfm?topic=A00585> (last visited Mar. 19, 2014).

benefit of not requiring the same length of time for convalescence.<sup>2</sup> The progression of this area of medical science has raised an issue as to whether a veteran who undergoes a partial replacement of a joint is entitled to the 100-percent rating evaluation during the convalescent period under DCs 5051 through 5056.

VA has long interpreted “joint replacement,” as used in § 4.71a, to mean total joint replacement. Recently, the United States Court of Appeals for Veterans Claims (Veterans Court) issued a precedential panel decision upholding VA’s interpretation of § 4.71a. In Hudgens v. Gibson, 26 Vet. App. 558 (2014), the Veterans Court upheld the Board of Veterans’ Appeals decision that DC 5055 applies only to total knee prosthetic replacements. The Veterans Court determined that the plain language of DC 5055 was unambiguous. Id. at 561. The Veterans Court found that the medical definition of “knee joint” encompassed three distinct compartments of the knee and that “[n]othing in the plain language of the regulation indicates that it applies to replacements of less than a complete knee joint . . .”. Id. In addition, the Veterans Court cited DC 5054, for hip joint prosthesis, as an example of when VA intends to evaluate partial joint replacement. Diagnostic Code 5054, also under § 4.71a, provides evaluation criteria for “[p]rosthetic replacement of the head of the femur or of the acetabulum” (italics added), which together make up the hip joint. Id. The Veterans Court concluded that “DC 5055 applies only to total knee replacements, as the Secretary has demonstrated in other parts of § 4.71(a) [sic] that he is

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<sup>2</sup> Id.

aware of how to include partial joint replacements as part of disability rating criteria in other parts of § 4.71(a) [sic].” Id. at 562.

In view of the above court decision, and VA’s longstanding interpretation, VA is amending its regulations to clarify that the language of § 4.71a, Prosthetic Implants, which refers to replacement of the named joint, refers to replacement of the joint as a whole, except where it is otherwise stated under DC 5054. To avoid confusion in applying these DCs, VA is adding an explanatory note under 38 CFR 4.71a, directly above DCs 5051 through 5056, which notifies readers that “prosthetic replacement” means a total, not a partial, joint replacement, except as it is otherwise stated under DC 5054.

This final rule provides interpretive guidance on VA’s meaning of “prosthetic replacement” as noted in the preceding discussion and consistent with the recent Hudgens v. Gibson decision. This guidance does not represent a new agency interpretation or a substantive change to the eligibility criteria for any VA benefit; rather, it provides notice regarding VA’s longstanding interpretation of its regulation on prosthetic implants, which the Veterans Court recently upheld. As such, VA is publishing this final rule without opportunity for public comment.

#### Administrative Procedure Act

The Secretary of Veterans Affairs finds that this is an interpretive rule, which, under 5 U.S.C. 553(b)(A), VA may promulgate without prior opportunity for public comment. See also Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199, 1206 (2015). This rule merely restates VA’s longstanding interpretation of its

regulation, which the Veterans Court upheld. Therefore, a prior opportunity for notice and comment is unnecessary. Additionally, based on the above cited justification, VA finds good cause to dispense with the delayed-effective-date requirement of 5 U.S.C. 553(d)(2).

#### 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. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4)

Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of this rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

#### Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). This final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### 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

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.116, Vocational Rehabilitation for Disabled Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, 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. Nabors II, Chief of Staff, Department of Veterans Affairs, approved this document on July 6, 2015, for publication.



List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Dated: July 13, 2015.

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William F. Russo,  
Acting Director,  
Office of Regulation Policy & Management,  
Office of the General Counsel,  
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs 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.

### Subpart B – Disability Ratings

2. In § 4.71a, add a note preceding the footnote after the table “Prosthetic Implants” to read as follows:

#### § 4.71a Schedule of ratings-musculoskeletal system.

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#### PROSTHETIC IMPLANTS

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Note: The term “prosthetic replacement” in diagnostic codes 5051 through 5056 means a total replacement of the named joint. However, in DC 5054, “prosthetic replacement” means a total replacement of the head of the femur or of the acetabulum.

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3. Amend appendix A to part 4 by revising the entries for diagnostic codes 5051 through 5056 to read as follows:

#### APPENDIX A TO PART 4—TABLE OF AMENDMENTS AND EFFECTIVE DATES SINCE 1946

Sec.	Diagnostic Code No.	
* * *	*	*
	5051	Added September 22, 1978. Note [insert date of publication in the <u>FEDERAL REGISTER</u> ].
	5052	Added September 22, 1978. Note [insert date of

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	5053	publication in the FEDERAL REGISTER]. Added September 22, 1978. Note [insert date of publication in the FEDERAL REGISTER].
	5054	Added September 22, 1978. Note [insert date of publication in the FEDERAL REGISTER].
	5055	Added September 22, 1978. Note [insert date of publication in the FEDERAL REGISTER].
	5056	Added September 22, 1978. Note [insert date of publication in the FEDERAL REGISTER].
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