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## 51454 Federal Register/Vol. 68, No. 166/Wednesday, August 27, 2003/Rules and Regulations

### Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3 (b) (2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

### Protection of Children

The Coast Guard has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

### Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial

§ For the reasons discussed in the preamble, the Coast Guard amends 33

CFR part 165 as follows:

### **PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS**

§ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

§ 2. A new temporary safety zone § 165.T09–249 is added to read as follows:

#### **§165.T09–249 Safety Zone; Grundy County Corn Festival, Morris, IL**

(a) *Location.* The following is a safety zone: All waters of the Illinois River bounded by the arc of a circle with a 840-foot radius from the fireworks launch site with its center in the

**DATES:** *Effective Date:* This amendment is effective September 26, 2003.

#### **FOR FURTHER INFORMATION CONTACT:**

Audrey Tomlinson, Medical Officer, Policy and Regulations Staff (211A), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 273–7215.

**SUPPLEMENTARY INFORMATION:** VA has amended its Schedule for Rating

Disabilities, 38 CFR part 4, by revising that portion of the Musculoskeletal System that addresses disabilities of the spine. The intended effect of this action is to update this portion of the rating schedule to ensure that it uses current medical terminology and unambiguous criteria, and that it reflects medical advances that have occurred since the last review. VA published a notice of proposed rulemaking in the **Federal Register** on September 4, 2002 (67 FR

dates, effect, or relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**Environment**

We have considered the environmental impact of this rule and concluded that under figure 2-1, paragraph (34) (g), of Commandant Instruction M16475.IC, this rule is categorically excluded from further environmental documentation. A “Categorical Exclusion Determination” is available in the docket for inspection or copying where indicated under ADDRESSES.

**Energy Effects**

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under that order because it is not a “significant regulatory action” under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**List of Subjects in 33 CFR Part 165**

Harbors, Marine Safety, Navigation (water), Reporting and Record Keeping Requirements, Security Measures, Waterways.

approximate position 41°21.2' N, 088°23.08' W (NAD 1983).

(b) *Effective period.* This section is effective from 8:30 p.m. until 9 p.m. (local) on September 27, 2003.

(c) *Regulations.* In accordance with § 165.23, entry into this zone is prohibited unless authorized by the Coast Guard Captain of the Port, Chicago, or the designated On-Scene Representative. Section 165.23 also contains other general requirements.

Dated: August 12, 2003.

**Terrence W. Carter,**  
*Captain, U.S. Coast Guard, Captain of the Port Chicago.*  
[FR Doc. 03-21956 Filed 8-26-03; 8:45 am]  
BILLING CODE 4910-15-P

**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 4**

RIN 2900-AJ60

**Schedule for Rating Disabilities; The Spine**

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

**SUMMARY:** This document amends the Department of Veterans Affairs (VA)

Schedule for Rating Disabilities by revising that portion of the Musculoskeletal System that addresses disabilities of the spine. The intended effect of this action is to update this portion of the rating schedule to ensure that it uses current medical terminology and unambiguous criteria, and that it reflects medical advances that have occurred since the last review.

56500). Interested persons were invited to submit written comments prior to before November 4, 2002. We received comments from two commenters, one from the Disabled American Veterans, and one from a VA employee.

We proposed to evaluate spine disabilities under a General Rating Formula for Diseases and Injuries of the Spine that included the following introductory language: “With symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease”. One commenter felt that including this language does not allow raters to take into account the impairment that may result from asymptomatic residuals or sequelae of diseases or injury of the spine and also that the proposed rating formula would not recognize pain as disabling unless it is present in conjunction with ankylosis or limitation of motion, *etc.* The commenter went on to say that symptoms such as pain, stiffness, and aching should alone or in combination with each other warrant compensable ratings when severe enough to cause disability.

In response to this comment, we have changed the introductory language quoted above to “With or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease”. Doing so removes the requirement that there be pain, stiffness, or aching in order to assign any evaluation under the General Rating Formula for Diseases and Injuries of the Spine. Pain alone cannot be evaluated without being associated with an underlying pathologic abnormality. In

the case of spine disabilities, it would be rare for pain not to be present. Pain is often the primary factor limiting motion, for example, and is almost always present when there is muscle spasm. Therefore, the evaluation criteria provided are meant to encompass and take into account the presence of pain, stiffness, or aching, which are generally present when there is a disability of the spine.

The prior schedule directed that a vertebral fracture that did not meet the criteria for a 60-percent or higher evaluation would be evaluated on the basis of limited motion or muscle spasm, with 10 percent added for demonstrable vertebral body deformity. Since the term “demonstrable deformity” was not defined, however, this provision was applied inconsistently. We proposed that a 10-percent evaluation be assigned for a vertebral body fracture with loss of 50 percent or more of the height. One commenter felt that this requirement was too stringent.

As we reported in the preamble to the proposed regulation, a recent medical textbook on disability evaluation states that vertebral fractures with loss of height of the vertebral body of 50-percent or less ordinarily do not require surgery, heal uneventfully, and are compatible with the resumption of normal activities after healing (“Disability Evaluation,” 292–3 (Stephen L. Demeter, M.D., Gunnar B.J. Anderson, M.D., Ph.D., and George M. Smith, M.D., 1996)). Furthermore, should a vertebral body fracture with less than 50 percent loss of height prove

depending on which is more beneficial to the **veteran**. All other spine diseases and injuries will be evaluated under the General Rating Formula for Diseases and Injuries of the Spine.

We proposed that the language under diagnostic code 5243 be: “Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either on the total duration of incapacitating episodes over the past 12 months or by combining under § 4.25 evaluations under the General Rating Formula for Diseases and Injuries of the Spine along with evaluations for all other disabilities, whichever method results in the higher evaluation.” A commenter felt that the proposed language was confusing and suggested that we revise it.

We agree that the language could be clearer and have revised it to read: “Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either under the General Rating Formula for Diseases and Injuries of the Spine or under the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes, whichever method results in the higher evaluation when all disabilities are combined under § 4.25.”

One commenter felt that painful motion, even if the range of motion is normal, should be one of the criteria for a 10-percent evaluation because usually any limitation of motion is due to pain, and we usually give 10 percent for pain on motion, under §§ 4.45 (The joints) and 4.59 (Painful motion).

As discussed above, we developed evaluation criteria that are meant to take

syndrome because there is no demonstrable pathology to account for the symptoms. It is a controversial diagnosis because there is no agreement on how to diagnose it, and there is no way to confirm the diagnosis by testing. We have not added this to the rating schedule because its diagnosis is controversial and uncertain.

Section 4.40 indicates that functional loss of the musculoskeletal system may be due to pain when it is supported by adequate pathology. The diagnosis of mechanical back pain is a broad general diagnosis that does not identify an underlying pathologic process to account for the pain. Most mechanical back pain (70%) is due to lumbar strain or sprain, with 10% due to degenerative changes in discs and facets, 4% due to herniated discs, 4% due to osteoporotic compression fractures, and 3% due to [spinal stenosis. \(<http://www.emedicine.com/pmr/topic73.htm>\)](http://www.emedicine.com/pmr/topic73.htm). Examiners should be asked to identify the underlying pathologic process causing back pain, and evaluations can then be made under the appropriate diagnostic codes for spine disabilities that are listed in the rating schedule.

We agree that neck strain is a common disability in veterans and have therefore revised the title of diagnostic code 5237 to “Lumbosacral or cervical strain”. We have also revised the heading of the General Rating Formula for Diseases and Injuries of the Spine accordingly.

One commenter suggested we add a note explaining when to use diagnostic code 5320 (for muscle injury of Group XX muscles (spinal muscles)) rather than 5237 (lumbosacral or cervical

to be disabling, it may be evaluated based on any specific disabling residuals that are present, such as pain or limitation of motion. In our judgment, the requirement that there be a loss of 50 percent or more of the height of a fractured vertebral body in order to assign a 10-percent evaluation based on deformity alone has a sound medical basis and will promote consistency, and we have made no change based on this comment.

One commenter felt that it is confusing and illogical to list the evaluation criteria for diagnostic codes 5235 to 5242 after diagnostic code 5243. In response, we have moved the General Rating Formula for Diseases and Injuries of the Spine to the beginning of the Spine subsection. For further clarity, we have added the title “Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes” to the set of evaluation criteria under diagnostic code 5243 and explained that intervertebral disc syndrome may be evaluated under either rating formula,

pain and other symptoms into account. Therefore, an evaluation based on pain alone would not be appropriate, unless there is specific nerve root pain, for example, that could be evaluated under the neurologic sections of the rating schedule.

The same commenter said there is no need for criteria for a zero-percent evaluation, since § 4.31 (Zero percent evaluations) states that a zero percent evaluation can be assigned in any case when the requirements for a compensable evaluation are not met. On further consideration, and in view of other changes we have made in the General Rating Formula, we agree and have removed the zero-percent criteria.

The commenter also suggested that we add diagnostic codes for piriformis syndrome, mechanical back pain due to poor posture, and neck strain to the rating schedule.

Piriformis syndrome, often called pseudosciatica, is characterized by sciatica-like pain. It is regarded as a pain syndrome or a functional

strain).

In our judgment, such a note is unnecessary. Diagnostic code 5320 is primarily used for evaluating muscle injuries due to wounds caused by gunshots or other missiles, as § 4.56 (Evaluation of muscle disabilities) indicates. Lumbosacral and cervical strain do not stem from wounds but mainly from work or recreational injuries that involve sudden twisting, overuse, improper lifting, etc., sometimes superimposed on mechanical problems such as obesity, postural defects, or anatomical defects (<http://users.rowan.edu>, *The Merck Manual* (17th edition 1999, page 504), <http://www.bonetumour.org/book>, <http://www.emedicine.com/sports/topic69.htm>). Muscle strains are, therefore, most appropriately evaluated under diagnostic code 5237 (lumbosacral and cervical strain).

VA appreciates the comments submitted in response to the proposed rule. Based on the rationale stated in the proposed rule and in this document, the

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proposed rule is adopted with the changes noted.

**Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

**Regulatory Flexibility Act**

**Executive Order 12866**

This regulatory amendment has been reviewed by the Office of Management and Budget under the provisions of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993.

**Unfunded Mandates**

The Unfunded Mandates Reform Act

Approved: June 12, 2003.

**Anthony J. Principi,**  
*Secretary of Veterans Affairs.*

<sup>s</sup>For the reasons set out in the preamble, 38 CFR part 4, subpart B, is amended as set forth below:

**PART 4—SCHEDULE FOR RATING DISABILITIES**

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This amendment would have no such effect on State, local, or tribal governments, or the private sector.

The Catalog of Federal Domestic Assistance program numbers are 64.104 and 64.109.

**List of Subjects in 38 CFR Part 4**

Disability benefits, Individuals with disabilities, Pensions, Veterans.

**Subpart B—Disability Ratings**

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

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

s 2. In § 4.71a, the table “The Spine” is revised and is transferred so that it precedes the table “The Hip and Thigh”; and Plate V is added immediately following the table “The Spine”, to read as follows:

**§4.71a Schedule of ratings—**

**musculoskeletal system.**

\* \* \* \* \*

THE SPINE

Rating

**General Rating Formula for Diseases and Injuries of the Spine**

(For diagnostic codes 5235 to 5243 unless 5243 is evaluated under the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes):

With or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease

|  |     |
|--|-----|
| Unfavorable ankylosis of the entire spine .....  | 100 |
| Unfavorable ankylosis of the entire thoracolumbar spine .....  | 50  |
| Unfavorable ankylosis of the entire cervical spine; or, forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine .....   | 40  |
| Forward flexion of the cervical spine 15 degrees or less; or, favorable ankylosis of the entire cervical spine .....   | 30  |
| Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, forward flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, the combined range of motion of the cervical spine not greater than 170 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis .....   | 20  |
| Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees; or, forward flexion of the cervical spine greater than 30 degrees but not greater than 40 degrees; or, combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees; or, combined range of motion of the cervical spine greater than 170 degrees but not greater than 335 degrees; or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour; or, vertebral body fracture with loss of 50 percent or more of the height ..... | 10  |

**Note (1):** Evaluate any associated objective neurologic abnormalities, including, but not limited to, bowel or bladder impairment, separately, under an appropriate diagnostic code.

**Note (2):** (See also Plate V.) For VA compensation purposes, normal forward flexion of the cervical spine is zero to 45 degrees, extension is zero to 45 degrees, left and right lateral flexion are zero to 45 degrees, and left and right lateral rotation are zero to 80 degrees. Normal forward flexion of the thoracolumbar spine is zero to 90 degrees, extension is zero to 30 degrees, left and right lateral flexion are zero to 30 degrees, and left and right lateral rotation are zero to 30 degrees. The combined range of motion refers to the sum of the range of forward flexion, extension, left and right lateral flexion, and left and right rotation. The normal com-

hinged range of motion of the cervical spine is 340 degrees and of the thoracolumbar spine is 240 degrees. The normal ranges of motion for each component of spinal motion provided in this note are the maximum that can be used for calculation of the combined range of motion.

**Note (3):** In exceptional cases, an examiner may state that because of age, body habitus, neurologic disease, or other factors not the result of disease or injury of the spine, the range of motion of the spine in a particular individual should be considered normal for that individual, even though it does not conform to the normal range of motion stated in Note (2). Provided that the examiner supplies an explanation, the examiner's assessment that the range of motion is normal for that individual will be accepted.

**Note (4):** Round each range of motion measurement to the nearest five degrees.

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THE SPINE—Continued

Rating

**Note (5):** For VA compensation purposes, unfavorable ankylosis is a condition in which the entire cervical spine, the entire thoracolumbar spine, or the entire spine is fixed in flexion or extension, and the ankylosis results in one or more of the following: difficulty walking because of a limited line of vision; restricted opening of the mouth and chewing; breathing limited to diaphragmatic respiration; gastrointestinal symptoms due to pressure of the costal margin on the abdomen; dyspnea or dysphagia; atlantoaxial or cervical subluxation or dislocation; or neurologic symptoms due to nerve root stretching. Fixation of a spinal segment in neutral position (zero degrees) always represents favorable ankylosis.

**Note (6):** Separately evaluate disability of the thoracolumbar and cervical spine segments, except when there is unfavorable ankylosis of both segments, which will be rated as a single disability.

- 5235 Vertebral fracture or dislocation
- 5236 Sacroiliac injury and weakness
- 5237 Lumbosacral or cervical strain
- 5238 Spinal stenosis
- 5239 Spondylolisthesis or segmental instability
- 5240 **Ankylosing spondylitis**
- 5241 Spinal fusion
- 5242 Degenerative arthritis of the spine (see also diagnostic code 5003)
- 5243 Intervertebral disc syndrome

Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either under the General Rating Formula for Diseases and Injuries of the Spine or under the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes, whichever method results in the higher evaluation when all disabilities are combined under §4.25.

**Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes**

|  |    |
|--|----|
| With incapacitating episodes having a total duration of at least 6 weeks during the past 12 months .....                       | 60 |
| With incapacitating episodes having a total duration of at least 4 weeks but less than 6 weeks during the past 12 months ..... | 40 |
| With incapacitating episodes having a total duration of at least 2 weeks but less than 4 weeks during the past 12 months ..... | 20 |

With incapacitating episodes having a total duration of at least one week but less than 2 weeks during the past 12 months ..... 10

**BILLING CODE 8320-01-P**





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**BILLING CODE 8320-01-C**

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