

an economically significant rule and does not concern 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 and direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

### Energy Effects

We have analyzed this 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.

### Environment

We have considered the environmental impact of this rule and concluded that, under figure 2-1, paragraphs (34)(h) and (35)(a) of Commandant Instruction M16475.1D, this rule is categorically excluded from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine parade permit are specifically excluded from further analysis and documentation under those sections. A "Categorical Exclusion Determination" is available in the docket where indicated under **ADDRESSES**.

### List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C 1233; 49 CFR 1.46.

2. From 9:30 a.m. on September 28, 2002 to 6:30 p.m. on September 29, 2002, add temporary section, § 100.35–T05–062 to read as follows:

#### § 100.35–T05–062 Sunset Lake, Wildwood Crest, New Jersey.

(a) *Definitions.* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Group Atlantic City.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Group Atlantic City with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* includes all vessels participating in the Sunset Lake Hydrofest under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Group Atlantic City.

(b) *Regulated area.* Includes all waters of Sunset Lake, from shoreline to shoreline, south of latitude 38°58'32" N. All coordinates reference Datum: NAD 1983.

(c) *Special local regulations.* (1) Except for event participants and persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area shall:

(i) Stop the vessel immediately when directed to do so by any official patrol.

(ii) Proceed as directed by any official patrol.

(iii) Unless otherwise directed by the official patrol, operate at a minimum wake speed not to exceed six (6) knots.

(d) *Enforcement period.* This section will be enforced from 9:30 a.m. to 6:30 p.m. on both September 28 and 29, 2002.

Dated: August 14, 2002.

**A.E. Brooks,**

*Captain, U.S. Coast Guard, Acting Commander, Fifth Coast Guard District.*

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### DEPARTMENT OF VETERANS AFFAIRS

#### 38 CFR Part 4

**RIN 2900–AI22**

#### Schedule for Rating Disabilities; Intervertebral Disc Syndrome

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends that portion of the Department of Veterans Affairs (VA) Schedule for Rating Disabilities that addresses intervertebral disc syndrome. The effect of this action is to clarify the criteria to ensure that veterans diagnosed with this condition meet uniform criteria and receive consistent evaluations.

**DATES:** *Effective Date:* This amendment is effective September 23, 2002.

#### FOR FURTHER INFORMATION CONTACT:

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**SUPPLEMENTARY INFORMATION:** VA published a proposal to amend the evaluation criteria for diagnostic code 5293, intervertebral disc syndrome (IVDS), in the **Federal Register** of February 24, 1997 (62 FR 8204).

Interested persons were invited to submit written comments on or before April 25, 1997. We received comments from the Vietnam Veterans of America, Disabled American Veterans, Paralyzed Veterans of America, and two concerned individuals.

We proposed to evaluate IVDS either on its chronic neurologic and orthopedic manifestations or on the total annual duration of incapacitating episodes, whichever would result in a higher evaluation. One commenter recommended that the final rule specify whether there could be separate evaluations of the chronic manifestations of each spinal segment with IVDS; whether there could be separate evaluations based on incapacitating episodes of each spinal segment; and whether one spinal segment could be evaluated based on incapacitating episodes and another on chronic manifestations.

In response to this comment, we have added a third note specifying that IVDS in separate spinal segments will be separately evaluated as long as the effect on each segment is clearly distinct. Inherent in the rule is the concept that each affected spinal segment will be evaluated under the method that results in the highest overall evaluation. This means that affected segments may be separately evaluated based on: (1) Incapacitating episodes; (2) chronic manifestations; or (3) one affected segment may be evaluated based on incapacitating episodes and another segment may be evaluated based on chronic manifestations.

One commenter stated that acute incapacitating symptoms are distinct from chronic symptoms involving

persistent orthopedic and neurological manifestations because each has a different effect on functionality. The commenter stated that IVDS should be rated on both acute and chronic symptoms, as long as the manifestations are different, and then the ratings should be combined. The commenter stated that, if for example a veteran has foot drop as a result of IVDS that interferes with earning capacity and also requires frequent bed rest due to IVDS that affects earning capacity, the veteran has separate disabilities that should be evaluated separately and then combined, rather than rating based on the higher of the two respective evaluations.

Acute incapacitating symptoms and chronic symptoms do not necessarily represent different manifestations of IVDS. For example, IVDS may result in chronic back pain and limitation of motion (a chronic orthopedic manifestation); back pain and limitation of motion may also cause periods of acute incapacitation. Some individuals present predominantly or exclusively with acute symptoms, some with chronic symptoms, and some with both. We have provided alternative methods of evaluation that allow the use of either the chronic manifestations or the total duration of incapacitating episodes for evaluation, whichever results in a higher evaluation. But, in our view, assigning an evaluation under both methods for functional impairment due to IVDS would clearly result in duplicate evaluations of a single disability, and therefore would constitute pyramiding, which is prohibited by 38 CFR 4.14. We therefore make no change in response to this comment.

Another commenter noted that, in some individuals both IVDS and residuals of a vertebral fracture in the same spinal segment are service-connected. Diagnostic code 5285, which applies to fractures of vertebral bodies, directs that ten percent be added to a spinal evaluation if it is less than 60 percent disabling and if there is demonstrable deformity of the vertebral body. The commenter suggested that the evaluation criteria indicate whether ten percent should be added to a rating for IVDS for either chronic residuals or incapacitating episodes.

When vertebral fracture and IVDS are present in the same spinal segment, the signs and symptoms of each condition commonly overlap and may be inseparable. For example, both conditions may cause pain and limitation of motion of the spine and neurologic disability. In such cases, a single overall evaluation for the

manifestations of both disabilities would be assigned, since evaluating the same disability under two diagnoses is prohibited (*see* 38 CFR 4.14). Ten percent would be added to the single overall evaluation, if it is less than 60 percent disabling, when there is demonstrable vertebral deformity, because the x-ray finding that is the basis for the added ten percent does not duplicate or overlap any other evaluation criteria for either condition. This is true whether the evaluation is based on the criteria for residuals of vertebral fracture, on the total duration of incapacitating episodes of IVDS, or on the chronic orthopedic and neurologic manifestations of IVDS. There may be some cases where the effects of IVDS and vertebral fracture are clearly separable. When that happens, the fracture residuals would be evaluated under diagnostic code 5285, with ten percent added for deformity of the vertebral body when appropriate, and the IVDS would be evaluated under either alternative method, as directed. As with other complex rating issues, if the situation arises, raters may request an advisory review opinion from the Compensation and Pension Service, but we do not believe this situation arises frequently enough to warrant the addition of specific regulatory instructions. We therefore make no change based on this comment.

The same commenter asked if bed rest because of spasm warrants the added 10 percent.

The instruction under diagnostic code 5285 specifies that ten percent is to be added on the basis of demonstrable vertebral deformity due to fracture. Bed rest because of spasm therefore does not warrant an additional 10 percent.

Another commenter recommended that the rule specify whether the evaluation for incapacitating episodes is to be compared with the neurologic and orthopedic evaluations, once combined pursuant to 38 CFR 4.25, or with the higher of those evaluations if both are present.

In response to this comment, we have revised the language under diagnostic code 5293 to direct that IVDS be evaluated based either on the total duration of incapacitating episodes or on the combination of separate evaluations of its chronic orthopedic and neurologic manifestations, whichever method results in the higher evaluation.

One commenter suggested that VA increase the proposed percentage evaluations for incapacitating episodes having a total duration of at least four to six weeks during the past 12 months because, in the commenter's view,

veterans who are incapacitated for four to six weeks or more over the course of a year are unemployable. Another commenter also suggested that the evaluation criteria for IVDS should include a 100-percent level.

IVDS is characterized by periods of exacerbation and remission, with a tendency toward recovery over time ("Practical Orthopedic Medicine" (Brian Corrigan and G.D. Maitland) 312, 1983). When IVDS first appears, with few exceptions, the preferred treatment is conservative and includes bed rest of approximately two to four weeks. The majority of patients with IVDS recover from the acute symptoms and have minimal residual functional or work capacity impairments ("Disability Evaluation" (Stephen L. Demeter, M.D., Gunnar B.J. Anderson, M.D., and George M. Smith, M.D.) 288, 1996). The minority in whom conservative treatment fails; or who have repeated, disabling attacks resulting in prolonged loss of time from work; or who have intractable pain or severe or progressive neurological signs, will undergo surgery ("Fundamentals of Orthopedics" (John J. Gartland, M.D.) 334, 1987). Only an occasional patient has disabling back pain and radicular symptoms after surgery ("Campbell's Operative Orthopaedics") 2114, 1980). Therefore, except for short periods of treatment, or periods of convalescence following surgery, IVDS is rarely totally disabling.

The percentage ratings in the schedule "represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations," 38 CFR 4.1; 38 U.S.C. 1155, and, in our view, a 100 percent evaluation level for IVDS is not warranted. If a veteran has permanent neurological or orthopedic residuals following back surgery, those residuals could alternatively be rated under other appropriate rating formula. Also, an individual who is shown by the evidence to be unemployable may be assigned a total evaluation (even though the schedule does not provide a 100-percent evaluation) under the provisions of 38 CFR 4.16, 4.17, and 4.18. In view of this fact, and the information regarding the course and outcome of IVDS after treatment, we make no change based on this comment.

Another commenter suggested that the rule clarify the meaning of incapacitating episodes "per year" in order to assure that the calendar year is not used.

In response to this comment, we have revised diagnostic code 5293, for the sake of clarity, to specify total duration

of incapacitating symptoms "during the past 12 months" rather than "per year."

We proposed to define the term "incapacitating episode of intervertebral disc syndrome" to mean a period of acute symptoms (orthopedic, neurologic, or both), requiring bed rest prescribed by a physician and treatment by a physician. Such treatment by a physician would not require a visit to a physician's office or hospital but would include telephone consultation with a physician. One commenter suggested that we revise the definition to require bed rest "prescribed by a physician," but eliminate the requirement for treatment.

A physician prescribing bed rest will ordinarily prescribe treatment, *e.g.*, analgesics, muscle relaxants, or traction, as well. In our view, the requirement for treatment by a physician makes the criteria clearer, more objective, and more likely to promote consistent evaluations. We therefore make no change in response to this comment. However, in order to clarify note (1), we have added "prescribed by a physician" following "bed rest."

The same commenter suggested that we waive the requirement for medical verification of the veteran's previous episodes of incapacitating back pain in original claims for IVDS because in such cases there would otherwise be a one-year waiting period from the date of claim.

Although in an original compensation claim, an award will be effective from the date of claim or the date entitlement arose, whichever is later (38 CFR 3.400(b)(2)(i)), nothing in the regulations precludes VA from considering medical evidence establishing the total duration of incapacitating episodes during the twelve-month period preceding the date of claim when evaluating the disability. Existing medical records documenting incapacitating episodes of IVDS, as defined in the regulation, during the twelve months before the veteran filed a claim, would be sufficient to establish the severity of the condition without a one-year waiting period. If there are no records of the need for bed rest and treatment, by regulation there were no incapacitating episodes. Chronic manifestations, on the other hand, could be evaluated based on an examination, regardless of whether there were any prior incapacitating episodes. We therefore make no change based on this comment.

Another commenter objected to the proposal to evaluate IVDS based only on doctor-ordered periods of bed rest and suggested that objective findings of IVDS provide a basis for evaluation and

should be incorporated into the schedular criteria.

Objective findings, when present, may be used to evaluate IVDS based on chronic orthopedic and neurologic manifestations that are rating criteria under other diagnostic codes. However, some individuals with disabling IVDS exhibit few, if any, objective findings between incapacitating episodes. We have therefore provided alternative evaluation criteria based on periods of incapacitating episodes. Since we will evaluate IVDS under whichever method would result in the higher overall evaluation, we make no change based on this comment.

One commenter assumed that VA will issue companion regulations on how to rate each neurologic and orthopedic manifestation of IVDS, since chronic symptoms are not assigned evaluations in the proposed regulation. The commenter urged that such criteria accurately reflect impairment of earning capacity.

VA plans no separate regulation to address each neurologic and orthopedic manifestation of IVDS. There are existing criteria for evaluating neurologic and orthopedic disabilities, whether they result from IVDS, stroke, or other condition, in the neurologic and musculoskeletal portions of the rating schedule. Additional neurologic manifestations are addressed under diagnostic codes in the schedule for rating genitourinary or digestive systems. For further clarity, we have revised note (2) to indicate that the chronic orthopedic and neurologic manifestations of IVDS are to be evaluated under the most appropriate code or codes. Evaluating disabilities due to IVDS that are identical to disabilities of other etiology under the same criteria will assure consistency and fairness of evaluations.

Proposed note (2) stated that, when evaluating IVDS on the basis of chronic manifestations, orthopedic manifestations, such as limitation of motion of lumbar or cervical spine, paravertebral muscle spasm, or scoliosis of the spine, are to be evaluated under diagnostic code 5293 (IVDS), using evaluation criteria for an appropriate diagnostic code, and neurologic manifestations, such as footdrop, muscle atrophy, sensory loss, or neurogenic bladder, are to be evaluated separately under diagnostic code 5293, using evaluation criteria for an appropriate diagnostic code. One commenter said the note does not provide clear or objective guidance on the degree of disability to be assigned for these manifestations.

There are so many potential neurologic and orthopedic manifestations of IVDS that it would be impractical to incorporate all of them into a single set of criteria. It is not only more practical, but also consistent with the manner in which VA evaluates other conditions that may affect more than one body system, to use evaluation criteria for existing orthopedic and neurologic diagnostic codes to evaluate the specific manifestations of IVDS. We therefore make no change based on this comment.

The same commenter suggested additional chronic manifestations of IVDS that the commenter believes are more objective than the proposed criteria.

The criteria suggested by the commenter would require subjective interpretations of terms such as "light" or "heavy" labor, "moderate" activity, etc. In our view this language is less objective than that in the proposed criteria, and we make no change based on this comment.

One commenter asserted that proposed note (2) conflicts with *Esteban v. Brown*, 6 Vet. App. 259 (1994), because it precludes an evaluation for the orthopedic manifestations of the spine in addition to an evaluation for IVDS under diagnostic code 5293.

In *Esteban*, a case that concerned the evaluation of a facial injury, with residuals of painful scars, injury to the facial muscles, and disfigurement, the Court of Appeals for Veterans Claims (CAVC) pointed out that each of the three disabling effects of the injury could be separately evaluated unless they constitute the "same disability" or the "same manifestation" under 38 CFR 4.14 (see above), or unless any of the diagnostic codes in question state that a veteran may not be rated separately for the described conditions. None of the three diagnostic codes at issue precluded separate ratings for the described conditions and the CAVC stated that the critical element in the case was that none of the symptomatology for any one of the three conditions is duplicative of, or overlapping with, the symptomatology of the other two conditions.

Diagnostic code 5293 allows for separate evaluations of chronic orthopedic and chronic neurologic manifestations of IVDS because these manifestations are separate and distinct, and do not constitute the "same disability" or the "same manifestation" under 38 CFR 4.14. However, virtually all acute incapacitating episodes rated under diagnostic code 5293 for IVDS would be the result of chronic orthopedic and/or chronic neurologic

findings. We therefore believe that, if ratings for orthopedic and chronic manifestations were combined with a rating for incapacitating episodes under diagnostic code 5293, it would result in evaluation of the same disability under multiple diagnostic codes, a result which is to be avoided per 38 CFR 4.14. Also providing alternative methods for evaluating IVDS is consistent with the manner in which we evaluate other conditions. For example, lupus erythematosus, diagnostic code 6350, may be evaluated based either on an overall evaluation under 6350 or on an evaluation of its residuals under other diagnostic codes in an appropriate system or systems, whichever method results in a higher evaluation. As a result, there is no conflict with *Esteban*, and we make no change based on this comment.

One commenter stated that the rule is inconsistent with the manner in which IVDS and orthopedic and/or neurologic manifestations were rated under the prior version of diagnostic code 5293. According to the commenter, prior diagnostic code 5293 allowed the maximum 60-percent rating for disability attributable to IVDS plus a separate rating for disability affecting other body parts or functions. In support of this comment, the commenter cited *Bierman v. Brown*, 6 Vet. App. 125, 129 (1994).

Evaluations of zero to 40 percent under the previous version of diagnostic code 5293 were based on recurring attacks and the extent of relief between attacks. The maximum evaluation of 60 percent required "persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent relief." In *Bierman*, the Board of Veterans' Appeals (BVA) denied a separate rating for neurological deficits because the veteran's 60 percent for IVDS under diagnostic code 5293 already compensated him for neurological deficits and their effects for which he was seeking a separate rating. The CAVC stated that, because the BVA failed to articulate a satisfactory statement of reasons or bases for its rating, the Court could not determine why this veteran's IVDS was not rated separately for foot drop under DC 8521, pertaining to paralysis of the popliteal nerve. The CAVC also stated that it was unclear from the rating schedule itself which functional disabilities were compensated as part of a 60-percent rating for IVDS.

Notwithstanding the commenter's interpretation of the prior evaluation

criteria, a memorandum issued by the BVA Chairman, Memorandum, No. 01-92-23, dated August 10, 1992, did not interpret prior diagnostic code 5293 to allow a full 60 percent in addition to a separate evaluation for other body parts. Rather, it stated that, except for exceptional cases, a single rating of 60 percent will ordinarily be assigned when a veteran's footdrop is the result of radiculopathy attributable to IVDS. By specifying in this rulemaking that a rating for IVDS may be based either on the combined severity of the chronic neurological and orthopedic findings, or on the extent of incapacitating episodes resulting from all manifestations of the disease under diagnostic code 5293, we clarify how functional manifestations of IVDS are to be evaluated, and we make no further changes based on this comment.

The same commenter stated that the rating criteria in the proposed rule are not consistent with other ratings in the schedule because the design of the proposed rule does not provide a rating that corresponds to functional impairment.

We disagree. On the contrary, the revised rule will assure consistency with other ratings in the schedule because the same rating criteria will be used to evaluate identical disabilities, regardless of etiology. The functional impairment due to footdrop or limitation of motion of the spine, for example, will be evaluated using the same criteria, whether due to IVDS or any other cause. If both footdrop and limitation of motion of the spine are present, the combined evaluation will be the same, whether due to IVDS or any other cause. These provisions are clearly consistent with the approach and manner in which we assess functional impairment in similar disabilities, and we make no change based on this comment.

The same commenter stated that the rule must "continue" to recognize that secondary disabilities involving separate anatomical segments or body parts and separate functions are separately ratable and may be rated in combination with a 60-percent rating for disc syndrome itself.

As discussed above, the commenter's interpretation of the previous evaluation criteria for IVDS is not consistent with VA's interpretation. Under the new criteria, all orthopedic and neurologic disabilities that are part of IVDS, whether affecting the spine, the extremities, the bladder, or other areas, will be evaluated under one or the other of the alternative methods of evaluation. However, the revised regulation is also clear that IVDS cannot be evaluated

under both sets of criteria for a single spinal segment. If the evaluation is based on the chronic orthopedic and neurologic manifestations, there will be no evaluation for incapacitating episodes. We therefore make no change based on this comment.

We have edited the definition of incapacitating episodes for clarity and have defined "chronic manifestations" to mean "orthopedic and neurologic signs and symptoms resulting from IVDS that are present constantly, or nearly so." These are not substantive changes.

We have also simplified note (2) by editing for clarity and by removing specific examples of chronic manifestations, which we believe are unnecessary.

VA appreciates the comments submitted in response to the proposed rule, which is now adopted with the amendments noted above.

#### Unfunded Mandates

The Unfunded Mandates Reform Act 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 rule would have no consequential effect on State, local or tribal governments.

#### Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3520).

#### 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.

#### Regulatory Flexibility Act

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.

