

Dept. of Veterans Affairs  
Regional Office (346)  
Jackson Federal Building  
915 2<sup>nd</sup> Ave.  
Seattle, Wash 98174-1060

Re:  
Moving Party

October 10<sup>th</sup>, 2011

**CUE MOTION RE MARCH 29<sup>TH</sup>, 2010 DRO REVIEW**

Dear Sirs,

In going over my records, I observe the Regional Office ratings procedures incorporated into 38 CFR §§ 4.14, 4.20 and 4.118 DC 7815 were misinterpreted. The DRO review of March 29<sup>th</sup>, 2010 reduced my primary rating for Porphyria Cutanea Tarda (Diagnostic Code 7815) rated at 10%. In its stead, the Review Officer substituted Diagnostic Code 7704 at 40% to comprehend the phlebotomies I receive monthly.

Two regulations are salient here with respect to this situation. 38 CFR § 4.14 clearly states that no rating shall be duplicative of another or overlap in symptomatology. However it does not rule out rating a condition under two different diagnostic codes if they are dissimilar manifestations and have no commonality.

The evaluation of the same disability under various diagnoses is to be avoided. Disability from injuries to the muscles, nerves, and joints of an extremity may

overlap to a great extent, so that special rules are included in the appropriate bodily system for their evaluation. Dyspnea, tachycardia, nervousness, fatigability, etc., may result from many causes; some may be service connected, others, not. Both the use of manifestations not resulting from service-connected disease or injury in establishing the service-connected evaluation, **and the evaluation of the same manifestation under different diagnoses are to be avoided.**

My 10% rating for PCT fell under 38 CFR § 4.118 DC 7815 Porphyria Cutanea Tarda for bullous pemphigoids and the scarring of the distal portions of my hands and forearms in addition to scars due to mechanical trauma associated with PCT (exposed areas). This constitutes five or more percent of the exposed portions of the skin. This warrants 10% as documented by my QTC Compensation and Pension exam of July 2008 and my award granted October 3<sup>rd</sup>, 2008. I reprint DC 7815 here:

7815 Bullous disorders (including pemphigus vulgaris, pemphigus foliaceus, **bullous pemphigoid**, dermatitis herpetiformis, epidermolysis bullosa acquisita, benign chronic familial pemphigus (Hailey-Hailey), and **porphyria cutanea tarda**):

>At least 5 percent, but less than 20 percent, of the entire body, **or at least 5 percent, but less than 20 percent, of exposed areas affected**, or; intermittent systemic therapy such as corticosteroids or other immunosuppressive drugs required for a total duration of less than six weeks during the past 12-month period  
-----10%

The rating decision dated October 3<sup>rd</sup>, 2008 erroneously stated the following:

"While the condition is currently in remission and primarily only affects your hands, we are assigning this evaluation based on your intermittent need for phlebotomies."

I would disagree with the examiner. My disease is active from April to October every year. My need for phlebotomies is currently once a month to reduce my hematocrit to 37%. It is currently 44% as of today's phlebotomy (October 10<sup>th</sup>, 2011). A detailed dermatological exam will reveal extensive scarring on the distal portions of the forearms as well as the hands and mechanical trauma scars on the anterior aspect of both as well. There is no provision for phlebotomies- intermittent or otherwise- anywhere to be found in Diagnostic Code 7815. This is clear and unmistakable error and provoked an outcome determinative error-to wit, attempting to rate the phlebotomies under DC 7815.

My NOD, dated October 8<sup>th</sup>, 2008 clearly pointed out a higher rating was in order for this as I receive *regular* phlebotomies and have almost continuously since 1992. The only diagnostic code referring to phlebotomies is DC 7704 Polycythemia Vera. It contemplates 40% for this condition. As such, it falls under § 4.20 (analogous ratings). I reprint 38 CFR § 4.20 here:

**When an unlisted condition is encountered it will be permissible to rate under a closely related disease or injury in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous.** Conjectural analogies will be avoided, as will the use of analogous ratings for conditions of doubtful diagnosis, or for those not fully supported by clinical and laboratory findings. Nor will ratings assigned to organic diseases and injuries be assigned by analogy to conditions of functional origin.

In no way, shape or form are there any overlapping conditions or manifestations of bullous pemphigoids (scarring) with phlebotomies. The two medical situations represent two entirely different concepts. Scarring is a static condition, whereas phlebotomies are an ongoing monthly medical procedure to remove excess blood and the iron therein. This provokes anemia. Because DC 7815 does not contemplate this procedure, DC 7704 must be used by analogy. This in no way constitutes pyramiding. Therefore the reduction of the rating for DC 7815 from 10% to 0% was unlawful and clearly and unmistakably erroneous.

Based on this, an outcome determinative error resulted in reducing my rating for scars from 10% to 0% where 10% is warranted by law and was indeed awarded *lawfully* on October 3<sup>rd</sup>, 2008. I believe 38 CFR §3.105(a) covers this contingency under clear and unmistakable error:

**(a) Error.** Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. **Where evidence establishes such error, the prior decision will be reversed or amended.** For the purpose of authorizing benefits, **the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision.** Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply.

I respectfully petition VA to restore the rating of 10% for my scarring effective February 23<sup>rd</sup>, 2007 immediately based on clear and unmistakable error committed on the March 29<sup>th</sup>, 2010 Decision Review. If it comes to pass that my Substantive Appeal currently before the BVA

grants me an earlier effective date of March 31, 1994, I would ask that the effective date for this rating comply with the 1994 decision. If this is unclear, let me reiterate it. My ratings for PCT, secondary to Hepatitis C (DC 7354) should reflect DC 7815 at 10% and DC 7704 at 40% respectively and should commence on March 31, 1994 if, and only if, the BVA Appeal grants that date as the effective date of my claim.

I certify that the above is true and correct to the best of my knowledge and belief.

Sincerely,

The Nodster