



*"A man who is good enough to shed his blood for his country
is good enough to be given a fair deal later."™*

The background of the slide features a large, light blue circular seal. The outer ring of the seal contains the text "NORTH DAKOTA VETERANS AFFAIRS" at the top and "PUTTING VETERANS FIRST" at the bottom. In the center of the seal is a portrait of a man with a beard and mustache, wearing a suit and tie. Behind the portrait is a shield with a blue field containing three white stars and a red field. Below the portrait, the text "EST. 1945" is visible.

Common VA Errors

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What We Will Cover

- **Joints**
- **Agent Orange**
- **Sleep Apnea**
- **Hearing Loss and Tinnitus**
- **Medicine and Ratings**
- **TDIU**

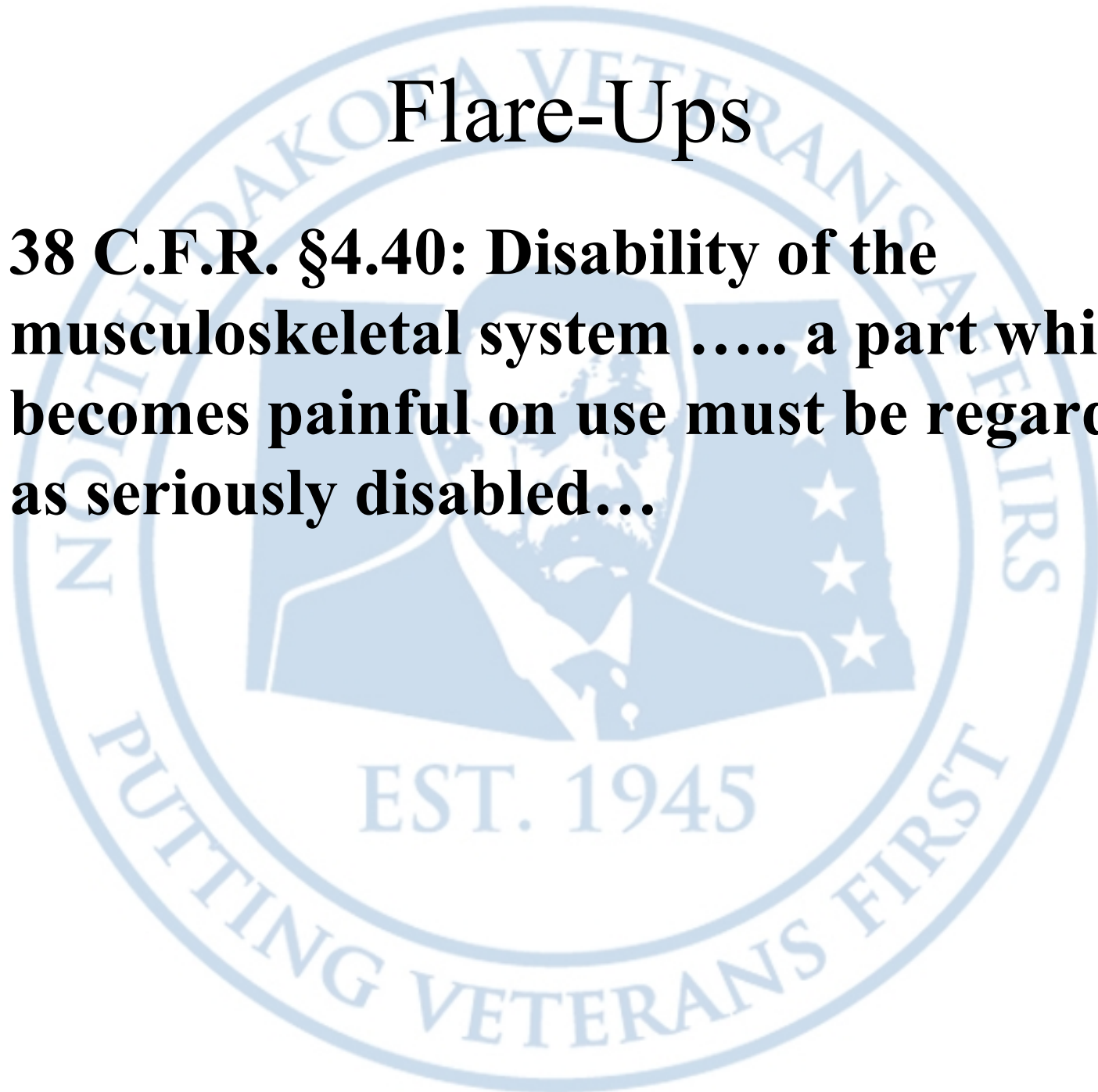
Joints

- **Flare-ups**
- **Mere Speculation**
- **Observable Painful Joints**
- **Weight Bearing**



Flare-Ups

- **38 C.F.R. §4.40: Disability of the musculoskeletal system a part which becomes painful on use must be regarded as seriously disabled...**



Flare-Ups

- In *DeLuca v. Brown*, 8 Vet.App. 202 (1995), the CAVC held that in examinations of musculoskeletal disabilities, the examiner must be asked to give an opinion on whether pain could significantly limit functional ability during flare-ups or with repeated use over a period of time.
- This information must be portrayed in terms of the degree of additional ROM lost due to pain on use or during flare-ups.

Flare-Ups

- **What is a Flare-Up?**
 - A flare is a transient worsening in severity of a disease or condition that eventually subsides or lessens
- **Normal Activity vs C&P Examination**
- **Gather Evidence During a Flare-Up**
 - Chiropractor (Range of Motion)
 - Specific, Detailed Lay Statement

Mere Speculation Opinion

- **“It is not possible without mere speculation to estimate either loss of range of motion or describe loss of function during flares because there is no conceptual or empirical basis for making such a determination without directly observing function under these circumstances.”**

Mere Speculation

- **It must be clear that no additional testing could be conducted or information obtained that would permit such an opinion.**
- **VA must ensure that examiner performed all due diligence in seeking relevant medical information that may have bearing on the requested opinion, and the opinion was not the first impression of an uninformed examiner.**

Sharp v. Shulkin

Vet. App. No. 16-1385 (Sept 6, 2017)

- **An examiner need not directly observe a flare in order to offer an opinion as to additional limitations.**
- **VA examiner must elicit information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from Vet.**
- **VA must determine whether the examiner's inability is due to a personal lack of knowledge or experience, and if so, to attempt to obtain an opinion from a more qualified examiner.**

Mere Speculation Take Away

- **Submit SPECIFIC lay statements about impairment during flare-ups**
- **Loss of movement is quantifiable and lay people are competent to approximate level of movement during a flare-up**
- **Fight the perception among VA examiners that they must observe flare-ups to quantify their severity**

38 CFR § 4.59 Painful Motion

- The facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints
- It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, **as entitled to at least the minimum compensable rating for the joint**

38 CFR § 4.59 Painful Motion

- **The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint**

Pettiti v. McDonald

27 Vet. App. 415 (2015)

- **The terms “painful motion” and “actually painful joints” are synonymous and claimant who has painful motion is considered to have limited motion, even if the pain does not cause actually limited motion**
- **Some DCs (5002, 5003, etc.) require “objective evidence” of painful motion, which includes confirmation of the Vet's testimony regarding joint pain by a medical examiner or a lay person**

Painful Motion Take Away

- **If your Vet has 0% for Joint Condition and there is painful motion, VA must discuss § 4.59 and credibility of lay statements about pain**
- **Get statements from friends/family that discuss Vet's observable pain**
- **Highlight Med Records with complaints of pain**

Agent Orange

Hypertension

- Hypertension
 - The IOM issued reports in 2006, 2008, 2010, 2012, and 2014 (Veterans and Agent Orange: Update) which found limited or suggestive evidence of an association between hypertension and Agent Orange
- Recent VA study examined the hypertension risk in Army Chemical Corps Vets who sprayed defoliant in Vietnam
 - YS Cypel, “Herbicide Exposure, Vietnam Service, and Hypertension Risk in Army Chemical Corps Veterans” J Occup Environ Med, 2016 Nov; 58 (11): 1127-1136 (available at www.ncbi.nlm.nih.gov/pubmed/27820763)
- It concluded that there was a significant association between:
 - Hypertension risk and exposure to herbicides; and
 - Hypertension risk and military service in Vietnam

Agent Orange

Hypertension

- Most often, VA opinions only address whether hypertension **began** in Service NOT whether the hypertension is **related** to exposure to herbicides
- Advocates should cite to the IOM reports and 2016 VA study that suggest a link between hypertension and Agent Orange.

Agent Orange Hypertension

- Argue to VA adjudicators that the IOM reports and Federal Register notices are sufficient to trigger VA's duty to provide a medical nexus opinion regarding direct service connection.
- The IOM reports and the new VA study results can also support a private medical opinion linking a Vet's hypertension to Agent Orange exposure.

Sleep Apnea

- **Buchanan v. Nicholson 451 F.3d 1331 (Fed. Cir. 2006)**
 - Lay evidence may be enough to prove service connection on its own.
 - VA cannot conclude that lay evidence is not credible solely due to the lack of contemporaneous medical evidence.

Sleep Apnea

- Lay Evidence
 - Loudly Snoring (by itself insufficient)
 - Stop snoring/breathing for periods
 - Falling asleep/fatigue during the day

Sleep Apnea

Take Aways

- Even if sleep apnea is not documented in STRs, SC can still potentially be granted if there is credible and competent lay evidence that shows Vet had in-service symptoms of sleep apnea
- The lack of contemporaneous medical evidence is not be an absolute bar to a Vet's ability to prove a claim of entitlement to disability benefits based on that competent lay evidence

Medication

- Jones v. Shinseki, 26 Vet. App. 56 (2012)
 - VA may not deny entitlement to a higher rating on the basis of relief provided by medication when those effects are not specifically contemplated by the rating criteria

Medication

- If a DC does not specifically contemplate the effects of medication, VA is required to discount the ameliorative effects of medication when assigning a rating.
- If a DC does specifically contemplate the effects of medication, then VA can rate the condition based on its severity when the Vet is medicated.

Medication

Example

- **Migraine (DC 8100)**
 - **50%: Migraine headaches with very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability**
 - **30%: Migraine headaches with characteristic prostrating attacks occurring on average once a month over last several months**
 - **10 %: Migraine headaches with characteristic prostrating attacks averaging one in 2 months over last several months**
 - **0%: Migraine headaches with less frequent attacks**

Medication Example

- No Reference to medication in the schedule
 - Actually based on frequency
- VA must rate based on the severity of disability without medication
- Ratings for spine are based on ROM
 - Pain medication will mask the disability

Medication Take Aways

- Review the Diagnostic Code for any mention of Medication
- If the Schedule **does not specifically include medication**, the VA must rate based on severity without medication

Total Disability Individual Unemployability (TDIU)

- The regular disability rating schedule is based on the average work-related impairment caused by a disability
- TDIU is based on an individual's particular circumstances.

38 CFR § 4.16 TDIU

- **Total disability ratings may be assigned, where schedular rating is less than total, when the disabled person is unable to secure or follow a substantially gainful occupation as a result of SC disabilities**

38 CFR § 4.17

Marginal Employment

- **Marginal employment may exist when a Vet's earned annual income does not exceed the amount established by the U.S. Bureau of the Census as the poverty threshold for one person**

38 CFR § 4.17

Marginal Employment

- **Marginal employment may also be held to exist, on a facts found basis, such as employment in a protected environment, when earned annual income exceeds the poverty threshold**

TDIU

Take Aways

- **Vet's earned annual income is at or below the poverty threshold**
- **Is employment a protected environment, such as a family business or sheltered workshop**
- **Reasonable Accommodations rule**
 - **Your local ND Job Service or VocRehab**



Q and A