

United States Court of Appeals for the Federal Circuit

NATIONAL ORGANIZATION OF VETERANS'
ADVOCATES, INC., PETER CIANCHETTA,
MICHAEL REGIS, ANDREW TANGEN,
Petitioners

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2020-1321

Petition for review pursuant to 38 U.S.C. Section 502.

Decided: September 20, 2022

BLAKE E. STAFFORD, Latham & Watkins LLP, Washington, DC, argued for petitioners. Also represented by SHANNON MARIE GRAMMEL, ROMAN MARTINEZ.

MOLLIE LENORE FINNAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, MARTIN F. HOCKEY, JR.; JULIE HONAN, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before NEWMAN, PROST, and CUNNINGHAM, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CUNNINGHAM.

Dissenting opinion filed by *Circuit Judge* PROST.

CUNNINGHAM, *Circuit Judge*.

At the heart of the government's scheme for awarding disability benefits to veterans is a rating schedule. The Department of Veterans Affairs adopted this rating schedule to standardize the evaluation of how severely diseases and injuries resulting from military service impair veterans' earning capacity. 38 C.F.R. § 4.1. The rating schedule is, in turn, divided into diagnostic codes that provide disability ratings for various symptoms or conditions.

National Organization of Veterans' Advocates, Inc., Peter Cianchetta, Michael Regis, and Andrew Tangen petition this court under 38 U.S.C. § 502 to review the VA's interpretation of two of these diagnostic codes: DCs 5055 and 5257, both found at 38 C.F.R. § 4.71a. The VA set out its interpretation of DC 5055 in Agency Interpretation of Prosthetic Replacement of a Joint, 80 Fed. Reg. 42,040 (July 16, 2015) (the "Knee Replacement Guidance" or "Guidance"), and VA Adjudication Procedures Manual M21-1 Section III.iv.4.A.6.a (the "Knee Replacement Manual Provision"). The VA set out its interpretation of DC 5257 in Manual Section III.iv.4.A.6.d (the "Knee Joint Stability Manual Provision").

For the reasons provided below, we conclude that the Knee Replacement Manual Provision is not a reviewable agency action. We also hold that the Knee Replacement Guidance is arbitrary and capricious under the controlling precedent of *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016). Finally, we dismiss the challenge to the Knee Joint Stability Manual Provision as moot. Accordingly, we grant-in-part and dismiss-in-part the petition.

BACKGROUND

I. The VA's Interpretation of DC 5055

Petitioners seek review of two interpretive rules. To introduce the VA's interpretation of DC 5055, we must turn back to the claim at issue in *Hudgens*. In that case, the VA regional office ("RO") denied Michael A. Hudgens, a U.S. Army veteran, a 100-percent disability evaluation for his partial prosthetic knee replacement under DC 5055 because the RO found that DC 5055 applied only to total knee replacements. *Hudgens*, 823 F.3d at 632–33. The Board of Veterans' Appeals and the United States Court of Appeals for Veterans Claims both affirmed the RO's conclusion that DC 5055 did not apply to Mr. Hudgens's partial knee replacement claim. *Id.* at 633–34. Mr. Hudgens then appealed to this court. *Id.* at 634.

On July 16, 2015, twelve days before the Secretary's final brief in *Hudgens* was due with this court, the VA published the Knee Replacement Guidance. *Id.* The Guidance stated that the VA was providing notice of the agency's "longstanding interpretation of DCs 5051 to 5056" as providing for a 100-percent evaluation "when the total joint, rather than the partial joint, has been replaced by a prosthetic implant." 80 Fed. Reg. at 42,040. The VA also announced in the Guidance that an "explanatory note" would be added to 38 C.F.R. § 4.71a stating that the "term 'prosthetic replacement' in diagnostic codes 5051 through 5056 means a total replacement of the named joint."¹ *Id.* at 42,041.

In *Hudgens*, we nevertheless reversed the judgment of the Veterans Court and remanded for further proceedings.

¹ The VA also included an exception to this interpretation for DC 5054, which relates to hip replacements. Knee Replacement Guidance, 80 Fed. Reg. at 42,041–42. That exception is not relevant here.

823 F.3d at 640. We held that DC 5055 “does not unambiguously exclude [partial knee] replacements.” *Id.* at 637 (emphasis omitted). We further concluded that the Secretary’s interpretation of DC 5055 could not be afforded *Auer* deference for two reasons. First, the Secretary’s interpretation “conflict[ed]” with “numerous inconsistent rulings by the Board” holding that partial knee replacements could be evaluated under DC 5055. *Id.* at 638–39. Second, the Knee Replacement Guidance was a “*post hoc* rationalization” “conveniently adopted to support the Veterans Court’s interpretation in this case.” *Id.* at 639. Finally, we held that Mr. Hudgens’s “interpretation of DC 5055 is permitted by the text of the regulation,” meaning that we had to apply the pro-veteran canon, *see id.*; *see also Brown v. Gardner*, 513 U.S. 115, 117–18 (1994), and “resolve any doubt in the interpretation of DC 5055 in his favor,” *Hudgens*, 823 F.3d at 639. His claim, therefore, could be evaluated under DC 5055. *Id.*

On November 21, 2016, six months after our decision in *Hudgens*, the VA informed RO adjudicators of how the agency intended to reconcile our decision in that case with the Knee Replacement Guidance. J.A. 4, 28. In the Knee Replacement Manual Provision, the VA directed RO adjudicators to not evaluate under DC 5055 any claims for partial knee replacements “filed and decided on or after July 16, 2015.” J.A. 28. Claims filed before July 16, 2015, and pending as of that date were to be evaluated under DC 5055 if doing so would be more favorable than evaluating the same claims under another applicable diagnostic code. *Id.* Finally, claims filed before July 16, 2015, and adjudicated before that date were not to be revised. *Id.*

Four years later, the VA amended DC 5055 following notice-and-comment to “clarify VA’s intent to provide a minimum evaluation following only total joint replacement.” Schedule for Rating Disabilities: Musculoskeletal System and Muscle Injuries, 85 Fed. Reg. 76,453, 76,454, 76,456 (Nov. 30, 2020). The change was effective February

7, 2021. *Id.* at 76,453. On February 8, the VA rescinded the Knee Replacement Manual Provision. J.A. 246–47. But “the new Manual provisions still reference the historical Knee Replacement Manual Provision because adjudicators use the historical guidance to rate claims that were pending as of February 7, 2021[,] and that include rating periods prior to that date.” Resp’t’s Br. 12; *see* J.A. 318.

II. The VA’s Interpretation of DC 5257

The second rule was stated in the Knee Joint Stability Manual Provision. When this Manual provision was promulgated in 2018, J.A. 111, 113, DC 5257 assigned a 10-percent rating for “Slight” knee instability, a 20-percent rating for “Moderate” instability, and a 30-percent rating for “Severe” instability. 38 C.F.R. § 4.71a (2018). The Knee Joint Stability Manual Provision directed RO adjudicators to determine whether a claimant had slight, moderate, or severe instability by measuring the amount of movement in the joint. J.A. 113. The Manual provision associated slight instability with 0–5 millimeters of joint translation, moderate instability with 5–10 millimeters of joint translation, and severe instability with 10–15 millimeters of joint translation. *Id.* On January 21, 2021, following our decision in *National Organization of Veterans’ Advocates, Inc. v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (en banc) (“*NOVA 2020*”), the VA rescinded the Knee Joint Stability Manual Provision. J.A. 183, 228.

III. The Instant Appeal

On January 3, 2020, NOVA filed a petition for review of the Knee Replacement Manual Provision and the Knee Joint Stability Manual Provision. *NOVA 2020*, 981 F.3d at 1365–66. NOVA later amended the petition to add Messrs. Cianchetta, Regis, and Tangen—three members of NOVA—as petitioners and to challenge the Knee Replacement Guidance. *Id.* at 1368. In *NOVA 2020*, we held that NOVA has associational standing to challenge the Guidance and both Manual provisions. *Id.* at 1371. We further

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