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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3151

STEVEN V. CROWELL, APPELLANT,

V.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

TOTH, *Judge*: Air Force veteran Stephen V. Crowell appealed a May 2016 Board decision. The Board determined that his athlete's foot—in VA parlance, tinea pedis—qualified for only a noncompensable rating under the relevant diagnostic code, which provides compensation based on the area of the body affected and the type of treatment used. *See* 38 C.F.R. § 4.118, DC 7806 (2020). But Mr. Crowell didn't challenge the schedular rating assigned. Instead, he sought review of the Board's decision not to refer his condition for consideration of an extraschedular rating.

The Board "carefully compared the level of severity and symptomatology of [his] service-connected tinea pedis with the established criteria found in the rating schedule" but nevertheless found that Mr. Crowell's "subjective complaints, including complaints of pain, irritation, and dry skin, are contemplated by the rating criteria under which his disability is rated." R. at 15. On appeal, Mr. Crowell initially argued that the Board failed to adequately explain how the symptoms or "functional impairments" of his athlete's foot were contemplated by the rating schedule. Appellant's Br. at 6. The Secretary responded that "simply having symptoms that are typical and characteristic of one's service-connected condition is not grounds for consideration of an extraschedular rating." Secretary's Br. at 8-9.

The case was referred to a panel. We asked the parties to submit supplemental briefing to address the following issues: (1) as a general matter, on what bases may the Board determine whether symptoms of a particular condition are "typical and characteristic"; (2) on what bases did the Board rely in this case; and (3) how does the first factor set forth in *Thun v. Peake*, 22 Vet.App. 111 (2008)—a comparison between symptomatology of a veteran's condition and the criteria found in the diagnostic code for that condition—work in the context of diagnostic codes that are not symptom-based? The parties provided memoranda of law with many helpful insights on these questions. Oral argument was held on February 13, 2018.

At that point, wider consideration of the extraschedular issue began at the Court. Two months after oral argument was held, a case was submitted for full-Court review. This remained *sub judice* until May 2019, at which point the case was returned to a panel, which issued a precedential decision. *Morgan v. Wilkie*, 31 Vet.App. 162 (2019). At the same time *Morgan* was issued, the Court accepted another case for en banc review, a decision in which was handed down in December 2020. *Long v. Wilkie*, __ Vet.App. __, No. 16-1537, 2020 WL 7757076 (Dec. 30, 2020) (en banc). The panel reserved judgment in Mr. Crowell's case while these matters were pending. Given these legal developments, however, the panel decided that the most prudent course would be to return the matter to the original screening judge.

The Court concludes that remand is appropriate. The Board offered no explanation or support for its determination that Mr. Crowell's athlete's foot symptoms were "fully addressed by the rating criteria under which that disability" was evaluated. R. at 15. This renders its statement of reasons or bases inadequate. See *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017). The Secretary opined that extraschedular referral isn't warranted for a condition's "typical and characteristic" symptoms. But, even if that is correct as a legal matter, there's no indication that this was the Board's reason for its decision. In such circumstances, the Court cannot treat the Secretary's post hoc rationale for what the Board might have said as though that is what the Board actually said. See *McCray v. Wilkie*, 31 Vet.App. 243, 258 (2019).

As for whether such a basis for declining to refer a claim for extraschedular consideration is legally viable, the Court concludes that it is better to remand this case for the Board to reconsider its extraschedular decision in light of *Morgan* and *Long*, as well as the supplemental memoranda of law filed in this case. The Board may find the Court's analyses in those intervening cases instructive or helpful in framing the extraschedular inquiry. And it should give careful attention to

the parties' supplemental memoranda of law. These discussed in detail the legal parameters within which the Board could properly address the extraschedular question in the context of Mr. Crowell's case. On some issues, the parties found common ground. But neither the veteran nor the Secretary identified a specific legal analysis that the Board was obliged to follow under current statutes, caselaw, regulations, or other binding authority. It is one thing for the Court to conclude that the Board did not offer any justification for its determination that Mr. Crowell's symptoms didn't justify an extraschedular referral. It is quite another for the Court to hypothesize on the sort of justification the Board *could* offer. The latter is not something the Court may do. *See, e.g., Norvell v. Peake*, 22 Vet.App. 194, 200 (2008) (warning that this Court doesn't offer opinions on "moot questions or abstract propositions" or "declare principles or rules of law" that might not affect the case on appeal).

Given the intervening legal developments in this Court and the arguments advanced by the parties, the Board is in a better position in the first instance to formulate an analysis for evaluating the propriety of an extraschedular referral on the facts of Mr. Crowell's case. *See Massie v. Shinseki*, 25 Vet.App. 123, 126 (2011) (noting this Court's authority to address novel arguments in the first instance or to remand them for Board consideration). To ensure that the Board has the benefit of those arguments, the Court will order that initial briefing, the Secretary's December 12, 2017, supplemental memorandum, and Mr. Crowell's January 9, 2018, supplemental memorandum be associated with the veteran's claims file.

The May 27, 2016, Board decision is VACATED and the matter is REMANDED for additional proceedings consistent with this opinion.

DATED: February 22, 2021

Copies to:

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