

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-6129

JOSE RIVERA-COLON,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, *Chief Judge*, and PIETSCH and LAURER, *Judges*.

ORDER

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

The veteran, Mr. Rivera-Colon through counsel appeals a June 12, 2019, Board of Veterans' Appeals (Board) decision finding, among other things, that he was not entitled to an evaluation in excess of 10% for gastritis. On July 30, 2021, the appeal was referred to a panel of the Court for decision, and oral argument is scheduled for October 12, 2021. On August 27, 2021, the Secretary moved for clarification of the issues to be addressed at oral argument. The Court has determined that supplemental memoranda of law will clarify the issues to be discussed at oral argument and aid the Court in resolution of this matter.

In his brief, Mr. Rivera-Colon asserts that an extraschedular evaluation is warranted because his gastritis symptoms are more severe than contemplated by the assigned 10% evaluation. The Secretary argues that an extraschedular evaluation is not warranted because the type of symptoms that Mr. Rivera-Colon experiences are contemplated by the assigned evaluation. Neither party responded directly to the opposing argument, and neither party addressed whether the language of the specific diagnostic code (DC) assigned, which refers generally to "symptoms," permits assignment of an extraschedular evaluation. *See* 38 C.F.R. § 4.114, DC 7307.

In the supplemental memoranda of law, the Court would like the parties' responses to the following questions:

(1) 38 C.F.R. § 4.114, DC 7307, assigns a 10% evaluation for chronic gastritis "with small nodular lesions, and symptoms" and a 30% evaluation for "multiple small eroded or ulcerated areas, and symptoms." Does the phrase "and symptoms" permit the assignment of an extraschedular evaluation, or does the phrase encompass all possible symptoms at any level of severity such that an extraschedular evaluation is not available when a schedular 10% or 30% evaluation is assigned?

(a) If extraschedular evaluations are available under DC 7307, what criteria (for example, the type of symptoms or their severity) determine whether an extraschedular evaluation is warranted?

(b) If extraschedular evaluations are excluded when a disability is assigned a 10% or 30% evaluation under DC 7307, does that render 38 C.F.R. § 3.321(b) inapplicable as to DC 7307?

(2) The Board also considered whether an increased evaluation was warranted under DC 7346. The introductory text to 38 C.F.R. § 4.114 advises VA that "diagnostic codes 7301 to 7329, inclusive, 7331, 7342, and 7345 to 7348 inclusive will not be combined with each other," directs the assignment of a single evaluation "which reflects the predominant disability picture," and provides for "elevation to the next higher evaluation where the severity of the overall disability warrants such elevation."

(a) When the Board considers and denies an increased evaluation under two or more diagnostic codes that cannot be combined under § 4.114, should the analysis of whether an extraschedular evaluation is warranted address the criteria under all diagnostic codes considered?

(b) Does the reference to severity in the introductory text to § 4.114 imply that severity is always relevant when assigning a single evaluation to encompass symptoms reflected by multiple DCs? If so, how should that principle be applied to DC 7307?

The parties' memoranda should not exceed 15 pages in length, excluding any attachments or exhibits not barred from the Court's consideration under *Kyhn v. Shinseki*, 716 F.3d 572 (Fed. Cir. 2013), and should be supported by reference to statutes, regulations, caselaw, or other authority. The parties must attach to their memoranda any authority that may not be readily available to the Court through sources that can be electronically searched.

Upon consideration of the foregoing, it is

ORDERED that, no later than 14 days after the date of this order, the parties shall serve on each other and file with the Court supplemental memoranda of law, not exceeding 15 pages, addressing the issues identified above.

DATED: September 2, 2021

PER CURIAM.

Copies to:

Javier A. Centonzio, Esq.

VA General Counsel (027)