United States Court of Appeals for Veterans Claims

JOSE F. RIVERA-COLON,
Appellant,

v. Vet. App. No. 19-6129

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

MR. RIVERA-COLON'S RESPONSE TO ORDER OF SEPTEMBER 2, 2021

On September 2, 2021, this Court requested additional briefing on several issues. In response Mr. Rivera-Colon submits the following memorandum.

Mr. Rivera-Colon's Memorandum of Law

Introduction

Mr. Rivera-Colon has been continuously prosecuting his claim for the maximum benefit available under law for his service connected disability from a disability secondary to his need to take medications taken for his service-connected conditions since June 23, 2014. RBA 8756-8757. On appeal he sought an initial rating higher than 10 percent and was denied. RBA 5-16. Mr. Rivera-Colon's brief challenged the Board reasons or bases for the rating assigned for his service connected digestive system disability, which has been evaluated by VA under the provisions of 38 C.F.R. § 4.114 using diagnostic code 7307 as gastritis. Specifically,

he averred that the Board had failed to consider the reasonably raised issue of his entitlement to extraschedular consideration under 38 C.F.R. § 3.321(b)(1) because the evidence of record indicated that his symptoms were so severe that he discontinued working as a result of his service connected disability. *See* RBA 3134-3135 (a physician found Mr. Rivera-Colon's symptoms, included nausea and vomiting which caused him to be unable to work). The evidence of record reasonably raised the issue of his entitlement to extraschedular consideration under § 3.321(b)(1) because his disability was exceptional and due to the marked interference with employment the general rating schedule was inadequate to rate his disability.

Questions Presented By Court's Order

Question I:

> **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?**

The phrase "and symptoms" can not be understood to encompass all possible symptoms at any level of severity such that extraschedular consideration would not be available simply because a schedular rating could be assigned. Such a reading misapprehends the regulatory purpose of extraschedular consideration.

Extraschedular consideration was created by the Secretary to address the inadequacies of his schedular evaluation criteria. Therefore, when as here, the Secretary's rating criteria is determined to be inadequate to rate a single service connected disability because the application of the regular schedular standards are impractical and the veteran's disability is found to be so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization extraschedular consideration is the required remedy. This remedy is consistent with the Secretary's statement of regulatory policy that it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. *See* 38 C.F.R. § 3.103(a). "The Secretary is required to maximize benefits[.]" *Bradley v. Peake*, 22 Vet.App. 280, 294 (2008). Veterans are "generally [ ] presumed to be seeking the maximum benefit allowed by law and regulation[.]" *AB v. Brown*, 6 Vet.App. 35, 38 (1993); *see also Tatum v. Shinseki*, 23 Vet.App. 152, 157 (2009).

The Board made favorable findings of fact regarding Mr. Rivera-Colon's symptoms of record: burning sensation and reflux, RBA 8; epigastric burning sensation, bloating, and belching, *id.*; dyspepsia, regurgitation, and pyrosis, *id.*; constipation, *id.*; chronic hypertrophic gastritis with small nodular lesions and symptoms, specifically, weight loss; periodic nausea; periodic abdominal pain;

periodic vomiting; hematemesis and epigastric pain and reflux. RBA 9.

However, the Secretary in 38 C.F.R. § 4.114, DC 7307 does not define the term "and symptoms." The Secretary's regulation is written in the conjunctive, meaning that in order to be assigned a higher 30 percent rating a veteran must have **both** "multiple small eroded or ulcerated areas, **and** symptoms". Without both – a 30 percent rating cannot be assigned. As such, the application of DC 7307 by the terms of its regular schedular standards is impractical because Mr. Riveria-Colon's disability is shown by evidence to be exceptional or unusual due to its marked interference with his employment. Marked interference with employment is not a symptom nor is it the specific symptom of multiple small eroded or ulcerated areas listed in DC 7307. *See* RBA 3134-3135. His disability has resulted in a marked interference with his employment resulting from his symptoms other than those specified in VA's rating criteria as a factor mandating extraschedular consideration under § 3.321(b)(1). The Secretary's rating criteria for a 60 percent rating even though written in the disjunctive is equally impractical because it is limited to **either** severe hemorrhages, **or** large ulcerated or eroded areas. DC 7307's regular schedular standards are successive in nature in that they progress from one specific symptom and symptoms, to another specific symptom and symptoms, and end with one of two specific symptoms without consideration of any other symptoms. The rigidity of this successive criteria is impractical because it precludes VA raters from considering all

symptoms.

In *Petermann v. Wilkie*, 30 Vet. App. 150, 155 (2018), this Court concluded:

> Thus, because of the successive nature of the rating schedule, there will be some symptoms (as our hypothetical showed) that will not be addressed in a schedular rating. And that remains the case. But that conclusion does not say anything about the role an extraschedular analysis might play in addressing those symptoms. The Secretary acknowledges § 3.321's "gap filling function" but argues that "it is not true that Appellant has shown there is any gap to be filled here." *Id.* But the gap to be filled comes from the unique nature of successive ratings and precisely because the successive schedular rating retains its attributes. Thus, applying *King*'s logic here allows § 3.321(b)(1) to fill that gap. **Any failure to consider symptoms not contemplated by a claimant's disability rating is contrary to law and potentially deprives a veteran of compensation**.

Petermann, 30 Vet. App. 155. (emphasis added).

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?

Extraschedular consideration is available to Mr. Riveria-Colon as noted above because the schedular standards provide for in DC 7307 are inadequate to rate **his** single service connected disability. This is because the application of the regular schedular standards in DC 7307 are impractical by its explicit terms and Mr. Rivera-Colon's disability has been shown to be exceptional or unusual due its factors as marked interference with his employment. *See* RBA 3134-3135

In order for this Court to properly review the Board's decision, it is necessary to address a more basic question, the implications of the Secretary's 2017 amendment to § 3.321(b)(1). This Court in *Thun v. Peake*, 22 Vet.App. 111 (2008) interpreted the Secretary's regulation at 38 C.F.R. § 3.321(b)(1) as it existed in 2008. The Federal Circuit affirmed this Court's interpretation in *Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). However, in 2017 the Secretary amended § 3.321(b)(1) resulting in substantive changes which have not been addressed by this Court.

This Court in its *Thun* decision interpreted the prior version of § 3.321(b)(1) to mean:

> The determination of whether a claimant is entitled to an extraschedular rating under § 3.321(b) is a three-step inquiry, the responsibility for which may be shared among the RO, the Board, and the Under Secretary for Benefits or the Director, Compensation and Pension Service.

Thun, 22 Vet.App. 115. The Federal Circuit in affirming concluded:

> The regulation's use of the phrase "upon field station submission" suggests, at a minimum, that the regional offices and the Board were intended to play some role in evaluating a claim for an extra-schedular rating. Permitting the regional offices and the Board to issue a "field station submission" in which they recommend extra-schedular consideration still reserves to the Under Secretary and the Director the ultimate authority to "approve" those recommendations based on whether the veteran should receive an extra-schedular rating "to accord justice."

Thun, 572 F.3d 1370. The substantive changes made by the Secretary made in

amending § 3.321(b)(1) call into question the continuing viability of those holdings.

The Secretary's amended regulation now provides:

> To accord justice to the exceptional case where the schedular evaluation is inadequate to rate a single service-connected disability, **the Director of Compensation Service or his or her delegate is authorized to approve on the basis of the criteria set forth in this paragraph (b)**, an extra-schedular evaluation commensurate with the average impairment of earning capacity due exclusively to the disability.

38 C.F.R. § 3.321(b)(1). (emphasis added). The unambiguous language delegates to the Director of Compensation Service or his or her delegate ("Director"), without a threshold determination or referral from a regional office or the Board, the sole responsibility to make extraschedular determinations. Mr. Riveria-Colon urges this Court to revisit its interpretation of § 3.321(b)(1) based on the amended language of the regulation.

As a result, this panel should conclude that as a result of the Secretary's amendment extraschedular consideration is now within the exclusive purview of the Director without a threshold inquiry by the regional office or the Board and without a referral from either. Further, this Court should conclude, that an unfavorable finding by the Director that regular schedular standards are adequate would require the Secretary to provide notice of such finding in accordance with the provisions of 38 U.S.C. § 5104. In the event of a favorable finding by the Director, the Director

would assign Mr. Rivera-Colon's service connected digestive disability an extra schedular rating adequate to rate his disability under 38 C.F.R. § 3.321(b)(1). Thereafter, the Secretary would be required to implement the assigned rating and an appropriate effective date.

Such an interpretation is necessary since it is evident that the language relied upon previously by this Court as well as the Federal Circuit in *Thun* has been removed by the Secretary in his amended regulation. There is no longer any basis in the amended language of § 3.321(b)(1) to support the need for any threshold inquiry by a regional office or the Board. Nor is there a basis for the regional office or the Board to make a referral to the Director to undertake extra-schedular consideration. There is no longer any ambiguity that it is the Director, who must make a finding on the issue on a veteran's entitlement to extraschedular consideration. This is true because the amended version removed the phrase "upon field station submission" from the Secretary's regulation.

Additionally, the Secretary's amendment to § 3.321(b)(1) explicitly provides:

> The governing norm in these exceptional cases is a finding by the Director of Compensation Service or delegatee that application of the regular schedular standards is impractical because the disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization.

Id. See 82 FR 57835, Dec. 8, 2017. (emphasis added). Previously, § 3.321(b)(1) in

the concluding sentence of the regulation was apparently providing the "governing norm" for VA field stations to determine whether to refer for extraschedular consideration. Now, the amended version of § 3.321(b)(1) indisputably instructs the Director to make a finding without referral or threshold inquiry regarding whether an application of the regular schedular standards is impractical because a veteran's disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization.

As a practical matter, what remains problematic for claimants seeking extraschedular consideration by the Director is the Secretary's failure to provide standardized form to initiate such consideration. The Secretary has never had a form which allows a claimant to inform the Secretary that he or she wants extraschedular consideration under § 3.321(b)(1). Whereas, the Secretary for decades has provided a standardized form for veterans seeking a TDIU rating under 38 C.F.R. 4.16. *See* VA Form 21-8940. In light of the amendment by the Secretary to § 3.321(b)(1), it is imperative that the Secretary create a standardized form for veterans seeking extraschedular consideration under § 3.321(b)(1).

Therefore, the criteria for determining whether an extraschedular evaluation is warranted has been unambiguously and exclusively delegated the full responsibility to the Director. This includes consideration of whether the application of VA's regular schedular rating criteria is or is not adequate to rate a single service connected

disability as well as whether there is or is not an exceptional case.

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?

There is no basis in § 3.321(b) for VA to exclude extraschedular consideration based upon the rating criteria for a 10% or 30% evaluation under DC 7307.

Question II:

> **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."**

The introductory text to 38 C.F.R. § 4.114 is mandatory and not permissive. It unambiguously provides that "diagnostic codes 7301 to 7329, inclusive, 7331, 7342, and 7345 to 7348 inclusive will not be combined with each other." In this case, the relevant diagnostic codes are 7307 and 7346. The introductory text unambiguously provides that: "A single evaluation **will be** assigned under the diagnostic code **which reflects the predominant disability picture**, **with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation**." (emphasis added).

This Court's characterization that the Board had "considered whether an increased evaluation was warranted under DC 7346, is quite generous. Mr. Rivera-Colon recognizes, as apparently this Court has, that the Board in fact and in law had an obligation to consider Mr. Rivera-Colon's service connected digestive disability under DC 7346 based the evidence of record of his symptoms and the introductory text to § 4.114. What the Board's consideration amounted to was as follows:

> While the Veteran has reported epigastric distress with symptoms such as dysphagia and regurgitation, there is no evidence of persistently recurrent epigastric distress with dysphagia, pyrosis, and regurgitation, accompanied by substernal or arm or shoulder pain which is productive of considerable impairment of health. The medical and lay evidence do not reflect substernal or arm or shoulder pain. *See* 38 C.F.R. § 4.114, DC 7346. Nor does the evidence reflect material weight loss, hematemesis, or melena with moderate anemia, or other symptom combinations productive of severe impairment of health to warrant higher disability ratings at any time during the appeal. The evidence does not reflect severe hemorrhages, or large ulcerated or eroded areas. *Id.*

RBA 11. After acknowledging the evidence of dysphagia and regurgitation, the Board erroneously focused on the absence of evidence of other symptoms. *McLendon v. Nicholson*, 20 Vet. App. 79, 85 (2006) (concluding that the lack of actual evidence does not constitute substantive negative evidence); *see also Horn v. Shinseki*, 25 Vet. App. 231, 239 n.7 (2012) (holding that the absence of evidence cannot be substantive negative evidence without "a proper foundation . . . to demonstrate that such silence

has a tendency to prove or disprove a relevant fact").

The diagnostic criteria for a 30 percent rating for a digestive system characterizes as hiatal hernia is:

> Persistently recurrent epigastric distress with dysphagia, pyrosis, and regurgitation, accompanied by substernal **or** arm **or** shoulder pain, productive of considerable impairment of health

38 C.F.R. § 4.114, DC 7346. (emphases added). This rating criteria is framed in the disjunctive and not framed as the rating criteria is for gastritis in the conjuntive for the 10 and 30 percent ratings. The use of the disjunctive "or" to separate the three groups shows that they are intended to be viewed separately. It is a familiar canon of statutory construction that terms connected by a disjunctive "are to be given separate meanings," *Loughrin v. United States*, 573 U.S. 351, 134 S. Ct. 2384, 2390, 189 L.Ed.2d 411 (2014). *See also Huerta v. McDonough*, 34 Vet.App. 76, 81 (2021).

The Secretary's introductory text to § 4.114 unambiguously provides that: "A single evaluation **will be** assigned under the diagnostic code **which reflects the predominant disability picture**, **with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation**," the Board was required to consider all applicable diagnostic codes to include DC 7346 to Mr. Rivera-Colon's service connected digestive disability which reflected the predominant disability picture. It is indisputable based on the evidence of record as noted above,

that Mr. Rivera-Colon was entitled to consideration of the next higher evaluation under DC 7346 based on the severity of his overall digestive system disability.

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?

Yes, the analysis of whether an extraschedular evaluation is warranted must address the criteria under all diagnostic codes considered or potentially applicable.

Such an analysis is required by the Board because of the Secretary's regulatory statement of policy as recently affirmed by this Court in *Morgan v. Wilkie*, 31 Vet.App. 162 (2019) which substantiates this view in the following holding:

> . . . that VA's duty to maximize benefits requires it to first exhaust all schedular alternatives for rating a disability before the extraschedular analysis is triggered. This is a threshold question intended to ensure that VA has satisfied its duty to maximize benefits by examining all possible rating methods in search of the highest level of established compensation as a schedular matter before resorting to the extraschedular referral process. Further, while we discussed above several schedular rating tools VA may use in satisfying its duty to maximize benefits, we emphasize again that this duty requires VA to search all avenues of schedular rating before resorting to an extraschedular analysis. The Board is not required to discuss each of these tools in every case, but it must do so when possible schedular alternatives for rating a disability are either raised by the claimant or reasonably raised by the record. *See Robinson v. Peake*, 21 Vet.App. 545, 553 (2008). Focusing on the full scope of schedular rating devices will significantly reduce the need to address extraschedular

> referral, reserving it for those cases that are truly "exceptional."

Morgan, 31 Vet.App. 168. In this case, it is evident that the Board did not exhaust all schedular alternatives for rating Mr. Rivera-Colon's service connected digestive system disability as well failing to properly consider § 3.321(b)(1). The intent of the introductory text to § 4.114 plain on its face. Equally, clear is that the Board did consider and denied under two diagnostic codes in its decision which could not be combined under § 4.114. As such the Board was required to analyze whether an extraschedular evaluation was warranted under the criteria under each diagnostic code considered or potentially applicable.

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?

Yes. *See* 38 C.F.R. § 4.10. (The basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body to function under the ordinary conditions of daily life including employment.). The severity of symptoms is always relevant when assigning a single evaluation to encompass symptoms reflected by multiple DCs. That principle should be applied to DC 7307 as this Court set out in *Thun*, 22 Vet.App at 115-116. The RO as well as the Board must compare "the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule

for that disability." *Id.* at 115. Both a disability's symptoms and its functional effects *inform* the severity of that disability. *See id.* at 118 ("it is not the symptoms, but their effects, that determine the level of impairment") (citing *Mauerhan v. Principi*, 16 Vet.App. 436, 443 (2002).

CONCLUSION

Based upon the above memorandum of law, Mr. Rivera-Colon respectfully requests that this Court revisit its interpretation of 38 C.F.R. § 3.321(b)(1) in light of the Secretary's amendment. Further, that this Court should find that based on the unambiguous language of the Secretary's amendment to § 3.321(b)(1), it is only the Director who is authorized to make a finding, without a referral by a VA regional office or the Board, that the application of the regular rating schedular standards are impractical because the veteran's disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization.

In addition, this Court must reverse the Board's decision to deny Mr. Riveria-Colon increased compensation for his service connected disability. This Court should instruct the Board to readjudicate Mr. Rivera-Colon's appeal of VA's decision to deny him a rating more than 10 percent his service connected digestive system disability in accordance with the introductory text to 38 C.F.R. § 4.114.

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