**IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

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| **JOSE F. RIVERA-COLON**, | ) | |
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| Appellant, | ) | |
| | ) | |
| v. | ) | Vet. App. No. 19-6129 |
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| **DENIS MCDONOUGH**, | ) | |
| Secretary of Veterans Affairs, | ) | |
| | ) | |
| Appellee. | ) | |

**APPELLEE'S SUPPLEMENTAL MEMORANDUM OF LAW**

The Court's September 2, 2021, order identified two questions the parties are to address in a supplemental memorandum of law and at oral argument. First, the Court requested the parties advise whether the language in 38 C.F.R. § 4.114, Diagnostic Code (DC) 7307, permits the assignment of an extraschedular evaluation and, if so, what criteria determine whether an extraschedular evaluation is warranted. Second, the Court asked the parties to address the introductory language of 38 C.F.R. § 4.114 in two regards: (1) which DC criteria should the Board consider when determining whether assignment for extraschedular evaluation is warranted when the Board denies an increased evaluation under two or more DCs that cannot be combined under § 4.114; and (2) whether "severity" in the introductory text to § 4.114 implies that severity is always relevant when assigning a single evaluation to encompass symptoms reflected by multiple DCs and, if so, how that principle is applied to DC 7307. The Secretary respectfully submits this supplemental memorandum of law in response to the Court's Order.

## I. The "And Symptoms" Phrases in 38 C.F.R. § 4.114

### A. Extraschedular Evaluations are Available for Exceptional or Unusual Disability Pictures When a Veteran's Disability is Rated Under 38 C.F.R. § 4.114, DC 7307

In a November 2015 rating decision, a Veterans Affairs (VA) Regional Office (RO) granted a 10% rating for Appellant's gastritis, effective June 23, 2014. [R. at 8389-90]. Appellant's gastritis is rated under DC 7307, pertaining to hypertrophic gastritis that is identified by gastroscope. *See* 38 C.F.R. § 4.114, DC 7307; [R. at 5-6 (5-16)]. In pertinent part, under DC 7307 a 10% rating is warranted for chronic gastritis "with small nodular lesions, *and symptoms*," and a 30% rating is warranted for chronic gastritis "with multiple small eroded or ulcerated areas, *and symptoms*." *See* 38 C.F.R. § 4.114, DC 7307 (emphasis added).

The assignment of an extraschedular evaluation is possible when a schedular 10% or 30% evaluation is assigned under DC 7307, but "only when a veteran presents symptoms that are truly unusual or exceptional," thus satisfying *Thun v. Peake*'s first step. *Long v. Wilkie*, 33 Vet.App. 167, 173 (2020); *Thun v. Peake*, 22 Vet.App. 111, 115-16 (2008). This broad language encompasses the usual or typical symptoms caused by or associated with a claimant's gastritis. To assist the Board in determining which gastritis symptoms are typical or normal, it can rely upon, among other things, adequate medical opinions that fully describe the functional effects caused by gastritis that would indicate whether Appellant is experiencing truly unusual or exceptional symptoms. *See Martinak v. Nicholson*, 21 Vet.App. 447, 455 (2007); *Doucette*, 28 Vet.App. at 375 (Schoelen, J.,

dissenting). Accordingly, DC 7307 does not preclude an assignment of an extraschedular evaluation when the RO or Board assigns a 10% or 30% rating.

### B. The Board May Assign a Claimant's Gastritis for Extraschedular Consideration When the Claimant's Disability Picture Meets the Three-Step Analysis Under *Thun v. Peake*

Because extraschedular evaluations may be available under DC 7307, the next question concerns the criteria—for example, the type of symptoms or their severity—that determines whether an extraschedular evaluation is warranted. Whether an extraschedular evaluation is warranted should simply follow the typical analysis under 38 C.F.R. § 3.321(b) and *Thun*, as well as the substantial caselaw on this topic that is sufficient to address this issue. That is, referral for extraschedular consideration is warranted when "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." 38 C.F.R. § 3.321(b)(1). As the Court emphasized in *Long v. Wilkie*, "exceptionality remains the touchstone in determining whether extraschedular consideration is warranted" under § 3.321(b)(1), and the first step in *Thun* "is satisfied only when a veteran presents symptoms that are truly unusual or exceptional." *Long*, 33 Vet.App. at 173. Then, if the severity of the symptoms were such that they presented an unusual impediment to economic activity—that is, "marked interference with employment of frequent periods of hospitalization"—referral for extraschedular consideration and evaluation would be appropriate under § 3.321(b).

Based on the nature of the extraschedular analysis, the Secretary cannot generally speculate as to the type of symptoms under DC 7307 and their severity that may determine whether an extraschedular evaluation is warranted. Because the "determination of whether a veteran presents exceptional symptomatology is, by nature, fact-bound and highly contextual, *Thun*'s first step should be approached as a totality of the factors inquiry rather than as a mechanical formula." *Id.* If the rating criteria "reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required." *Thun*, 22 Vet.App. at 115.

And, here, DC 7307 reasonably contemplates all of Appellant's gastritis symptoms, so exceptionality requires more than an absence of one or more of Appellant's gastritis symptoms from the rating criteria. *See Long*, 33 Vet.App. at 173 (noting that this Court has "consistently declined to treat *Thun*'s first step as a mechanical test that is satisfied whenever a veteran presents a symptom not expressly listed in the diagnostic code"). Each diagnostic code necessarily contemplates all symptoms typically associated with the disability it is designed to assess.[1] *See id.* at 174. Here, the Board could determine which symptoms are

[1] For example, although the diagnostic code assessing hearing loss fails to list any symptoms related thereto but simply relies on audiometric results to determine which rating is appropriate, this Court held that the rating criteria for hearing loss "contemplated symptomatology (i.e., the full range of symptoms) related to decreased hearing[.]" *Long*, 33 Vet.App. at 173 (citing *Doucette v. Shulkin*, 28 Vet.App. 366, 369 (2016)).

typically associated with gastritis by reviewing the DBQs at issue in this matter. *See* [R. at 8748-51]; [R. at 7331-33]; [R. at 4494-500]; [R. at 3132-36].

In *Long*, citing *Doucette*, this Court stated that "rather than engaging in a line-item accounting of each symptom and effect as compared to the diagnostic criteria, we based our ruling on the common-sense observation that a diagnostic code designed to assess hearing loss necessarily contemplates those symptoms and effects commonly associated with such." *Long*, 33 Vet.App. at 174 (citing *Doucette*, 28 Vet.App. at 371). Similarly, DC 3707, which is designed to assess gastritis, necessarily contemplates the usual and typical symptoms and effects commonly associated with this disability, as explicitly referenced by the "and symptoms" phrase. *See* Sec. Br. at 5-8 (noting, for example, that "the majority of the symptoms Appellant argues are exceptional, are all listed as usual symptoms on Appellant's August 2018 DBQ exam"). Accordingly, exceptionality would not exist where Appellant simply exhibited symptoms normally associated with gastritis, even though those symptoms are not explicitly listed in DC 7307.

Here, the rating criteria for 10% and 30% ratings under DC 7307 require chronic gastritis with "small nodular lesions" or "multiple small eroded or ulcerated areas," respectively. 38 C.F.R. § 4.114, DC 7307. Each rating also contains the "and symptoms" phrase, which makes plain what this Court has already held—that each diagnostic code reasonably contains the full range of symptoms usually associated with or caused by the disability. *See Long*, 33 Vet.App. at 173 (citing *Doucette*, 28 Vet.App. at 369). Thus, when determining whether an extraschedular

evaluation is warranted, the Board and RO should first determine whether the "disability is so exceptional" as compared to the rating criteria in DC 7307 and then whether factors like "marked interference with employment or frequent periods of hospitalization" are present. 38 C.F.R. § 3.321(b)(1); *Thun*, 22 Vet.App. at 114.

### C. The Record Did Not Reasonably Raise the Issue of Extraschedular Consideration Under *Thun*'s Three-Step Inquiry

Although the language in DC 3707 may not preclude the assignment of an extraschedular rating, Appellant did not explicitly raise the issue of assignment for extraschedular consideration, nor did the record reasonably raise it. *See* Secretary's Brief (Sec. Br.), at 6-7. All of Appellant's symptoms are contemplated by DC 7307 pertaining to gastritis. *See* [R. at 8748-51]; [R. at 7331-33]; [R. at 4494-500]; [R. at 3132-36].

Further, Appellant identified three symptoms he alleged constituted exceptional symptoms, but he failed to explain how any of them made "application of the regular schedular standards . . . impractical because the disability is so exceptional or unusual due to such factors as marked interference with employment or frequent periods of hospitalization." Appellant's Brief (App. Br.), at 5; 38 C.F.R. § 3.321(b)(1). Indeed, a statement by a physician that Appellant's abdomen pain was unrelieved by standard ulcer therapy does not relate to either of the above criteria, and Appellant made no showing that this fact made application of DC 7307 impractical. [R. at 3133 (3132-36)]; Sec. Br. at 7. Additionally, a single instance of hospital treatment due to "acute diarrhea and partial dehydration," which the medical professional in no way associated with

Appellant's gastritis in the treatment note, cannot constitute "*frequent* periods of hospitalization." [R. at 4826 (4824-31)]; 38 C.F.R. § 3.321(b)(1) (emphasis added); Sec. Br. at 7-8.

Finally, the September 2018 private examiner found that Appellant's gastritis impacted his ability to work, stating that Appellant claimed he discontinued work due to his symptoms. [R. at 3135 (3132-36)]. Notably, Appellant has not demonstrated he has met *Thun*'s "threshold inquiry," or "a finding that the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate," such that application of *Thun*'s second step is appropriate. *Thun*, 22 Vet.App. at 115; Sec. Br. at 6-7. The Board also discussed this private examination in detail in its decision, and every other examiner found Appellant did not have incapacitating episodes and that his gastritis symptoms did not affect his ability to work. *See* [R. at 9 (5-16)]; [R. at 8749, 8750 (8748-51)]; [R. at 7332, 7333 (7331-33)]; [R. at 4495, 4496 (4494-500)]. Accordingly, although consideration of an extraschedular rating may be available under 38 C.F.R. § 4.114, DC 7307, Appellant's symptoms were contemplated by DC 7307, and his disability is not "so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization" such that a discussion of an assignment for extraschedular consideration was warranted. 38 C.F.R. § 3.321(b)(1).

## II. The Introductory Language in 38 C.F.R. § 4.114

In its decision, the Board also considered whether a rating under DC 7346 was appropriate. [R. at 9 (5-16)]. Under this DC, a 60% rating is warranted when the claimant has a hiatal hernia with symptoms of pain, vomiting, material weight loss and hematemesis or melena with moderate anemia; or other symptom combinations productive of severe impairment of health. 38 C.F.R. § 4.114, DC 7346. Additionally, a 30% rating is warranted when the claimant has a hiatal hernia with persistently recurrent epigastric distress with dysphagia, pyrosis, and regurgitation, accompanied by substernal or arm or shoulder pain, productive of considerable impairment of health. *Id.* Finally, a 10% rating is warranted when the claimant has a hiatal hernia with two or more of the symptoms for the 30% evaluation of less severity. *Id.* The Board found the evidence did not warrant a 30% rating under DC 7346. [R. at 9 (5-16)].

### A. When the Board Considers and Denies an Increased Evaluation Under Two or More DCs that Cannot Be Combined Under § 4.114, the Analysis of Whether an Extraschedular Evaluation is Warranted Should Address the Criteria Under All DCs Considered

When the Board considers and denies an increased evaluation under two or more diagnostic codes that cannot be combined pursuant to 38 C.F.R. § 4.114, it should consider the criteria under all DCs considered by the Board. The introductory language in 38 C.F.R. § 4.114 mentions the "severity of the overall disability," and the standard stated in 38 C.F.R. § 3.321(b) similarly mentions the veteran's "disability picture." Thus, *Thun*'s first step is met when there "is a finding that the evidence before VA presents such an exceptional disability picture that the

available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115. This Court has acknowledged that the "sole focus of *Thun*'s first step is on the ability of the rating schedule to evaluate any impairment manifested by the veteran's symptomatology." *Long*, 33 Vet.App. at 174. Then, the Board must look to the veteran's "exceptional disability picture" to determine if it exhibits other related factors, such as those provided by the regulation as governing norms, which includes "marked interference with employment" and "infrequent periods of hospitalization." *Thun*, 22 Vet.App. at 115; 38 C.F.R. § 3.321(b). Additionally, once the RO or the Board determines the appropriate rating under the predominant DC under 38 C.F.R. § 4.114, elevation of that rating is possible via the extraschedular framework, assuming the claimant's disability picture and symptoms meet the three-step analysis articulated in *Thun* and expounded upon in *Long.*

Accordingly, when the issue is explicitly raised by the veteran or reasonably raised by the record, the Board's failure to discuss each applicable DC considered, as well as the impairments manifested by the veteran's symptomatology, in the context of determining whether referral for extraschedular consideration is warranted may constitute a reasons or bases error. *Long*, 33 Vet.App. at 175. As discussed above, however, the issue of referral for extraschedular consideration was not raised explicitly by Appellant or raised reasonably by the record, so the Board did not need to discuss this issue.

### B. The Severity of the Overall Disability Is Relevant When Determining Whether a Disability Warrants Elevation Under 38 C.F.R. § 4.114, But Consideration of Only the Predominant DC's Criteria is Pertinent for Elevation Under *Urban v. Shulkin*

Finally, the reference to "severity" in the introductory text to 38 C.F.R. § 4.114 does imply that severity is relevant when assigning a single evaluation to encompass symptoms reflected by multiple DCs. In considering severity, though, this Court should follow its holding in *Urban v. Shulkin*, which addressed nearly identical language contained in 38 C.F.R. § 4.96(a). Essentially, once a "single evaluation [is] assigned under the diagnostic code which reflects the predominant disability picture," the criteria for the predominant DC should be the primary factor in determining whether elevation to the next higher evaluation is warranted. 38 C.F.R. § 4.114.

The introductory text to 38 C.F.R. § 4.114, which encompasses DCs 7307 and 7346, provides as follows:

> Ratings under diagnostic codes 7301 to 7329, inclusive, 7331, 7342, and 7345 to 7348 inclusive will not be combined with each other. 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.

*Id.* In *Urban v. Shulkin*, this Court dealt with language in 38 C.F.R. § 4.96(a) almost identical to that in 38 C.F.R. § 4.114.[2] *Urban v. Shulkin*, 29 Vet.App. 82 (2017).

[2] The introductory language in 38 C.F.R. § 4.96(a) provides as follows, in pertinent part: "Ratings under diagnostic codes 6600 through 6817 and 6822 through 6847 will not be combined with each other. Where there is lung or pleural involvement, ratings under diagnostic codes 6819 and 6820 will not be combined with each other or with diagnostic codes 6600 through 6817 or 6822 through 6847. A single

The issue in *Urban* was "whether VA, when assigning a single disability evaluation for coexisting service-connected respiratory conditions under 38 C.F.R. § 4.96(a), is to evaluate severity on the basis of the criteria listed in the diagnostic code (DC) of the predominant respiratory disability alone." *Id.* at 84. In *Urban*, the Board noted that if rated separately, Appellant's service-connected obstructive sleep apnea (OSA) symptoms would warrant a 50% evaluation under DC 6847 and his service-connected asthma symptoms would warrant a 60% evaluation under DC 6602. *Id.* at 86. Because the regulatory scheme precluded combination of those DCs, though, the Board found asthma to be the "predominant disability" based on the severity of the overall disability under § 4.96(a) "because it provided the veteran a higher evaluation." *Id.* at 86, 92.

The Court found that the phrase "where the severity of the overall disability warrants such elevation"—which is the same language contained in § 4.114—to be ambiguous. *Id.* at 88. The Secretary argued this phrase means that, after determining which disability is predominant, VA "is then required to apply the predominant disability DC, considering all of the signs and symptoms attributable to either one or both of those disabilities." *Id*. (internal quotations omitted). The Court agreed and deferred to the Secretary's interpretation, stating that the plain language of the phrase at issue "is reasonably interpreted as referring to the next higher evaluation level of the predominant disability DC and is also reasonably

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rating will be assigned under the diagnostic code which reflects the predominant disability with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation."

interpreted as meaning that, to attain such elevation, the criteria listed in that evaluation level are key to assessing the severity of the overall disability from both respiratory conditions." *Id.* at 89-90. Accordingly, once VA determines the predominant disability, it can "assess the overall symptoms of the coexisting respiratory conditions against the criteria listed in the predominant disability's DC." *Id.* at 89. This Court should apply the language in 38 C.F.R. § 4.114 the same way when a single evaluation is assigned to encompass symptoms reflected by multiple DCs.

Like the Court stated in *Urban*, the Secretary's interpretation of 38 C.F.R. § 4.114 is aligned with the anti-pyramiding purpose of VA's regulatory scheme. *Id.* (noting that, under § 4.96(a), the Secretary "provides a single evaluation for certain coexisting respiratory conditions to avoid duplicate compensation payments for the same symptoms or for conditions that manifest in the same way, a practice known as pyramiding"). This Court has recognized that under the regulatory scheme at play in §§ 4.96(a) and 4.114, "[a]llowing criteria from other . . . DCs to be considered when assigning an evaluation would seem to conflict with the . . . language that prohibits combining evaluations under § 4.25." *See id.* at 89-90. Accordingly, "there may be very few instances where symptoms of a nonpredominant disability would result in a higher disability rating under the criteria for the predominant disability," but the opportunity to receive a higher rating under this scheme "balances the goals of adequately compensating veterans and

avoiding improper pyramiding." *Id.* at 90. Thus, this Court should adopt the Court's reasoning in *Urban* and apply the same framework to 38 C.F.R. § 4.114.

Thus, in the context of § 4.114, severity is relevant when assigning a single evaluation to encompass symptoms reflected by multiple DCs. However, the Court should employ the same interpretation of the introductory language in 38 C.F.R. § 4.114 as it did for the language in in 38 C.F.R. § 4.96(a) in *Urban*. Accordingly, once the Board determines that, for example, DC 7307 reflects the predominant disability picture, elevation from a 10% rating to a 30% rating would require evidence of chronic gastritis "with multiple small eroded or ulcerated areas, and symptoms." This is so regardless of additional, less severe—that is, non-predominant—diagnosed digestive system conditions and their related symptomatology. However, as mentioned previously, assuming gastritis is the predominant disability and is rated under DC 7307, Appellant may still be entitled to an elevated rating via extraschedular consideration for a non-predominant disability provided his disability picture meets *Thun*'s three step-inquiry.[3] Appellant has not met his burden in this regard, however.

[3] An extraschedular rating in this instance would not invoke the anti-pyramiding regulatory scheme in 38 C.F.R. § 4.114 because the symptom warranting extraschedular consideration would, by definition, not be contemplated by those DCs in § 4.114.

## CONCLUSION

Based on the foregoing, Appellee, Secretary of Veterans Affairs, respectfully responds to the Court's order and continues to request the Court affirm the Board's June 12, 2019, decision.

Respectfully submitted,

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