IN THE 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.	)	

APPELLEE'S RESPONSE TO THE COURT'S SEPTEMBER 29, 2021, ORDER

Appellant argues that the Secretary's amendments to 38 C.F.R. § 3.321(b)(1), effective January 8, 2018, superseded this Court's decision in *Thun v. Peake*, 22 Vet.App. 111 (2008), and the Federal Circuit's decision affirming that decision, *Thun v. Shinseki*, 572 F.3d 1366 (2009). *See* Appellant's Supplemental Memorandum of Law (App Supp. Mem.) at 6-10; *see also* 82 Fed. Reg. 57,830 (Dec. 8, 2017) (amending 38 C.F.R. § 3.321(b)(1)). Under Appellant's reading of the amended regulation, the Director of Compensation Service (Director) or his or her delegate has "the sole responsibility to make extraschedular determinations" "without a threshold determination or referral from a regional office [(RO)] or the Board." App. Supp. Mem. at 7. But Appellant ignores the plain language of the regulation; the comments regarding the amended language; VA's continued policy to have ROs or the Board handle the fact-intensive referral process, as stated in Veteran's Benefits Administration's Adjudication Procedures Manual, M21-1 (M21-

1); and this Court's recent case law. Accordingly, Appellant's arguments are without merit and *Thun* remains good law under the amended regulation.

First, contrary to Appellant's assertions, nothing in the current text of § 3.321(b)(1) precludes the RO or the Board from making a threshold determination under *Thun* as to whether referral for extraschedular consideration is warranted. In pertinent part, § 3.321(b)(1) states that the Director "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 regulation states only that the Director is authorized to approve an extraschedular evaluation, but it is silent as to the referral process and how the issue of an extraschedular rating comes before the Director. The Director has not delegated the authority "to approve . . . an extra-schedular evaluation" to the RO or the Board at this time. *See* VBA's Adjudication Procedures Manual, M21-1, V.ii.3.D.3.b (M21-1). Instead, when either the RO or Board determine that an extraschedular evaluation may be warranted—whether explicitly raised by the claimant or reasonably raised by the record, and, in either case, based on the analysis set forth in *Thun*—the matter must be referred to the Director in the first instance. This has been VA's longstanding and continuing policy, even after the 2017 amendment to § 3.321(b)(1).

Second, although the amendments to § 3.321(b)(1) removed the phrase "upon field submission" and the word "referred," the final rule demonstrates that

the VA did not remove this language to change the extraschedular referral process. *See* 82 FR 57830, 57833. One commenter stated that, "to the extent that extraschedular evaluation of the combined effect of multiple disabilities may impose an additional burden on the [Director], the decision should instead be made by [ROs] and the [Board]." *Id.* VA agreed, noting that the ROs "should make these fact-intensive decisions in the first instance, and we have therefore revised the rule by eliminating the phrase 'upon field station submission' and the word 'referred.'" *Id.* VA removed this language from § 3.321(b)(1) so that the Director could ultimately delegate the authority to approve an extraschedular rating to the ROs, but the Director has not done so at this time. The 2017 amendment to § 3.321(b)(1) was not intended to eliminate the ROs involvement in the determination of whether referral for extraschedular consideration is warranted, and the final rule reiterates the ROs involvement in these fact-intensive decisions.

The stated purpose of the proposed amendment was to "clarify VA's regulation pertaining to exceptional compensation claims such that an extra-schedular evaluation is available only for an individual service-connected disability but not for the combined effect of more than one service-connected disability—i.e., confirming the VA's interpretation of the old regulation prior to" *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 927 F.3d 1263, 1266 (Fed. Cir. 2019) (citing Extra-Schedular Evaluations for Individual Disabilities, 81 Fed.Reg. 23,228, 23,228 (Apr. 20, 2016)); *see Chudy v. O'Rourke*, 30 Vet.Ap. 34, 37 n. 3 (2018) (noting that VA

amended § 3.321(b)(1) to "prohibit extraschedular consideration based on the combined effects of more than one service-connected disability," as outlined in *Johnson*). Accordingly, VA's intent in amending § 3.321(b)(1) was not to change the extraschedular referral process.

Third, VA's policy of requiring the RO to conduct the initial *Thun* analysis to determine whether referral to the Director for extraschedular consideration is warranted has remained in effect after the 2017 amendment. *See* M21-1, V.ii.3.D.3.a-h. The M21-1, updated September 2021, explicitly instructs the RO on how to handle the referral process. *Id.* Thus, in practice, VA handles the issue of referral for extraschedular consideration the same way as it did before the 2017 amendment to § 3.321(b)(1).

Finally, the above understanding of § 3.321(b)(1) comports with this Court's case law, as the Court has already held that the RO or Board should apply the *Thun* analysis under the amended version of § 3.321(b)(1). Recently, in *Long v. Wilkie*, the en banc Court considered the amended version of § 3.321(b)(1) when articulating when referral for extraschedular consideration is warranted, including when the Board addressed the referral question. *See Long v. Wilkie*, 33 Vet.App. 167, 173 (2020) ("To warrant *referral* for extraschedular consideration, a disability must be so exceptional or unusual that it renders application of the regular schedular ratings impractical. 38 C.F.R. § 3.321(b)(1) *(2020).*") (emphasis added); (emphasizing also that *Thun*'s first step "requires *adjudicators* to 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'") (emphasis added). In doing so, the en banc Court maintained the *Thun* standard under the amended regulation. *Id.* at 173-78; *see also id.* at 179 (Schoelen, J., concurring) (noting that "[e]ven with recent regulatory changes, I believe [the *Thun*] framework to be sound and well-grounded in the text of the regulation; therefore, it should continue to serve as the bedrock of our extraschedular analysis" and that the *Long* majority "appears to agree that *Thun* should remain the law of the land"). Thus, Appellant's argument that extraschedular consideration is now within the exclusive purview of the Director without a threshold inquiry and referral by the RO or the Board after the 2017 amendment to § 3.321(b)(1) is not supported by this Court's case law or understanding.[1] *See Chudy v. O'Rourke*, 30 Vet.Ap. 34, 37 (2018) (noting that under § 3.321(b)(1) (2017), disabilities that meet the first two *Thun* steps "must be *referred* to the [Director] to determine whether an extraschedular rating is warranted") (emphasis added).

[1] Notably, on September 30, 2021, this Court issued a non-precedential opinion rejecting Appellant's argument on this topic. *See Reeves v. McDonough*, No. 20-2808 (2021). Specifically, the claimant in *Reeves* argued that the Board erred by relying on a misinterpretation of § 3.321(b)(1) by applying the Court's analysis in *Thun* in its discussion of extraschedular consideration despite the fact that the regulation has been amended. The Court, however, found "this argument without merit. The en banc Court has considered the amended version of [§ 3.321(b)(1)] and maintained the *Thun* requirements in its extraschedular analysis applying that provision." *Reeves v. McDonough*, No. 20-2808 (2021), Mem. Dec. at 5. This Court should similarly reject Appellant's belated arguments in this matter.

CONCLUSION

Based on the foregoing, Appellee, Secretary of Veterans Affairs, respectfully responds to the Court's September 29, 2021, order and continues to request the Court affirm the Board's June 12, 2019, decision.

Respectfully submitted,

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