



VETERANS LAW UPDATE: December 2015
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Summaries of Precedential Cases Issued by
the U.S. Court of Appeals for Veterans Claims and
the U.S. Court of Appeals for the Federal Circuit

[Kuppamala v. McDonald](#), 27 Vet.App. 447 (December 30, 2015)
38 C.F.R. § 3.321; *BOARD'S REVIEW OF EXTRASCHEDULAR DETERMINATION*
HELD: The Board has the authority to review the Director's entire extraschedular determination de novo, and is authorized to assign an extraschedular rating when appropriate.

Veteran was service connected for ulcerative colitis under Diagnostic Code (DC) 7323, with a 10% disability rating. After undergoing a total colectomy, the RO increased his rating to 20% for the period prior to his surgery, 100% for the two-month period following the surgery, and then a 10% rating from that point on. He was later awarded a 40% disability rating under DC 7329, for residuals of resection of the large intestine. This is the highest rating under that DC.

Several years later, he filed a request for an increased rating, stating that his condition was worse. At a VA examination, he reported severe symptoms that caused extreme fatigue, stress, and the need for frequent bathroom stops. The RO continued the 40% rating and the veteran appealed, reporting weight loss, loss of appetite, reduced energy, and disrupted sleep that affected his memory and concentration. Another VA examiner noted significant symptoms that interfered with his work and social life. The Board remanded for extraschedular consideration, including referral to the Director of Compensation and Pension Service. The Director determined that an extraschedular evaluation was warranted and awarded a 10% extraschedular rating, bringing his combined rating to 50%.

On appeal to the Court, the veteran argued that "the Board failed to fulfill its obligation to provide a de novo review of the Director's decision" because the Board simply repeated the Director's determination and did not fully consider his other symptoms. The Secretary asserted that "neither the Board nor the Court has the authority to review the Director's decision awarding an extraschedular rating" because (1) this is a policy-based decision; (2) "there are no manageable judicial standards for the Board to apply and the Board lacks the necessary expertise to assign an extraschedular rating"; (3) "38 C.F.R. § 3.321(b) authorizes only two entities to award extraschedular ratings – the Director and the Under Secretary for Benefits"; and (4) reviewing the Director's decision "renders the regulation unworkable" and conflicts with 38 U.S.C. § 7252.

The Court disagreed with the Secretary and held that the Board has jurisdiction to review the Director's extraschedular determination. The Court first noted that the Board "acts on behalf of the Secretary in making the ultimate decision on claims" and "may review the entire Agency decision below" unless the decision "is committed to the discretion of the Secretary and no manageable standards exist to evaluate that decision." The Court determined that the statute from which 38 C.F.R. § 3.321 is derived (38 U.S.C. § 1155) contains a "guiding principle: That ratings shall be based on the average impairment of earning capacity resulting from service-connected disabilities." Similarly, the regulation requires that an extraschedular rating be based on "the average earning capacity impairment resulting from the service-connected disabilities." Although the Court acknowledged that "average impairment in earning capacity is not a clearly defined standard," it is the standard "that forms the basis for the entire rating schedule, and is, therefore, "sufficient to establish a judicially manageable standard." The Court found that where the governing law provides "a judicially manageable standard limiting the Secretary's discretion, the Board *must* review the Secretary's decision to [e]nsure that it was made within the statutory or regulatory confines."

The Court determined that in order to "allow for proper review, the Board must have before it an actual decision complete with a statement of reasons or bases" – and rejected the Secretary's argument that the Director could issue an extraschedular decision "that merely states that 'an extraschedular rating of 10% is warranted.'" The Court held that when providing such a decision, "the Director must comply with the same requirements as the RO . . . and provide a statement of reasons for the decision and a summary of the evidence considered."

The Court further held that the Board may assign an extraschedular rating – and it is only prohibited from doing so "in the first instance." The Court found no "discernible distinction between the Board's ability to review a denial of an extraschedular rating and review of an award of an extraschedular rating." The Court held that once the Director has issued an extraschedular decision in the first instance, the Board has the authority to review that decision *de novo* and may assign an extraschedular rating.

The Court rejected the Secretary's argument that the Board lacked the necessary expertise to conduct this sort of review, noting that "the Board's review is not solely limited to a mechanical application of the rating schedule." The Court specifically pointed to regulations pertaining to rating by analogy and ratings for mental health conditions that require the Board to "consider all symptoms" and "go beyond the criteria in the rating schedule to determine what level of impairment to earning capacity results from an appellant's unique symptoms."

With respect to the Secretary's policy argument, the Court noted that the regulation "allows the Director to exercise his expertise in the first instance," which "provides a degree of uniformity over those exceptional decisions." This also "keeps the Director apprised of the number and type of unique disability cases," which can facilitate the Secretary's obligation to determine whether revisions to the rating schedule are

necessary. The Court held that “the Board’s ability to review the Director’s decision and assign a rating *after* the Director has had an opportunity to review the claim does not render referral to the Director meaningless.” Instead, “it allows the Director to exercise his expertise while preserving the Board’s appellate authority.”

Applying its holding to the facts of the present case, the Court found that neither the Director nor the Board addressed the veteran’s symptoms that form his complete disability picture – and that the Board’s limited analysis frustrates judicial review. The Court thus remanded this issue to the Board.