Dear Secretary McDonald, October 9th, 2014

I wish to thank you for your and your employees' prompt responses to my entreaty. I suspect I should be more careful what I ask for. Yesterday, I received my Statement Of the Case for a Clear and Unmistakable Error (Motion To Revise) action concerning my errant Porphyria Cutanea Tarda claim. Left unmentioned were the three claims I filed two years ago which still languish at the RO. Those were what actually prompted my initial inquiry last Wednesday. This is simple and revolves around two things. SMC-S and an effective date of March 31st, 1994 for Porphyria.

Below, in no particular order, are cites from the Supreme Court, the Federal Circuit and the CAVC concerning precedence in this matter that predate my original grant of service connection for porphyria on October 2, 2008 (one of the tenets of CUE)

38 C.F.R. § 4.3 (2008).

When reasonable doubt arises as to the degree of disability, such doubt will be resolved in a Veteran's favor.

§ 4.10 Functional impairment.

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. Whether the upper or lower extremities, the back or abdominal wall, the eyes or ears, or the cardiovascular, digestive, or other system, or psyche are affected, evaluations are based upon lack of usefulness, of these parts or systems, especially in self-support. This imposes upon the medical examiner the responsibility of furnishing, in addition to the etiological, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification, **full description of the effects of disability upon the person's ordinary activity**. In this connection, it will be remembered that a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity.

§4.15

However, full consideration must be given to unusual physical or mental effects in individual cases, to peculiar effects of occupational activities, to defects in physical or mental endowment preventing the usual amount of success in overcoming the handicap of disability and to the effect of combinations of disability. **Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; Provided, That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person.** The following will be considered to be permanent total disability: the permanent loss of the use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or permanently bedridden. **Other total disability ratings are scheduled in the various bodily systems of this schedule.**

38 C.F.R. § 4.126 (2000).

Assignment of an evaluation shall be based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination.

The assignment of a particular Diagnostic Code is "completely dependent on the facts of a particular case." Butts v. Brown, 5 Vet. App. 532, 538 (1993). One Diagnostic Code may be more appropriate than another based on such factors as an individual's relevant medical history, the current diagnosis, and demonstrated symptomatology. Any change in Diagnostic Code by a VA adjudicator must be specifically explained. See Pernorio v. Derwinski, 2 Vet. App. 625, 629 (1992). In this case, the Board has considered whether another rating code is "more appropriate" than the one used by the RO. See Tedeschi v. Brown, 7 Vet. App. 411, 414 (1995).

As this Court has made clear,"[t]he Board's consideration of factors which are wholly outside the rating criteria provided by the regulations is error as a matter of law." Massey v. Brown, 7 Vet.App. 204, 208 (1994); see also Drosky v. Brown, 10 Vet.App. 251, 255 (1997) (finding legal error where the Board, "in essence, impermissibly rewrote" the regulation by considering factors wholly outside the rating criteria); Pernorio v. Derwinski, 2 Vet.App. 625, 628 (1992) ("In using a standard that exceeded that found in the regulation, the Board committed legal error.")

"[A] functioning system of laws must give primacy to the plain language of authorities."Tropf, 20 Vet.App. at 322; see also Myore v. Nicholson, 489 F.3d 1207, 1211 (Fed. Cir. 2007)("'Statutory interpretation begins with the language of the statute, the plain meaning of which we derive from its text and its structure'" (quoting McEntee v. Merit Sys. Prot. Bd., 404 F.3d 1320, 1328 (Fed. Cir. 2005))); Otero-Castro, 16 Vet. App. at 380 ("The basic principles that apply to construing statutes apply equally to construing regulations." (**citing Smith v. Brown, 35 F.3d 1516, 1523 (Fed. Cir. 1994))). Requiring the Secretary to explicitly list the factors to be considered when rating a disability ensures consistent application of the disability ratings. "**

The Court notes that these cases do not preclude the use of factors outside the rating criteria when evaluating an extraschedular rating. See, e.g., Thun v. Peake, 22 Vet.App. 111, 115 (2008) (requiring evidence that "presents such an exceptional or unusual disability picture that the available schedular evaluations for that service-connected disability are inadequate"), aff'd sub nom. Thun v. Shinseki, 572 F.3d 1366 (Fed. Cir. 2009); Fisher v. Principi, 4 Vet.App. 57, 60 (1993) ("[T]he rating schedule will apply unless there are 'exceptional or unusual' factors which render application of the schedule impractical.").

RBA 1076-1077 clearly diagnoses the Porphyria as secondary to the Hepatitis C and thus inextricably intertwined as envisaged by Harris v. Derwinski 1 Vet. App 180, 183 (1991)

The porphyria claim, on its own, cannot stand as a distinct disability without consideration of 38 CFR §3.310.

THE PRESUMPTION OF REGULARITY

The Presumption of Regularity assumes that VA's doctors and their assigns are competent to diagnose diseases and injuries and assign causal findings to them.

A finding by a VA doctor of total disability is a finding that must be rebutted to be overturned. Here, the VA accepted the finding of totally disabled. If they felt the July 18th, 2008 compensation examination was inadequate for rating purposes, they had ample opportunity to order a new one prior to the rating or review it for correctness. Left unrebutted, a VA medical diagnosis in a rating becomes a finding that can only be overturned by clear and convincing evidence that an error occurred.

Shafrath v. Derwinski dealt with the adequacy of a compensation examination. VA cannot now, six years later, argue that "total disability means something other than what Dr. James Morgan described on July 18th, 2008. That is called post hoc rationalization advanced for the first time on appeal.

Furthermore, the presumption of validity of all medical decisions is assumed to be correct unless the presumption is conclusively proven to be clearly and unmistakably erroneous. VA made no argument as to the validity of Dr. Morgan's assessment of total disability based on extraschedular manifestations that were not incorporated into DC 7815.

There is a presumption of regularity under which it is presumed that government officials properly discharge their official duties in good faith and in accordance with law and governing regulations. Marsh v. Nicholson, 19 Vet.App. 381, 385 (2005); Sthele v. Principi, 19 Vet.App. 11,17 (2004); Ashley v. Derwinski, 2 Vet.App. 307, 308 (1992).

If the act is not a regular one but is irregular, the Secretary is not entitled to the presumption. See Warfield v. Gober, 10 Vet.App. 483, 486 (1997); see also United States v. Roses, Inc., 706 F.2d 1563, 1567 (Fed. Cir. 1983) ("The presumption [of official regularity may also] operate in reverse. If [the act] appears irregular, it is irregular, and the burden shifts to the proponent to show the contrary").

Sickels v. Shinseki, 643 F.3d 1362 (Fed. Cir. 2011) (applying presumption of regularity to medical examiners' overall competence, including ability to understand instructions)

Rizzo v. Shinseki, 580 F.3d 1288, 1292 (Fed. Cir. 2009) (applying thepresumption of regularity to the competence of VA examiners).

At no time has the VA or its examiners found fault with the compensation examination. If anything, they have dissected it into several different findings showing continuous medication/phlebotomy has improved the underlying disease symptoms. Rating the disease on this is error. See Jones v. Shinseki and the cites therein. The precedence was simply reiterated in Jones and predates my September 2008 adjudication for which I claim CUE.

The findings are predicated on the combined effects of porphyria due to photosensitivity (i.e. **"must avoid sunlight (a precipitating factor) and ongoing "phlebotomies to control the iron content of the blood".**

VA is free to supplement the ratings criteria for DC 7815 to encompass phlebotomies but they have not. The omission is not, ipso facto, evidence against a rating of my total disability. Similarly, the VA is free to amend 38 CFR §4.118 (DC 7815) to reflect photosensitivity and susceptibility to mechanical trauma.

The compensation examination (RBA @1077) described the effects on my activities of daily living as **"no heavy house and yard work, must avoid the sun".**

VA was free to consider extraschedular application of a 100% rating for total disability but instead ignored the examination findings and focused solely on the degree of skin involvement (Rule of Nines) required to attain 10% under DC 7815. In the alternative, they focused on DC 7704- the only diagnostic code mentioning phlebotomies. At no time was the finding of "totally disabled" addressed or rated. This is one of the tenets of CUE. To wit:

Either the **correct facts**, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied.

FACTS ABOUT PORPHYRIA CUTANEA TARDA

The human body contains approximately 10 pints of blood. Furthermore, a healthy donor may donate ONE PINT every 56 days.

Thttp://www.redcrossblood.org/learn-about-blood/blood-facts-and-statistics

My prescription for phlebotomies written in November 1992 was for **a 1 pint phlebotomy every three weeks** until the level of iron was reduced. More frequent donations/phlebotomies increases the risk of anemia, dizziness, lightheadedness and an inability to work safely in the impaired state as well as the risk of heart attack. This is clearly what Dr. Morgan was alluding to and contemplated in his remarks following his diagnosis. Currently, my phlebotomy schedule is once a month and I have adhered to that religiously. The deleterious effects of anemia have been continuous since November 1992 and amply reflected in my medical records to this day. This is the primary reason I rarely drive.

Keeping my Porphyria in remission militates that I always skate the thin edge of anemia with its attendant risks. Dr. Morgan recognized this and alluded to it when he said it was in remission due to avoidance of sun and phlebotomies.

Therefore it is presumed the VA examiner was cognizant of Dr. Morgan's findings and the rationale for them. To ignore the findings and focus on the Rule of Nines in §4.118 (DC 7815) was clearly and unmistakably erroneous. Another violation of CUE (the statutory or regulatory provisions extant at the time were incorrectly applied).

To focus on phlebotomies exclusively without considering the application of the diagnostic codes for anemia (DC 7700) or thrombocytopenia (DC 7705) due to low platelet count was also error on the VA examiner's part.

A finding of totally disabled is a finding of fact. It need not be predicated, as the Decision Review Officer insists, on a narrow reading of 38 CFR §4.15. The DRO's

SOC focuses on only one interpretation of total disability. To wit, the second half of §4.15.

The following will be considered to be permanent total disability: the permanent loss of the use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or permanently bedridden. Other total disability ratings are scheduled in the various bodily systems of this schedule.

The DRO has to avoid the preface to that codicil which states:

Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; *Provided,* That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person.

Last Friday, the Decision Review Officer rationalized this in the SOC thus:

"Our regulations do not allow for a 100 percent evaluation based mere(sic)upon a designation of "totally disabled."

My disabilities with Porphyria are well-documented. Just because the Diagnostic Code does not provide for a 100% rating for total disability in DC 7815, it cannot be said that ergo I am not totally disabled. Similarly, DC 7704 for phlebotomies does not describe the effects of repetitive phlebotomies to the point of perennial anemia and its attendant medical consequences and complications.

I have attempted to argue for SMC S for being substantially housebound. I was denied for this in June 2010. I am 100% disabled by my Hepatitis C alone. It causes near-constant debilitating symptoms. Adding therapeutic phlebotomies, anemia, housekeeping and the avoidance of sunlight to preserve my health is synonymous with being housebound by most definitions.

The September 30th, 2008 rating decision awarding 10% was clearly and unmistakably erroneous because it did not encompass the examining physician's findings. This manifestly changed the outcome of the rating decision.

The March 29th, 2010 DRO decision reducing the 10% rating to 0% was also clearly and unmistakably erroneous because it again did not encompass the full findings of totally disabled in the porphyria compensation examination of July 18th, 2008. One cannot be "totally disabled" and have a 0% rating for it. Besides, the tenets of Russello v. United States, 464 U.S. 16, 23 (1983) acknowledges the effects of medication to control the symptoms –and thus the severity of the disease.

Finally, the two decisions are void ab initio because the BVA decision assigning an effective date for the Hepatitis C of March 31, 1994 is inextricably intertwined with the porphyria via 38 CFR §3.310. See RBA @ 1077:

Diagnosis:

"For the claimant's claimed condition of PORPHYRIA SECONDARY TO HEPATITIS C, the diagnosis is PORPHRIA CUTANEA TARDA SECONDARY TO HEPATITIS C". (emphasis mine)

VA has not rebutted this nexus. The VA examiner has never rebutted or found fault with the language of "totally disabled". That determination was made by Dr. Morgan on the evidence of record and reflects a finding based solely on the effects of Porphyria to the exclusion of Hepatitis C.

I am a pro se claimant and, as such, must be granted leeway in my presentation of my claim on a Motion for Revision. I do know that a Motion to Revise must allege a specific error. With no legal training, I am forced to feel my way through this as I go. Nevertheless, as the adjudicative posture evolves and my legal knowledge increases, I am still to be granted deference and leeway to perfect my theory of CUE while the admission of arguments on my theory of CUE is still viable. By law, I cannot change my theory at the CAVC after a BVA adjudication. Admittedly, I have changed my litigating posture since the initial filing of the Motion to Revise on October 11th, 2011. That was due to a more nuanced reading of my Record Before the Agency.

After over twenty years of adjudication on this matter, the fact remains that I still have no compensable rating for PCT with an effective date of March 31st, 1994-

the date of my claim filing. As I filed New and Material Evidence with my Notice of Disagreement on December 7th, 1994 relating to the Porphyria, that claim, too is still ripe for a decision.

The Courts have dictated I am entitled to one decision on appeal. I have never received that rating for March 31, 1994. The facts surrounding my Porphyria (phlebotomies, anemia, dizziness, photosensitivity) have been chronic and continuous as proven by the burgeoning EOR in my c-file. I believe I conservatively have had 22 gallons of blood removed over 23 years via phlebotomies. This can be confirmed by RBA@ 2940-2947(Cascade Regional Blood)

In keeping with the VA's professed nonadversarial posture and a desire to husband scarce judicial resources, I find it incongruous that untold sums of money have been expended over the ensuing twenty-plus years entirely devoted to keeping me from attaining a fair and equitable solution to this dilemma.

When I filed to reopen my Cryoglobulinemia, Fibromyalgia and Special Monthly Compensation S claims on October 11th, 2012 **(over two years ago)**, it was an attempt to bring recognition to my entitlement to SMC S via an alternate path of 100% plus an additional 60% or more. **<u>VA still has not made a decision on these three claims in spite of the fact that Seattle's Regional Office continues to insist they are only "fifteen months behind" on new claims.</u>**

In sum, I feel I am entitled to a 100% rating for Porphyria effective March 31st, 1994 as the same debilitating conditions existing now were well- documented then.

I would also like to discuss the Seattle VARO representative's crude attempts at estoppel. Ms. Cheryllanne M. Mackey contacted me last Friday, the 3rd of October. She stated categorically that I was 100% Permanent and Total and there simply was no higher rating and no more money to be had. When I reminded her of SMC S, she became officious and asked me what I was requesting so she could "convey it very clearly to the DRO" who had my c-file.

I attempted to address my twenty five month-old claims for the aforementioned Cryoglobulinemia/Fibromyalgia and SMC S. It was implied that the Decision Review Officer was aware of this. She stated my c-file was still in paper format and that the DRO had it in its entirety so she could not view it as we spoke. We were thus unable to have a conversation on the merits of my plea. She did have a copy of my Record Before the Agency (RBA)and ascertained the veracity of my contention that the C^P examination explicitly stated "totally disabled".

All I want is an equitable solution to this and I thought I had made myself clear last week. The Seattle RO seems bound and determined to prolong this past my demise. A SOC that confirms and continues a 0% rating after a medical finding of "totally disabled" is clearly and unmistakably erroneous. To misconstrue the meaning of 38 CFR §4.15 in an attempt to redefine "totally disabled" is a post hoc rationalization put forth in a desperate, Hail Mary attempt to justify an extremely flawed decision. The adversarial posture of the Seattle Regional Office is contrary to the advertised "Veteran friendly environment" in which we present our claims.

In lieu of receipt of this latest SOC, I am forced to file a Writ asking the Court to coerce the Seattle Regional Office and the VBA to adjudicate my other claims filed October 11th, 2012 which still remain unresolved in the first instance. This is what I had hoped to avoid.

Absent any actions on your part, I will also be forced to file my Form 9 containing these very same contentions and get into line for a three year wait for a docket and a decision up or down. This, of course, assumes I live that long.

I do not know how long I must pursue what, to most, is glaringly obvious. The VA raters in Seattle seem to be intent on stretching these adjudications far beyond my life span. This is why Veterans repeat the old adage of "Delay, deny-until we die."

I beg for whatever judicial remedy is available to end this charade, sir. I have devoted my entire adult life to it since my first filing in1989. VA's intransigence is

legend. I am rapidly approaching decompensated cirrhosis and my time to accomplish this grows short.

I certify that the above is true to the best of my knowledge and belief.

(Electronic signature here)

Respectfully,

Gordon A. Graham

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