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September 19th, 2018

Board Of Veterans Appeals
Litigation and Customer Support Division (01C2)
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

re: [redacted]

Amended Brief for Substantive Appeal

Appellant, through counsel, now submits a more complete brief based on a longitudinal review of the VBMS file. This involves a claims stream provoked by a request for a compensation &pension exam to ascertain a new or continued rating in the spring of 2016. A brief history of the claim, in a nutshell will dispel confusion.

Short History of the Appeal

1. 2/17/2010 - Original claim for R deltoid sarcoma granted (DC 5329-5301) @ 10% from 8/17/2009 (AO presumptive)
2. 10/21/2014- Myelodysplastic Syndrome (MDS) granted (DC 7703) @ 100% secondary to R deltoid sarcoma from 4/22/2014
3. 4/2016- VA requests reexamination of MDS. Mailed exam requests to wrong address.

4. 9/20/2016- VA proposes to reduce MDS DC 7703 from 100% to 0% for failure to report to a compensation & pension (C&P) exam.
5. 10/25/2016- Appellant attends c&p exam.
6. 1/14/2017- MDS rating reduced to 10% under DC 7700 Anemia instead of continuing the 100% under DC 7703 based on continuing "therapeutic procedure".
7. 5/17/2017- Counsel files appearance for the claimant
8. 6/18/2017- Claims filed for phlebotomies and increase on anemia rating.
9. 7/23/2017 – Claims filed for Graft Versus Host Disease (GHVD) secondary to MDS and TDIU.
10. 11/02/2017- Entitlement to 40% rating for phlebotomies granted under DC 7704. Revocation of rating for anemia @ 10% under DC 7700 illegally discontinued. Restoration of 100% for continuance of therapeutic procedures denied under auspices of DC 7704, not 7703. SOC issued
11. 11/17/2017- VA 9 filed
12. 12/05/2017 - TDIU is denied.
13. 6/07/2018- DRO review grants skin disorder at 60% (DC 6399-6350), dry mouth rating at 0%.
14. 6/25/2018- TDIU granted effective 12/17/2017. SSOC Issued.

§4.20-Analogous Ratings

By operation of law, §4.20 requires using the most analogous rating when encountering unlisted diseases/injuries. In the instant case, § 4.117 Schedule of ratings - hemic and lymphatic systems DC 7703 (2018) provides the most analogous and highest rating permitted by law while protecting the Government's interests.

In addition, without violating §4.14 Pyramiding, entitlement under DC 7704 phlebotomy was for application in Spring 2016. So, too, are secondary residuals for Graft Versus Host Disease (GVHD). The Secretary only now acknowledges these are now secondaries in appellant's most recent ratings.

The VA examiner has chosen 38 CFR §4.88b Schedule of ratings - infectious diseases, immune disorders and nutritional deficiencies Diagnostic Code 6399-6350 (2018) for residuals of GVHD analogous to Lupus Erythematosus (DC 6350).

Exacerbations once or twice a year or symptomatic during the past 2 years-10%.

Appellant, however, is now rated for 60% for a skin condition (DC 6350) alone directly related to his Tacrolimus autoimmune suppressant therapy. He has long suffered constant, chronic impaired health. It is a matter of record that appellant suffers classic symptoms of secondaries to MDS. See https://www.lls.org/treatment/types-of-treatment/stem-cell-transplantation/graft-versus-host-disease (last visited 9/18/2018). In point of fact, post-bone marrow GVHD is well-documented. Nevertheless, the 10/25/2016 VA examiner neglected to rate appellant on these residuals as required by the Note in DC 7703 –the diagnostic code under which he was originally rated.

In deciding a case, the Board is required to apply all the appropriate and relevant statutes and regulations. See Browder v. Derwinski , 1 Vet. App. 204,205 (1991).

Entitlement to phlebotomies was not established until 4/01/2017 when it was evidence of record as early as 2016. Ditto appellant's GVHD. As the Veteran was unrepresented in this case prior to his appeal, VA had a duty to construe his claims liberally. See Moody v. Principi, 360 F.3d 1306, 1310 (Fed. Cir. 2004). The Court of Veterans Appeals does not recognize representation by a Veterans Service Organization as competent legal representation.

38 CFR §4.117 DC 7703 Ratings Criteria

Appellant is currently rated for his MDS under DC 7703. Regardless of the Secretary's contentions, appellant doesn't suffer from Polycythemia Vera. Quite the opposite, he suffers MDS. The only commonality of the two is phlebotomy.

DC-7703 Leukemia states:

With active disease or **during a treatment phase**--100%

Otherwise rate as anemia (code 7700) or aplastic anemia (code 7716), whichever would result in the greater benefit.

However, appended note below DC 7703 states:

"Note: The 100 percent rating **shall** continue beyond the cessation of **any surgical, radiation, antineoplastic chemotherapy or other therapeutic procedures.** ***Six months*** after discontinuance of such treatment, **the appropriate disability rating shall be determined** by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of §3.105(e) of this chapter. If there has been no recurrence, rate on residuals."

The disjunctive use of the word 'or' in DC 7703 operates to comprehend appellant's Tacrolimus autoimmune suppressant therapy because cessation of said "treatment phase" would virtually ensure the rejection of the transplanted bone marrow and the return of appellant's Myelodysplastic Syndrome (MDS).

"Regulatory interpretation begins with the language of the regulation, the plain meaning of which is derived from its text and its structure." Petitti v. McDonald, 27 Vet.App. 415, 422 (2015); see Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute [or regulation] is its language.").

In the SOC narrative dated 6/25/2018 rebutting a higher rating for MDS under DC 7703, under Reasons for Decision, the VA examiner held, in part:

"A higher evaluation of 100% would be assigned during periods of treatment with myelosuppressants and for three months following cessation of myelosuppressants therapy." [Note under DC 7704].

However, appellant's MDS was never rated under DC 7704 during his antineoplastic therapy nor during the post-treatment ratings phase. This post hoc rationalization by the VA examiner arose after appellant's recent award of a rating for phlebotomies under DC 7704 @ 40%. The argument is inapposite. Mr.

Green was rated @ 100% for his Myelodysplastic Syndrome under DC 7703 Leukemia on 4/22/2014 (antineoplastic chemotherapy and bone marrow transplant rating). On 11/02/2017, appellant was awarded, inter alia, a 40% rating for phlebotomies under DC 7704. At no time has he ever been rated for his MDS solely under DC 7704. Upon beginning representation of appellant, counsel attempted to impress on the examiner just how ill appellant was. He was instructed to file for the secondaries which only now have provoked his recent permanent and total TDIU rating.

By operation of law, §4.20 requires using the most analogous rating when encountering unlisted diseases/injuries. In the instant case, §4.117 DC 7700 at 10 percent was chosen as a "continuance" of appellant's residuals of MDS on 1/04/2017, effective on 4/01/2017. However, it is listed in the Confirmed Rating Decision dated 1/04/2017 (See Exhibit Two, page 2) under DC 7703 at 10% with no §4.27 hyphenation DC code containing DC 7700.

Choice of Diagnostic Code

Several arguments are in play here in the instant appeal. The first is the choice of Diagnostic Code 7703 under §4.13 is inviolate. While the Secretary is free to award a disability based on a finding of fact, he is not allowed to sever it absent a finding of clear and unmistakable error. See 38 CFR §3.105(d). The 2014 award of DC 7703 Leukemia was based on a cancerous condition analogous to a leukemia-like disease- i.e. MDS. Thus, the DC 7703 note was, and is, the controlling ratings criteria. In this case, the note at the bottom of DC 7703 instructs an examiner shall determine the appropriate disability rating six months *after* treatment phase by mandatory VA examination. As cessation of therapy still has not arisen, the 1/04/2017 ratings decision can only be seen as error. The 1/04/2017 ratings decision quotes DC 7700 @10% but there is no hyphenated rating for it. The former DC 7703 rating has now segued into DC 7703-7704.

New and Material IMO

Appellant submits a new and material Independent Medical Opinion (IMO) in the form of a letter from an oncologist and waives review by the Agency of Original Jurisdiction in the first instance. See Exhibit One- Letter of Mark Levin, M.D. with curriculum vitae.

Appellant relies on the statutory construction argument in his new IMO.

"Regulatory interpretation begins with the language of the regulation, the plain meaning of which is derived from its text and its structure." Petitti v. McDonald, 27 Vet.App. 415, 422 (2015); see Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute [or regulation] is its language."). See also Sickels v. Shinseki, 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011) (Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion.)

'Therapeutic procedure' may define many things but it certainly must be applicable in the instant case because the cessation of this 'treatment phase' will cause recurrence of the underlying infection or disease process-i.e. MDS.

Appellant rebuts the VA examiner's contention that this must be rated under DC 7704's note criteria. This is error. The ratings decision dated 9/20/2016 clearly and unmistakably shows the appellant was rated 100% temporarily under DC 7703 effective in 4/22/2014. The decision even references a future re-examination in spring 2016. **The most recent SOC dated 6/25/2018 segues into a discussion about how a higher rating for MDS under DC 7704 Polycythemia Vera is *not* for application.** Appellant filed his substantive appeal based on a continuation of the 100% rating under DC 7703 and its note referencing "therapeutic procedures". Appellant does not contend he has any entitlement to a higher rating for Diagnostic Codes 7700 or 7704- nor has he ever.

With the examiner's belated argument based on a completely different, medically inapposite theorem (Myelo*suppressive* therapy versus therapeutic immune suppression procedures), the VA examiner has violated the precepts

embodied in §§ 4.13, 4.20, 4.27. These are the bedrock regulations governing choice of diagnostic codes. Moreover, the argument is self-defeating. The last thing appellant will *ever need* medically is Myelo*suppressive* therapy. It would only hasten his demise.

Myelodysplastic Syndrome versus Polycythemia Vera

Myelodysplastic Syndrome (MDS) is a disease affecting the bone marrow's ability to produce healthy, mature blood cells capable of oxygenation. It requires the genetically similar match, and infusion of, red blood cell bone marrow from another to regenerate your own. Here's a current link:

https://www.mayoclinic.org/diseases-conditions/myelodysplastic-syndrome/symptoms-causes/syc-20366977 (last visited 9/18/2018)

Conversely, Myelosuppressive therapy is a medical procedure to *retard* production of red blood cells with attendant phlebotomies. This disease is called Polycythemia Vera. Polycythemia Vera is a slow-growing blood cancer in which your bone marrow makes *too many* red blood cells. Here is a current link:

https://www.mayoclinic.org/diseases-conditions/polycythemia-vera/symptoms-causes/syc-20355850 (last visited 9/18/2018)

For the record, appellant suffers from, and is rated for, MDS under DC 7003 but requires regular phlebotomies due to drug-induced iron overload; hence his rating under DC 7704 solely based on the analogy for phlebotomies.

The VA examiner attempts to conflate "treatment with myelosuppressants" in the note at the bottom of DC 7704 as synonymous with "surgical, radiation, antineoplastic chemotherapy or other therapeutic procedures" as used in DC 7703. Nowhere in the four corners of DC 7703 is there to be found any mention

of myelosuppression. DC 7704 is the only diagnostic code which specifically mentions phlebotomies. However, in the instant case, any analogy to appellant's claims ends there with the phlebotomies. Any increase in a rating for appellant's MDS would necessarily, by operation of law, have to defer to DC 7003 guidance from whence entitlement arose.

Presumption of Regularity

"[T]here is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties.'" Ashley v. Derwinski, 2 Vet.App. 307, 308 (1992) (quoting United States v. Chem. Found., Inc., 272 U.S. 1 (1926)).

The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties. Butler v. Principi, 244 F.3d 1337, 1339 (Fed.Cir. 2001). See also Sickels v. Shinseki, 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011) (holding that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without "demonstrating why the medical examiners' reports were competent and sufficiently informed").

Further, in Rizzo v. Shinseki, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009), it was held: "what appears regular is regular and what appears irregular is irregular- the burden of proof of irregularity falling on the appellant to rebut."

The presumption of regularity here operates to confirm that the application of DC 7703 was the correct rating. Similarly, it is presented to rebut the presumption that the reduction effected 4/01/2017 was correct. Switching diagnostic codes may be for application in certain circumstances. Here, inserting different ratings language interchangeably with disparate diagnostic codes os forbidden as a matter of law.

Appellant argues that it is presumed the 2014 VA examiner correctly chose DC 7003 as it most closely approximated the disease process for the initial 2014 rating diagnostic code as well as comprehending the ongoing need for a therapeutic procedure to ensure continued remission. The most recent VA examiner has chosen to ignore the clear and unambiguous instructions of the Secretary contained in his own VASRD.

Reasonable minds can agree that appellant received a bone marrow transplant from his sister. In any case, it is a matter of record- ipso facto appellant's temporary total 100% rating entitlement in April 2014. Reasonable minds can also concur that appellant is currently in a "treatment phase" for his MDS- albeit a therapeutic immune suppression procedure to prevent recurrence. Nowhere in Diagnostic Code 7703 is there any stricture on, nor a definition of, "continuation of therapeutic procedures". A continued total rating under DC 7703 most closely conforms to the "cessation of procedures" note in DC 7003. In point of fact, it becomes moot anyway within 18 months with the grant of TDIU.

Further, it would be error to ignore the clear and unmistakable language in DC 7703 under which appellant was rated. The instructions are unambiguous and easily comprehended. The employment of the mandatory verb "shall" makes the note even more explicit. The note occurs in multiple ratings involving cancer therapy.

TDIU Rating Moot

As appellant in now in receipt of a TDIU rating effective 6/25/2018, a 100% rating for continued therapeutic procedures is the correct application of DC 7703 and moots the TDIU award. Dr. Levin's IMO clearly notes appellant is probably going to require immune suppressant therapy for the rest of his life to keep the MDS at bay.

Lastly, the 11/02/2017 DRO review and rating narrative incorrectly states, under **Decision**:

"Evaluation of residuals of myelodysplastic syndrome with anemia, secondary to sarcoma right deltoid (previously evaluated under DC 7703), which is currently evaluated at 10 percent disabling, is increased to 40 percent effective April 1, 2017."

The symptoms described under the reduction to 10% for MDS were based on anemia under DC 7700 (i.e. **Hemoglobin 10gm/100ml or less with findings such as weakness, easy fatigability or headaches**). As none of these descriptors pyramid the requirements for a phlebotomy under DC 7704,

the application of both ratings is permissible. Absent a finding of fact that appellant no longer qualifies for a 10% rating under DC 7700, a rating of 0% for this disability would be for application under §4.31. It would require a finding of clear and unmistakable error and the accompanying conclusion of law to revoke appellant's entitlement to DC 7700 at 10% as the examiner has not proven pyramiding under DC 7700 or 7704 exists. See 38 CFR §3.105(d)

Summary

Appellant essentially requests a continuation of his 100% rating for therapeutic procedures which have been ongoing since 2015 to the present. He is now rated TDIU anyway. He simply wishes the Board to correct an inequity. He has privately sought independent medical evidence to support his contentions. Unarguably, the Secretary finds appellant to be totally disabled sufficient to qualify for TDIU. The earlier effective date and continuation of a total schedular rating under DC 7703 is the proper legal standard of review. When viewed now in light of his total disabilities attributable to the GVHD, it is all the more evident.

Since 2016, VA examiners have attempted to reduce appellant's ratings in spite of overwhelming evidence to the contrary his disabilities are increasing exponentially. Sadly, he had inadequate legal assistance to help him navigate these waters prior to now.

Comer v Peake held:

"The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." Barrett v. Nicholson, 466 F.3d 1038, 1044 (Fed.Cir.2006); see also Jaquay v Principi, 304 F.3d (2002) at 1280 (2002) ("Congress has created a paternalistic veterans' benefits system to care for those who served their country in uniform."). The VA disability compensation system is not meant to be a trap

for the unwary, **or a stratagem to deny compensation to a veteran who has a valid claim**, but who may be unaware of the various forms of compensation available to him. To the contrary, **the VA "has the affirmative duty to assist claimants by informing veterans of the benefits available to them and assisting them in developing claims they may have."** Comer v. Peake, 552 F.3d 1362, 1369 (Fed. Cir. 2009). (emphasis counsel's).

Appellant submits he had a valid entitlement, and now a valid appeal, for an earlier effective date for permanent and total disability due solely to his service connected disabilities of MDS and the now-service connected GVHD secondaries. He seeks no more but certainly nothing less.

Respectfully submitted,

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Counsel for appellant [redacted]

Attachments:

Exhibit 1- IMO by [redacted] with CV

Exhibit 2 -Confirmed ratings decisions showing DC 7703 as the primary diagnostic code for MDS throughout the pendency of the claim until Notice of Disagreement was filed.