BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

SS [redacted]

Docket No. 18-52 694

Advanced on the Docket

Represented by

Gordon A. Graham, Agent

DATE: April 22, 2020

ORDER

Entitlement to an evaluation in excess of 70 percent for limb girdle dystrophy of the right upper extremity is dismissed.

Entitlement to an evaluation in excess of 60 percent for limb girdle dystrophy of the left upper extremity is dismissed.

Entitlement to a schedular evaluation in excess of 60 percent for limb girdle dystrophy of the left lower extremity is dismissed.

Entitlement to a schedular evaluation in excess of 60 percent for limb girdle dystrophy of the right lower extremity is dismissed.

Entitlement to an evaluation in excess of 10 percent for a cervical spine disability is dismissed.

Entitlement to an evaluation in excess of 20 percent for prostatitis is dismissed.

Entitlement to service connection for a respiratory disorder is dismissed.

Entitlement to special monthly compensation at the rate authorized by 38 U.S.C. § 1114(l) for the loss of use of both feet is granted, effective December 19, 2017.

Entitlement to special monthly compensation at the rate authorized by 38 U.S.C. § 1114(o) for conditions entitling the Veteran to two of the rates provided by 38 U.S.C. § 1114(l) is granted, effective December 19, 2017.

Entitlement to an additional monthly aid and attendance allowance at the rate authorized by 38 U.S.C. § 1114(r)(1) is granted, effective December 19, 2017.

FINDINGS OF FACT

1. At a Central Office hearing, on January 6, 2020, the Veteran made an explicit and unambiguous withdrawal of his appeals of the denial of increased ratings for limb girdle dystrophy of the upper extremities, increased schedular ratings for limb girdle dystrophy of the lower extremities, increased ratings for a cervical spine disability and prostatitis, and service-connected disability compensation for a respiratory disorder. He made this withdrawal with a full understanding of the consequences. In April 2020 the Board received a written brief from his representative confirming his intention to withdrawal these issues from appellate status and to proceed only in his appeal of the denial of additional special monthly compensation (SMC) for loss of use of the lower extremities.

2. The evidence is at least evenly balanced as to whether, since December 19, 2017, the Veteran's service-connected limb girdle dystrophy of the lower extremities has resulted in the loss of use of both feet; specifically, since that date balance and propulsion of the Veteran's feet could be equally accomplished by amputation stumps with prostheses.

3. The evidence is at least evenly balanced as to whether, without considering the functional effects of his lower extremity limb girdle muscular dystrophy, the Veteran requires the aid and attendance of another person as a result of service-connected disabilities.

CONCLUSIONS OF LAW

1. For the issues of increased schedular disability ratings for limb girdle dystrophy of the upper and lower extremities, chronic prostatitis, a cervical spine disability, and service-connected disability compensation for a claimed respiratory disorder,

the criteria for the withdrawal of an appeal by an appellant have been met. 38 U.S.C. § 7105(b)(2),(d)(5); 38 C.F.R. § 20.205.

2. Resolving reasonable doubt in the Veteran's favor, the criteria for SMC at the rate authorized by 38 U.S.C. § 1114(l) on account of the loss of use of both feet have been met since December 19, 2017. 38 U.S.C. §§ 1114(l), 5107; 38 C.F.R. § 3.350(a)(2),

3. The criteria for SMC at the rate authorized by 38 U.S.C. § 1114(o) for conditions entitling the Veteran to two of the rates authorized by 38 U.S.C. § 1114(l) (no condition being considered twice) have been met since December 19, 2017. 38 U.S.C. § 1114, 5107; 38 C.F.R. § 3.350(e)(3),

4. The criteria for an additional monthly aid and attendance allowance at the rate authorized by 38 U.S.C. § 1114(r)(1) have been met since December 19, 2017. 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350(h), 3.352.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from May to October of 1986 and from April 1994 to September 2016. This case comes to the Board from a decision issued by the Agency of Original Jurisdiction (AOJ) in October 2016. That decision included rulings on thirty separate claims for benefits, but only the issues listed above remain part of this appeal. In January 2020, the Veteran testified before the undersigned at the Board's Central Office in Washington, DC. A transcript of that hearing is of record.

Neither the initial October 2016 decision nor the Statement of the Case (SOC) issued by the AOJ in November 2018 expressly considered whether, in addition to the increased rating claims listed above, the Veteran was also eligible to receive special monthly compensation (SMC) under 38 U.S.C. § 1114. The Veteran raised the issue of additional SMC payments in his notice of disagreement and, since then, his representative has consistently argued that he should receive additional SMC payments. Under these circumstances, it is appropriate for the Board to

consider his eligibility for additional SMC payments as part of this appeal. *See Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991); *Bradley v. Peake*, 22 Vet. App. 280, 294 (2008).

Withdrawal of Schedular Increased Rating Claims and Service Connection for Respiratory Disorder

The Board may dismiss any appeal which fails to allege a specific error of fact or law in the determination being appealed. 38 U.S.C. § 7105. An appeal may be withdrawn as to any or all issues involved in the appeal at any time before the Board promulgates a decision. 38 C.F.R. § 20.205.

During the hearing in this case, through his representative, the Veteran indicated his intention to withdraw his appeal of the denial of increased initial ratings for his service-connected limb girdle dystrophy of the bilateral upper and lower extremities, his increased rating claims for prostatitis and his cervical spine disability, and his claim for service connection for a respiratory disorder. As the Veteran's representative explained, the Veteran has already been awarded a combined 100 percent schedular evaluation for service-connected disabilities as well as SMC based on his need for the regular aid and attendance of another person under 38 U.S.C. § 1114(l). According to the representative's calculations, an additional award of SMC based on the loss of use of the Veteran's lower extremities would have the effect of increasing the amount of his monthly benefits, but additional increases in his schedular disability ratings would not. The representative therefore indicated that the Veteran only wanted to proceed with his request for an award of additional SMC. Accordingly, the Board finds that the Veteran's withdrawal of his appeal was explicit and unambiguous.

The Board further finds that the Veteran was fully aware of the consequences of his decision to withdraw his appeal. The undersigned asked the Veteran whether he understood that, if he withdrew his appeal, the Board would not issue a decision on his claims for increased schedular ratings or his claim for service connection for a respiratory disorder. In response, the Veteran indicated that he understood these consequences. In a subsequent written brief, his representative confirmed the

Veteran's intention to withdraw all of his appeals, except for his request for additional compensation for the loss of use of the lower extremities.

For these reasons, the Board finds that, for the issues of increased schedular ratings for the Veteran's limb girdle dystrophy of the upper and lower extremities, bilaterally, increased ratings for prostatitis and a cervical spine disability, and service connection for a respiratory disorder, the Veteran's withdrawal of his appeal was explicit, unambiguous, and done with a full understanding of the consequences of his actions. *See Acree v. O'Rourke*, 891 F.3d 1009 (Fed. Cir. 2018); *DeLisio v. Shinseki*, 25 Vet. App. 45, 57-58 (2011).

With respect to these claims, there are no longer any alleged errors of fact or law for appellate consideration. *See* 38 C.F.R. § 20.205(b). The Board no longer has jurisdiction to review them and they are dismissed.

Special Monthly Compensation for the Loss of Use of the Lower Extremities

Special monthly compensation (SMC) is a benefit which is paid for certain service-connected disabilities, which result in impairment of the senses, loss or loss of use (of the extremities, creative organ, breast, or buttocks), or which render the Veteran housebound or in need of the regular aid and attendance of another person. 38 U.S.C. § 1114.

While schedular rates of compensation are predicated on the average reduction in earning capacity, special monthly compensation benefits are meant to provide additional compensation based on noneconomic factors such as personal inconvenience, social inadaptability, or the profound nature of the disability. VAOPGPREC 5-89 (Mar. 23, 1989).

38 U.S.C. § 1114 authorizes the payment of SMC at several different rates depending on the circumstances of the individual case. There are further criteria for deciding whether a particular claimant qualifies for the various rates of SMC in 38 C.F.R. §§ 3.350 and 3.352. The Veteran's arguments in this appeal implicate the rates authorized by subsections (l), (o), and (r) of 38 U.S.C. § 1114.

SMC at the (l) rate is authorized if the Veteran, "as the result of service-connected disability, has suffered the anatomical loss or loss of use of both feet, or of one hand and one foot, or is blind in both eyes, with a 5/200 visual acuity or less, or is permanently bedridden or with such significant disabilities as to be in need of regular aid and attendance." *Id.*

Subsection (o) authorizes the payment of additional SMC for conditions entitling the claimant to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. § 1114(l) through (n). *Id.*

Subsection (r) authorizes the payment of an additional monthly allowance to "any veteran, otherwise entitled to compensation authorized under subsection (o) of this section . . ." who is in need of regular aid and attendance or a higher level of care. *Id.*

After many years as an officer in the Army, the Veteran was compelled to retire after medical board proceedings, which determined that he was no longer fit for duty as a result of limb girdle muscular dystrophy. A letter from Dr. J.S., a neurologist, dated November 2015, describes the early treatment and diagnosis of this disease. In his letter, Dr. J.S. explained that he began treating the Veteran in December 2014 and described his symptoms as weakness of the shoulder and hip muscles. According to Dr. J.S., the severity of the Veteran's symptoms, "progressed from [requiring] occasional cane usage with occasional falls and [he] can now walk only one-third mile before requiring a break. Due to these changes and his progressive fall risk, [he] was recommended for a motorized wheelchair to assist with his mobility. . . ." The disease also had an unfavorable effect on strength and coordination in the upper extremities. According to the letter, "He also has difficulty dressing himself and shaving, which impacts his ability to perform self-care at home."

Apparently in connection with the medical Board proceedings, Dr. J.S. completed a disability benefits questionnaire in December 2015. The diagnosis was unspecified muscular dystrophy and the medical history section of the questionnaire predicted that the disease, "will ultimately impair ambulation. . ." The report indicated that the Veteran's gait was abnormal, described as "wide based [and] waddling. . ."

Muscle strength was normal during motion of the knees, but less than normal (4/5) when the Veteran moved his ankles. The December 2015 report of Dr. J.S. indicates that, in his opinion, the Veteran did not have functional impairment of any extremity such that no effective function remained other than that which would be equally well served by amputation with prosthesis.

For the sake of brevity, the Board will not provide detailed summaries of all of the subsequent medical treatment records and examination reports. Having reviewed these records – covering thousands of pages and including records of medical treatment, physical therapy, imaging studies, and diagnostic tests, both before and after the Veteran's retirement from the Army and originating from facilities and health care providers both inside and outside of the VA health system – this discussion will focus on the pieces of evidence most relevant to the application of the SMC provisions raised by the Veteran.

In his arguments, the Veteran's representative has consistently emphasized the importance of a subsequent questionnaire, also completed by Dr. J.S., two years later, in December 2017. In this report, Dr. J.S. wrote that weakness and resulting functional impairment continued to worsen, noting that the Veteran, "requires a cane for ambulation at all times and consistently uses a wheelchair for any significant distances and when fatigued." The questionnaire notes muscle atrophy of the shoulder girdle, hip girdle, and quadriceps and described "severe" muscle weakness of both lower extremities. Unlike the December 2015 questionnaire, the 2017 questionnaire does indicate that functioning in all four extremities was so diminished that the Veteran would be equally well-served by amputation with prostheses. Concerning the lower extremities, Dr. J.S. added the following remarks: "Right lower: extreme weakness of hip flexors [due to] muscular dystrophy: limits ability to operate pedals. Left lower: same."

Based on this questionnaire, particularly the statement concerning the Veteran's inability to use pedals, the AOJ issued a decision in March 2018 granting his claim for automobile and adaptive equipment pursuant to 38 U.S.C. § 3902. Through his representative, the Veteran argues that the Board should make a similar finding and grant SMC under 38 U.S.C. § 1114(l) for the loss of use of both feet.

Having considered all the evidence, particularly Dr. J.S.'s questionnaires and the Veteran's own description of his current limitations during the hearing, the Board finds that the Veteran has been entitled to SMC at the (l) rate since December 19, 2017 (the date of Dr. J.S.'s second questionnaire). 38 C.F.R. § 3.350(a)(2) defines the loss of use of a foot in essentially the same language used in the questionnaire: "no effective function remains other than that which would equally well served by an amputation . . . The determination made will be made on the basis of actual remaining function, whether the acts of . . . balance, propulsion, *etc.*, in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis. . ."

It is clear from the medical evidence that the Veteran has not entirely lost the ability to walk or stand. For example, physical therapy notes between January and May of 2018 indicate that he could occasionally conduct strengthening exercises by stepping down from a four-inch step with the supervision of his therapist. Most of these notes, however, suggest that he conducted these exercises, "with [upper extremity] support" – in other words, when his therapist was helping him balance. In *Jensen v. Shulkin*, 29 Vet. App. 66, 78-79 (2017), the Court indicated that loss of use is not necessarily the same as having absolutely no remaining function in the feet. At the hearing, the Veteran was asked how long he would be able to stand up without grabbing anything. His response ("Well, I can't stand without grabbing on anything") is credible, consistent with the greater weight of the medical evidence, and indicates that his service-connected muscular dystrophy of the lower extremities has left him with essentially no ability to use his feet to perform the functions of balance and propulsion.

There is some medical evidence in tension with this finding, most notably a series of examination reports completed by a nurse practitioner in April 2018. The examiner completed separate questionnaires concerning the hip and thigh, knee and lower leg, and addressing muscle injuries. On each of these questionnaires, the examiner indicated that the Veteran did not meet the criteria for loss of use. But the Board agrees that the persuasive force of this conclusion is undermined by the April 2018 examiner's indication, on each of the questionnaires, that the Veteran had no muscle atrophy.

Dr. J.S. indicated the presence of muscle atrophy in his December 2015 letter even before the Veteran's retirement from the Army. An October 2016 MRI study indicated the presence of "diffuse bilateral and symmetric atrophy of the visualized muscles of the pelvis and thighs." And the records of physical therapy treatment, dated both before and after April 2018, consistently mention "muscular atrophy in proximal [upper extremities] and throughout [lower extremities]." Under these circumstances, the evidence provided by Dr. J.S. is more persuasive than the contrary opinions of the April 2018 examiner. As a neurologist, Dr. J.S. has superior credentials and, as someone who was personally involved in the initial diagnosis treatment of the Veteran's muscular dystrophy, he has superior factual knowledge of the progress of this particular patient's disease over time. Unlike the April 2018 reports, his findings are also consistent with the imaging studies and physical therapy notes.

It is clear that the Veteran's functional ability in his lower extremities has deteriorated due to muscular dystrophy since his initial diagnosis in service and that deterioration has been gradual. There are a few temporary exceptions – *e.g.*, the physical therapy notes from May 2018 indicate that he was more capable of completing the exercise of stepping down from a 4-inch step without assistance than when he began physical therapy in January 2018. But in general, his ability to walk and stand has become progressively more limited over the course of the relevant appeal period (September 29, 2016 to the present). At the hearing, the Veteran described his symptoms has having become "progressively worse" and his representative called his disability a "progressive disease."

In a written brief received in July 2018, the Veteran's representative argued that the Veteran's eligibility for SMC "due solely to the loss of use of lower extremities, arose as early as December 19, 2017 based on the medical evidence in the claims file." But at the hearing and in his most recent April 2020 brief, he has suggested that a finding of loss of use would be appropriate "as early as [the Veteran's] date of separation" – *i.e.*, September 29, 2016.

In this case, the evidence favors the assignment of December 19, 2017 (the date of the second questionnaire from Dr. J.S.) as the effective date for the award of SMC at the (l) rate for loss of use of the lower extremities. On this issue it is significant

that the same physician, Dr. J.S., answered the same series of questions concerning the Veteran at two different times (November 2015 and December 2017). When completing the first questionnaire, he indicated that neither of the lower extremities were so functionally limited that the Veteran would be equally well served by amputation with prosthesis. By the time he completed the second questionnaire, he gave the opposite answer to the same question. Given Dr. J.S.'s expertise, his personal involvement with the Veteran's treatment over time, and his description of the gradual progression of the Veteran's symptoms, his responses to the same question at different times demonstrate that a significant deterioration took place in the interval between the two questionnaires.

According to medical treatment records dated March 2017, the Veteran "continues to drive but defers to his wife when tired." Treatment notes with the same date indicate that, at that time, the Veteran was still capable of driving alone, apparently without special adaptive equipment that would be granted later, for 30 minutes from his house to a train station and then riding the train to the Pentagon. As noted, in his December 2017 questionnaire, Dr. J.S. described the muscle weakness in the Veteran's hip flexors as so "extreme" that he could not safely operate the pedals on an automobile. But the March 2017 treatment notes indicate that, several months after his separation from service, the Veteran was still able to drive independently and, even when he was traveling with his wife, he would still choose to be the driver unless he felt tired. Based on these records and the gradually degenerative nature of the Veteran's disease, it would not be reasonable to find that the symptoms described in the December 2017 questionnaire already existed at the time of the Veteran's retirement in September 2016.

For these reasons, the Board will grant the Veteran's claim for SMC at the rate authorized by 38 U.S.C. § 1114(l) for the loss of use of the lower extremities, effective December 19, 2017.

As a result of the Board's decision to grant SMC for loss of use at the (l) rate, the Veteran has suffered from conditions entitling him to two of the rates provided in 38 U.S.C. § 1114(l) through (n). If both of these awards can be maintained without any condition being considered twice, the Veteran will be eligible for increased SMC under 38 U.S.C. § 1114(o).

The Veteran has previously been granted SMC based on his need for regular aid and attendance pursuant to subsection (l) because on his muscular dystrophy. As explained in the AOJ's October 2016 decision, this condition prevented the Veteran from dressing and shaving himself without assistance. The Board has considered whether two awards of SMC at the (l) rate for different effects of muscular dystrophy – one award based on the need for aid and attendance due primarily to the effects of the disease on the upper extremities and another award for the loss of use of the lower extremities – would be to consider the same condition twice for the purpose of 38 U.S.C. § 1114(o). Although the text of the statute is silent on this question, 38 C.F.R. § 3.350(e)(3) provides that, "The fact, however, that two separate and distinct entitling disabilities, such as anatomical loss, or loss of use of both hands and both feet, result from a common etiological agent, for example, one injury or rheumatoid arthritis, will not preclude maximum entitlement."

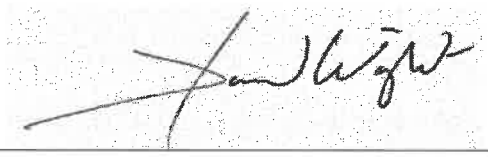
The Board has considered Veteran's hearing testimony and the physical therapy records, which consistently refer to his need for his wife's help with dressing, shaving, and other basic daily activities on account of his upper extremity muscular dystrophy. Based on this evidence, it is at least as likely as not that, even if limb girdle dystrophy did not affect the lower extremities, the Veteran would still need regular aid and attendance based solely on the effects of the disease on his upper extremities. *See* 38 C.F.R. § 3.352(a). Consistent with this finding, the Board concludes that, since December 19, 2017, the Veteran has been entitled to SMC at the rate authorized by 38 U.S.C. § 1114(o) because, since then, he has experienced conditions which entitle him to SMC at two of the rates provided in subsection (l) without considering the same condition twice.

Finally, the Board has considered the argument of the Veteran's representative that he is eligible for an additional monthly aid and attendance allowance at the rate authorized by 38 U.S.C. § 1114(r)(1). He does not argue that the Veteran is in need of "a higher level of care" for the purpose of subsection (r)(2), and there is no indication, at any time during the appeal period, that the Veteran has ever required that personal health-care services be provided by a specially licensed person on a daily basis in his home pursuant to 38 C.F.R. § 3.352(b)(3). Accordingly, it would not be appropriate to award him the higher allowance under subsection (r)(2).

For the allowance authorized by 38 U.S.C. § 1114(r)(1), the only requirements are that the Veteran must be otherwise entitled to SMC under subsection (o) (an issue just resolved in the Veteran's favor) and that he be in need of regular aid and attendance.

As noted, the Veteran's need for regular aid and attendance was previously considered when he was granted the first of his two awards for SMC under subsection (l). Unlike subsection (o), subsection (r) does not contain similar language prohibiting VA adjudicators from considering the same condition twice. One of the regulations implementing the statute, 38 C.F.R. § 3.350(h) ("Special aid and attendance benefit; 38 U.S.C. § 1114(r)"), expressly provides that "The regular or higher level aid and attendance allowance is payable whether or not the need for regular aid and attendance or a higher level of care was a partial basis for entitlement to the maximum rate under 38 U.S.C. § 1114(o) or (p), or was based on an independent factual determination."

Consistent with this language, the Board agrees with the Veteran that he is entitled to an additional monthly aid and attendance allowance at the rate authorized by 38 U.S.C. § 1114(r)(1), also effective December 19, 2017.



DAVID L. WIGHT
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board M. Nye, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.