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Dept. Of Veterans Affairs
Board of Veterans Appeals
Litigation and Support Group
P.O. Box 27063
Washington DC 20038

May 4, 2021

Re: [redacted]

In regard to: BVA Docket Nos. 190722-25761 and 200123-63335

Amended Brief for Motion to Revise the January 4, 2013, and June 19, 2015, Ratings Decisions

Movant, through counsel, now files her amended legal brief to clarify, with great specificity, the errors of law that have led to the present Motion. A brief procedural history of the claim is in order to better comprehend the chronology of the Movant's increasing disabilities.

Movant contends the aforementioned decisions were arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law. Movant will also point to the Secretary's attempt to recharacterize his regulation to the detriment of Movant (estoppel).

Facts

1. 10/04/2002—Veteran files her original claim.
2. 7/09/2003—Service connection is established for, inter alia, Multiple Sclerosis (hereinafter MS) with mild parasthesias in all four extremities and neurogenic bladder. Entitlement to other independently ratable disabilities were also established to include adjustment disorder with memory deficits, irritable bowel syndrome with constipation and incontinence, and migraine headaches.
3. 7/12/2005— VHA VistA records show complaint of "right sided weakness, numbness and troulbe [sic] walking".
4. 8/01/2005—Veteran files for increase in MS symptomatology.
5. 11/25/2005—Rating Decision (RD) awards higher ratings percentages for neurogenic bladder, moderate parasthesias of all extremities and headaches. In addition, Chapter 35 DEA benefits were awarded effective July 29, 2005.
6. 1/09/2012—Veteran files for entitlement to SMC at the (l) rate under §3.350(b)(3) aid and attendance of another.
7. Late 2012-early 2013—After repeated falls, Movant falls and breaks tibia in right lower extremity. No evidence of record in VBMS.
8. 1/04/ 2013—RD grants entitlement to Special Monthly Compensation (hereinafter SMC) at the intermediate rate between (l) and (m) (SMC (p) under §3.350(b)(3);(f)(3). Entitlement to automobile and adaptive equipment is established. Entitlement to specially adapted housing is established.
9. 9/23/2014—Veteran files VAF 21-526b supplemental claim for loss of use of the upper extremity and trigeminal neuralgia secondary to MS.
10. 6/19/2015—RD grants SMC at the intermediate rate between (l) and (m) for loss of use of the right upper **and lower extremities** under §3.350(b)(1) and residuals of trigeminal neuralgia but illegally rescinds entitlement to SMC at the (l) rate for aid and attendance of another under color of §3.350(h)(1).
11. 10/19/2015—Veteran files request for SMC at the (r)(1) rate having lost entitlement to aid and attendance of another in the 6/19/2015 rating decision.
12. 12/10/2015—Veteran files VAF 21 0958 Notice of Disagreement with denial of entitlement to SMC at the (r)(1) rate.

13. 12/08/2016—VA sends Appellant to New York University's Langone Medical Center to undergo brain surgery (left occipital craniectomy and partial sensory root rhizotomy) to suppress trigeminal neuralgia symptoms. Evidence not of record in VBMS.
14. 5/24/2017—RD grants SMC at the (m) rate under §3.350(f)(1)(vi),(3). RD does not determine entitlement to a higher level of aid and attendance under §3.350(e)(1)(ii),(h)(1).
15. 7/27/2018—Movant files Motion to Revise the prior rating decisions of 1/04/2013 and 6/19/2015 RDs due to clear and unmistakable error (CUE).
16. 10/12/2018—RD denies CUE in the 1/04/2013 and 6/19/2015 Rating decisions.
17. 10/22/2018—Movant files VAF 21-0958 NOD with denial of CUE decision.
18. 7/18/2019—Statement of the Case issued confirming and continuing the denial of a CUE.
19. 7/22/2019—Movant opts into the AMA by filing a VAF 10182 NOD with the BVA.
20. 9/03/2019—RD issued stating entitlement to two or more rates provided for in 38 U.S.C. §1114(l) is not shown.
21. 9/9/2019—BVA 90-day letter is issued.
22. 1/13/2020—Movant files additional VAF 10182 re SMC at the (r)(1) rate requesting BVA hearing.
23. 3/24/2020—RD states Movant is currently receiving SMC for the aid and attendance of another with additional disability of loss of use of a hand and foot. Rating Decision code sheet states on page 4 of 5 that entitlement to SMC at the (l) rate for A&A ceased on 9/23/2014.

Legal Standard of Review

All precedential legal cites, statutes and regulations regarding the 1/09/2013 decision are applicable based on the date of promulgation. Likewise, all cites and regulations extant at the time of the 9/23/2014 decision are timely and none of the citations to precedence were decided subsequent to the Motion for VA ratings revisions presented here. A determination that there was

CUE must be based upon the record and the law that existed at the time of the prior adjudication in question. ***May v. Nicholson***, 19 Vet.App. 310, 313 (2005).

'"Clear and unmistakable evidence,' as used in the governing statutes, has been interpreted to mean evidence that 'cannot be misinterpreted and misunderstood, i.e., it is undebatable.'" ***Quirin v. Shinseki***, 22 Vet.App. 390, 396 (2009) (citing ***Vanerson v. West***, 12 Vet.App. 254, 258-59 (1999)).

The claimant must provide "some degree of specificity as to what the alleged error is, and, unless it is the kind of error . . . that, if true, would be CUE on its face, persuasive reasons must be given as to why the result would have been manifestly different but for the alleged error." ***Fugo v. Brown***, 6 Vet.App. 40, 44 (1993); see also ***Bustos v. West***, 179 F.3d 1378, 1380–81 (Fed. Cir. 1999)

To establish CUE, it must be clear from the face of the decision that a particular fact or law had not been considered in the adjudication of the case. See ***Crippen v. Brown***, 9 Vet.App. 412, 421 (1996) (citing ***Eddy v. Brown***, 9 Vet.App. 52, 58 (1996)).

Russell v Principi, 3 Vet.App. 310, 313-14 (1992) (en banc) held "[E]ither 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. . . . [CUE is] the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made.

Discussion

1. The January 4, 2013 Rating Decision

Under the holding in ***Fugo*** *supra*, Movant now, with a great deal of specificity, contends the Secretary's January 4, 2013 rating decision on page 3 of 4, held in item 4 that an 80% evaluation for paralysis of the sciatic nerve was for application based on a finding of *complete* paralysis. The rating decision code sheet, however, fails to reflect any award of SMC at the (k) rate for loss of use of an extremity. This was a clear and unmistakable error that manifestly changed the outcome. Reasonable minds can only conclude that this January 2013 decision was fatally flawed at the time it was made.

The 1/4/2013 RD notably awarded Specially Adapted Housing (SAH) under 38 USC §2101(a)(2)(C)(ii). By operation of law, in order to qualify, the Movant had to have **the loss of, or loss of use of, one or more lower extremities** which so affects the functions of balance or propulsion as to preclude ambulating without the aid of braces, crutches, canes, or a wheelchair. It would be error to award this entitlement in the absence of loss of use of a lower extremity. Either the award of entitlement to SAH was a clear and unmistakable error or the Movant was entitled to SAH by virtue of loss of use of one or more lower extremities.

The 1/4/2013 RD also awarded Movant entitlement to automobile and adaptive equipment under 38 USC §3901-3904 based on her loss of use of one or both feet. Again, as above, in order to qualify, the Movant had to, by operation of law, have the loss of, or loss of use of, one or more lower extremities which so affected her functions of balance or propulsion as to preclude ambulating without the aid of braces, crutches, canes, or a wheelchair. Either the award of entitlement to an automobile grant under §3901-3904 was clearly and unmistakably erroneous or the Movant was entitled to an automotive grant by virtue of loss of use of one or more of her lower extremities and hence, entitlement to SMC at the (k) rate under §3.350(a)(2)(i)(b).

§3.350(a)(2)(i)(b) states the requirements for SMC at the (k) rate:

(i) Loss of use of a hand or a foot will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow or knee

with use of a suitable prosthetic appliance. The determination will be made on the basis of the actual remaining function, whether the acts of grasping, manipulation, etc., in the case of the hand, or of balance, propulsion, etc., in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis; for example:

(b) Complete paralysis of the external popliteal nerve (common peroneal) and consequent **footdrop**, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants confirmatory of complete paralysis of this nerve, will be taken as loss of use of the foot. (emphasis added).

Irrespective of the award at 80% for complete paralysis of the right lower extremity, the failure on 1/04/2013 to infer an ancillary award of SMC at the (k) rate under §3.350(a)(2)(i)(b) was clearly and unmistakably erroneous. §3.103(a); ***AB v. Brown***, 6 Vet. App. 35, 38 (1993)) [applicable law mandates that when a veteran seeks an original or increased rating, it will generally be presumed that the maximum benefit allowed by law and regulation is sought, and it follows that such a claim remains in controversy where less than the maximum benefit available is awarded]. See also ***Akles v. Derwinski***, 1 Vet.App. 118, 121 (1991) (noting VA's policy to consider SMC where applicable). Accordingly, any effective date must be based on that point in time when the evidence first supported an award of SMC, which may be well before Movant raised the issue of her entitlement thereto. See 38 U.S.C. §§ 5110(a), 1114(l); 38 C.F.R. §3.400(o) (2012).

The January 4, 2013 error manifestly changed the outcome and deprived Movant of monetary compensation she was otherwise entitled to under SMC at the (k) rate. Movant has never argued how the evidence was evaluated. That is forbidden by operation of law. §20.1403(d)(3). The contention that there is error in the January 4, 2013 rating decision hinges solely on an error of case law-i.e., §3.350(a)(2)(i)(b).

Moreover, the above awards of aid and attendance, SAH and an automotive grant were conclusions of law based on findings of fact. As such, they are inviolate absent a showing of an act of omission or commission on the

part of the Movant. See ***Medrano v. Nicholson***, 21 Vet.App. 165, 170 (2007) (stating that the Court is not permitted to reverse the Board's favorable findings of fact).

2. The June 19, 2015 Rating Decision

Initially, again citing to ***Fugo*** *supra*, Movant wishes to point out the most glaring error in the June 19, 2015 rating decision. Entitlement to loss of use of upper and lower extremities under the authority of §3.350(b)(1) was proper and supported by the evidence of record. However, the rating decision code sheet of June 19, 2015 on page 3 clearly and unmistakably rescinded the earlier award of aid and attendance of another under §3.350(b)(3). The Rating Code sheet states under Special Monthly Compensation:

"L-1 Entitled to special monthly compensation under 38 U.S.C. 1114, subsection (l) and 38 CFR 3.350(b) on account of being so helpless as to be in need of the regular aid and attendance **while not hospitalized at U.S. government expense** from 01/09/ 2012 to **09/23/2014**." (emphasis added to original).

Movant asks the Trier of fact first to note the date entitlement was terminated (9/23/2014) and the simultaneous substitution of the SMC award at the (l) rate for loss of use of a hand and a foot in its place on 9/23/2014. This is clear and unmistakable error. ***Medrano*** *supra*. Secondly, Movant asks the Board to review de novo the above code sheet statement as to its legal authority.

38 USC §1114 (l) states:

For the purposes of section 1110 of this title—

(l)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 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, the monthly compensation shall be $3,915.14.

38 CFR §3.350(b)(2021) states:

(b) Ratings under 38 U.S.C. 1114(l). The special monthly compensation provided by 38 U.S.C. 1114(l) is payable for anatomical loss or loss of use of both feet, one hand and one foot, blindness in both eyes with visual acuity of 5/200 or less or being permanently bedridden or so helpless as to be in need of regular aid and attendance.

(1) Extremities. The criteria for loss and loss of use of an extremity contained in paragraph (a)(2) of this section are applicable.

Nowhere above in Congress' published statute nor the Secretary's regulation, as alluded to in the June 19, 2015 rating code sheet, can there be found any appended regulatory suffix containing the phrase "while not hospitalized at U.S. government expense." In point of fact, the phrase only arises if, and when, Movant should attain an entitlement to the maximum rate under 38 CFR §3.350(e)(1)(ii). The actual regulatory phraseology the Secretary baldly attempts to insert can be found under §3.350(h)(1),(2).

§3.350(h)(1) states:

(h) Special aid and attendance benefit; 38 U.S.C. 1114(r) - (1) Maximum compensation cases. A veteran receiving the maximum rate under 38 U.S.C. 1114 (o) or (p) who is in need of regular aid and attendance or a higher level of care is entitled to an additional allowance **during periods he or she is not hospitalized at United States Government expense.** (See § 3.552(b)(2) as to continuance following admission for hospitalization.) Determination of this need is subject to the criteria of § 3.352. 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. (emphasis added to regulation).

Movant's code sheet dated 6/19/2015, on page 4 of 5, shows entitlement to SMC at the (l) rate for LOU of ***both*** RUE and RLE was awarded under DC 8018-5111. This, however, is the very first announcement of loss of use of the right lower extremity disability granted previously (albeit without the concomitant award of SMC at the (k) rate) in the January 4, 2013 rating decision. Movant contests this finding of fact as being clearly and unmistakably erroneous on its face. According to the evidence of record, loss of use of the right lower extremity was awarded on January 4, 2013 with the highest statutory schedular award of 80% for *complete* paralysis-but absent the accompanying award of SMC at the (k) rate as discussed i*nfra*.

The Court reviews the purely legal question of the proper interpretation of regulations de novo. See ***Good Samaritan Hosp. v. Shalala***, 508 U.S. 402 (1993) We look first to "the language of the regulation, the plain meaning of which is derived from its text and its structure." If the plain meaning of the regulation is clear on its face, then such plain meaning controls, and "that is 'the end of the matter.'" ***Tropf v. Nicholson***, 20 Vet.App. 317, 320 (2006) (quoting ***Brown v. Gardner***, 513 U.S. 115, 120 (1994)). See also ***King v. Shinseki,*** 26 Vet.App. 484, 488 (2014) ("As with statutes, when we assess the meaning of a regulation, we should not read its words in isolation, but rather in the context of the regulatory scheme and structure as a whole."

Absent a showing of how or why "while not hospitalized at U.S. government expense" might be implicated in an award under SMC at the (l) rate, Movant submits the Secretary attempts to read far more into his regulation than it contains. See ***Mitchell v. McDonald***, 27 Vet App. 431,440 (2015) (Cases "must be decided on the law as we find it, not on the law as we would devise it"). It is one thing to misinterpret the clear thrust of a regulation. It borders on misfeasance and is clearly and unmistakably erroneous to write into a regulation that which is clearly and unmistakably not there-and never has been.

Estoppel

Merriam Webster dictionary defines estoppel as a legal bar to alleging a fact because one's own previous actions or words to the contrary. It is meant to prevent people from being unjustly wronged by the inconsistencies of another person's words or actions. The Secretary clearly and unmistakably erred by advising the Movant to give up an entitlement under false pretenses.

In the rating decision dated June 19, 2015, on page 5 of 5, the VA examiner stated *in haec verba* the following:

"Please note: Although entitlement to special monthly compensation(SMC) based on the need for aid and attendance was previously established, it is to your benefit to amend your award to the rate payable for loss of use of one hand and one foot as this payment is not reduced for hospitalization at VA expense."

Movant wishes to point out here that, according to VBMS Notes, the rating decision was promulgated on June 19, 2015 at 9:11 AM. The requirement of two-signature authorization on VA Form 21-0961 was signed on June 19, 2015 at 9:31 AM , the SMC Rating Calculator Worksheet was accomplished on June 19, 2015 and lastly, the veracity of the rating decision code sheet was attested to on June 19, 2015-fully a week before Movant would ever set eyes on the decision. As the decision to revoke entitlement to SMC for aid and attendance was already promulgated, it was impossible for Movant to "amend" her Faustian choice of which SMC entitlement to continue with, and which to relinquish based on a false premise. Indeed, this, too, was clear and unmistakable error which manifestly changed the outcome in no uncertain terms. A VA Form 27-0820 Report of General Information dated June 26, 2015, fully four days after the mailing of the Notification letter, shows a VA employee, one Mr. Vincent Gatling (VBA319/NCC/VG), was contacted by Movant. The Veteran said she wished to "amend" her own SMC award if that meant she would continue to receive inpatient care free. As this promulgation was clearly and unmistakably erroneous by operation of law, it was void ab initio.

Movant further wishes the Trier of fact to note that the Secretary here has clearly conceded the award of aid and attendance-standing alone- "was previously established." Nothing in the note implies that entitlement to aid and attendance was obtained fraudulently or had been revoked. The rating decision note baldly attempted (and succeeded) in inducing Movant to renounce her entitlement to aid and attendance after the fact.

Application of Breniser Precedence

In 2011, the Court of Appeals for Veterans Claims (hereinafter CAVC or the Court) decided ***Breniser v. Shinseki***, 25 Vet.App. 64, 79 (2011). Throughout the course of this brief above, and especially in the Facts subsection, the record shows Movant was never awarded SMC at the (k) or (l) rates for loss of use of any extremities prior to the 2014 rating decision. Movant was awarded aid and attendance at the SMC (l) rate in 2013 under §3.350(b)(3) . The award of Aid and attendance was notably devoid of any discussion of loss of use of any extremity. Thus, reasonable minds can only conclude the SMC award for helplessness was based solely for the enumerated conditions mentioned-i.e. movant's right sided "weakness", a psychiatric illness with cognitive deficits, extreme bowel constipation and incontinence, a neurogenic bladder with catheterization needed up to three times per day and migraine headaches.

Prior to 9/23/2014, there was no formalized finding of fact of Movant's SMC entitlement to loss of use of any extremity. The June 19, 2015 conclusion of law that Movant had loss of use of two extremities entitled Movant to a separate and distinct second award of SMC at the (l) rate.

Breniser is on point in this discussion because the fact pattern is virtually identical. The only major difference is the order in which the disabilities were awarded. The Court has held repeatedly that VA has a "well-established" duty to maximize a claimant's benefits. See ***Buie v. Shinseki,*** 24 Vet. App. 242, 250 (2011); ***AB*** *supra.* see also ***Bradley v. Peake***, 22 Vet. App. 280 (2008). This duty to maximize benefits requires VA to assess all of a claimant's disabilities to

determine whether any single disability, or combination of disabilities, establishes entitlement to special monthly compensation (SMC) under 38 U.S.C.A § 1114. See ***Bradley*** *supra* (finding that SMC "benefits are to be accorded when a Veteran becomes eligible without need for a separate claim"). ***Buie*** held that it makes no difference in which order the disabilities were awarded when assembling them to obtain the highest and best rating.

In the Breniser decision, Mr. Breniser was awarded SMC at the (l) rate for loss of use of his lower extremities. However, he appealed for a higher rating of SMC at an additional (l) rate for aid and attendance based solely on his loss of use of his lower extremities. Breniser was affirmed based on the tenets of both §3.350(e)(1)(ii) and §4.14 – i.e. no condition being counted twice.

However, in the instant case, a different set of facts argue for the application in favor of the movant. First and foremost, movant was rated exclusively for aid and attendance of another in the first instance. The Court, in Breniser defines this as one "condition". From Breniser:

The Secretary argues that "[i]n the context of [section 1114(o)] and its history, the word 'conditions' clearly refers to a term such as 'circumstances,' and the latter use of the word 'condition,' in its singular form, refers to the underlying disability or disabilities, such as anatomical loss, loss of use, or blindness, that entitles a [v]eteran to a rate proscribed in paragraph (l) to (n) of 38 U.S.C. § 1114." But see ***Moreira v. Principi***, 3 Vet.App. 522, 524 (1992) (The rate of SMC "varies according to the nature of the veteran's service-connected disabilities.") (emphasis added). The Secretary is very explicit in his definitions of "condition" or "circumstance".

In 38 C.F.R. § 3.350(e)(3) the definition of conditions or combinations thereof, is explicit in its requirements and strictures against pyramiding.

Combinations. Determinations must be based upon separate and distinct disabilities. This requires, for example, that where a veteran who had suffered the loss or loss of use of two extremities is being considered for the maximum rate on account of helplessness requiring regular aid and attendance, the latter must be

based on need resulting from pathology other than that of the extremities. If the loss or loss of use of two extremities or being permanently bedridden leaves the person helpless, increase is not in order on account of this helplessness. Under no circumstances will the combination of "being permanently bedridden" and "being so helpless as to require regular aid and attendance" without separate and distinct anatomical loss, or loss of use, of two extremities, or blindness, be taken as entitling to the maximum benefit. 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. 38 C.F.R. § 3.350(e)(3)(2013).

"Statutory interpretation begins with the language of the statute, the plain meaning of which we derive from its text and structure." ***Myore v. Nicholson***, 489 F.3d 1207, 1211 (Fed. Cir. 2007) (quoting ***McEntee v. M.S.P.B.***, 404 F.3d 1320, 1328 (Fed. Cir. 2005).

Movant differs from Breniser inasmuch as she was rated for aid and attendance based on a specific subset of disabilities prior to an award for loss of use of extremities. However, unlike Breniser, movant was rated for aid and attendance first. See ***Buie*** *supra*. The qualifying disabilities included, inter alia, a mental disability under DC 9434, neurogenic bladder with the need for frequent catheterizations and other compensable ratings for irritable bowel syndrome and migraine headaches. While it can be said her "conditions" also included moderate paralysis of her various extremities due to muscular sclerosis, nowhere can it be read to say the aid and attendance was predicated solely on the condition (or circumstances) of the multiple sclerosis. Moreover, nowhere in the four corners of the award for aid and attendance is there any mention of loss of use of any extremity or extremities whatsoever. In point of fact, the circumstances reveal quite the opposite; the Secretary studiously avoided reaching a finding of loss of use of movant's right lower extremity in the 2013 decision even with the award of the highest schedular evaluation of complete paralysis of the sciatic nerve.

Taken in the context of Breniser, Movant's loss of use of her two extremities, which occurred subsequent to the award of aid and attendance, constitute a wholly separate and distinct qualifying "condition or circumstance" which is entirely divorced from the finding of a need for aid and attendance. Put another way, movant has suffered a loss of use which entitles her to another of the four enumerated qualifiers for SMC at the (l) rate under §3.350(b).

Breniser further held:

"Congress expressly devised ***progressively increasing*** rates of SMC in subsections (l) through (o) based upon its determination of what conditions were more disabling. Against this backdrop, the Court cannot find the Secretary's interpretation, which prohibits SMC at the maximum(o) rate when the need for aid and attendance arises from the same pathology that otherwise entitles the veteran to an award of SMC at a rate provided in subsections (l) through (n), unreasonable. Breniser supra. (emphasis added to original).

Conversely, it can be stated that any subsequent award of SMC at the (l) rate for loss of use of two extremities, and remote to an award at the (l) rate for aid and attendance, is not a "condition" being counted twice if the condition was not a sole predicate for the prior award of Aid and Attendance. Conflating loss of use of extremities at a later date as somehow part and parcel of an earlier continuing award for aid and attendance has no support in law based on Breniser jurisprudence.

Irrespective of the bright line rule in Breniser forbidding pyramiding, §3.350(e)(3) comprehends the instant appeal. The Secretary freely concedes Movant suffers two separate and distinct entitling disabilities-the need for the aid and attendance of another and loss of use of one hand and one foot above the knee. The mere fact that her disabilities result from a common etiological agent- i.e., Multiple Sclerosis- is not fatal to Movant's Motion to revise. Put more succinctly, Movant's claim for a higher level of aid and attendance under ((r)(1) is based not only on her loss of use of two extremities but equally on her helplessness requiring regular aid and attendance based on pathology other than that of the extremities.

By operation of law, it is forbidden to award SMC at the (l) rate for the aid and attendance of another due to the loss of use of two extremities. It is presumed Congress' intent was to carve out four distinct conditions enumerated in 38 U.S.C. §1114 and implemented similarly in §3.350(b) by the Secretary. As each condition in §3.350(b) describes different anatomical deficits, it would be illogical to conflate two separate and distinct entitling conditions into one SMC rating award alone. §3.103(a); ***Evans v. Shinseki***, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal).

Conclusion

While appellant has couched her claim as a Motion to Revise certain prior decisions, it should be noted that entitlement to SMC is due and payable at the earliest point it can be ascertained medically that the Veteran has established legitimate entitlement. ***Bradley*** *supra*. See §3.401(a)(1). Any prior error in this regard based on an error of interpretation of the regulations -i.e., §§3.350(a)(2)(i); (b)(1),(3);(e)(1)(ii),3;(f)(3),(4); (h)(1) and 38 USC §1114(l)- that existed at the time the decision was made, permits revision of the prior decision to comport with the medical facts. As such, Special Monthly Compensation, as enacted by Congress in 38 USC §1114, is not a 'claim' in the truest sense of the word but an inferred, ancillary entitlement due and owing based on date of entitlement arose. Once medical evidence unequivocally shows entitlement, that date is the date of entitlement. Movant, by operation of law, is not required to show the error manifestly changed the outcome. Unlike a claim for Clear and Unmistakable Error, SMC is a unique facet of law that requires no claim - and hence- no revision when it is ascertained a claimant clearly and unmistakably qualified earlier than the date the entitlement was awarded. See 38 CFR §3.401(a)(1). ***Akles*** *supra*. Accordingly, any effective date must be based on that point in time when the evidence first supported an award of SMC, which may be well before Movant raised the issue of her entitlement thereto. See 38 U.S.C. §§ 5110(a), 1114(l); 38 C.F.R. § 3.400(o) (2012).

Regardless of which legal vehicle is employed to correct an obvious error of fact or law, here, in the instant case, the evidence of record permits only one permissible interpretation of the legal standard of review. Movant benefits greatly from the simplicity of her argument. ***Medrano*** *supra*. Movant also relies on the correct reading of statute and regulation that supports her entitlement.

Lastly, from reading the March 24, 2020 rating decision confirming and continuing the predicate for Movant's instant Motion to revise, it should be noted that the Secretary continues to labor under the misconception that Movant is currently receiving aid and attendance. On page 2 of 3, in the fourth paragraph under REASON FOR DECISION, it states:

"You are currently being paid for Special Monthly Compensation-SMC- M based on the need for Aid and attendance for multiple sclerosis including the loss of use of one hand and one foot."

Movant submits the bright line rule in Breniser is for application. As such, §§3.350(e)(1)(ii) controls here and §3.350(h)(1) is for application. ***Buie*** *supra* allows the rearrangement of the disabilities to maximize entitlement to SMC and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. § 3.103(a).

Respectfully submitted,

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