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May 18, 2021

Re: [redacted]

Motion to Revise the March 4, 2020 Rating Decision

Movant, through counsel, now files his Motion to Revise his prior March 4, 2020, rating decision on the basis of clear and unmistakable error (hereinafter abbreviated as CUE).

Specifically, Movant requests revision of the decision which failed to render a decision granting every benefit under Special Monthly Compensation (hereinafter abbreviated as SMC) that can be supported in law while protecting the interests of the Government. See §3.103(a) (2021). See ***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 his entitlement thereto. See 38 U.S.C. §§ 5110(a), 1114(l); 38 C.F.R. §3.400(o) (2012).

A factual chronology is helpful to understand how the error of law occurred. Hence, Movant supplies this to clarify his Motion.

Facts

1. 4/28/2018—Rating Decision awards Special Monthly Compensation at the (s) rate for additional service connected disabilities of peripheral neuropathy, sciatic nerve, left lower extremity, peripheral neuropathy, femoral nerve, left lower extremity, peripheral neuropathy, sciatic nerve, right lower extremity, diabetes mellitus type II, peripheral neuropathy, femoral nerve, right lower extremity, allergic rhinitis, sinusitis independently ratable at 60% or more from 2/12/2018.
2. 6/29/2018—Rating Decision awards SMC at the (k) rate for loss of use of a creative organ with effective date of 5/11/2018.
3. 1/30/2019—Veteran applies for entitlement to SMC at the (l) rate for aid and attendance.
4. 3/03/2019— VA contractor (LHI) completes c&p exam with completed VA Form 21-2680 conducted for aid and attendance.
5. 3/13/2019—Rating Decision denies entitlement to A&A.
6. 2/24/2020—BVA Docket # 190419-3646 awards entitlement to SMC at the (l) rate for aid and attendance of another based on mental incapacity and physical limitations requiring the care and or assistance on a regular basis to protect Appellant from hazards or dangers incident to his daily environment.
7. 3/04/2020—Rating decision grants entitlement to SMC at the (l) rate only and fails to infer ancillary SMC entitlements.

Legal Standard of Review

All precedential legal cites, statutes and regulations regarding the March 4, 2020, decision are applicable based on the date of promulgation. Likewise, all cites and regulations extant at the time of the March 4, 2020, decision are

timely and none of the citations to precedence were decided subsequent to the instant Motion for revision of VA SMC 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).

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).

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.

A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); see ***Gilbert v. Derwinski,*** 1 Vet.App. 49, 52 (1990).

Relief Sought

1. Entitlement to SMC at the intermediate rate between (m) and (n) under authority of §3.350(f)(3),(4).

Discussion

1.) §3.350(f)(3)

Movant, per ***Fugo*** *supra*, specifically alleges an error in the SMC Rate of Disability occurred in the March 4, 2020 rating decision- i.e., failure to award the ancillary entitlement to SMC at the (p) rate (SMC at the intermediate rate between(l) and (m) with (k) under §3.350(f)(3)).

The March 4, 2020, rating decision error manifestly changed the outcome and deprived Movant of monetary compensation he was otherwise entitled to under SMC at the intermediate rate between (m) and (n). Movant does not argue how the evidence was evaluated. That is forbidden by operation of law. §20.1403(d)(3). The contention that there is error in the March 4, 2020 rating decision hinges solely on an error of case law-i.e., §3.350(f)(3),(4). The rating decision was outcome determinative and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law standard of review. ***Butts v. Brown***, 5 Vet.App. 532, 539 (1993) (en banc)..

§3.350(f)(3) states:

(3) ***Additional independent 50 percent disabilities.*** In addition to the statutory rates payable under 38 U.S.C. 1114 (l) through (n) and the intermediate or next higher rate provisions outlined above, additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114, but not above the (o) rate. **In the application of this subparagraph the disability or disabilities independently ratable at 50 percent or more must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114 (l) through (n) or the intermediate rate provisions outlined**

above. The graduated ratings for arrested tuberculosis will not be utilized in this connection, but the permanent residuals of tuberculosis may be utilized.

2.) §3.350(f)(4)

§3.350(f)(4), much like §3.350(f)(3), affords entitlement to the next higher statutory rate under 38 U.S.C. §1114 or if already entitled to an intermediate rate to the next higher intermediate rate, but in no event higher than the rate for (o)based on the same rationale evoked in §3.350(f)(3). The identical requirement that the disability independently rated at 100 percent must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114 (l) through (n) is for application. Here, in appellant's case, he is rated under §4.130 Diagnostic Code 9326 at the full schedular rating of 100% for a major neurocognitive impairment disorder. Reasonable minds can only concur a major depressive disorder qualifies as a separate and distinct anatomical segment or bodily system notably different from a diagnosed lung disorder of COPD.

3.) Concurrent receipt of §3.350(f)(3),(4)

Interestingly, The BVA's Purple Book does not impart guidance on the dual applicability of entitlement to §3.350(f)(3) and §3.350(f)(4) simultaneously. From prior experience, this representative has encountered denials at the Agency level based on an interpretation of the M 21-1MR forbidding concurrent receipt of both. However, this representative has also been admonished by Veterans Law Judge Cherry Crawford in a past appeal the Board accords no judicial weight to the Manual for legal interpretations of statute and regulation. From a longitudinal review of past BVA decisions on the subject, there are appeals which granted entitlement to both. Movant would not presume to insinuate there is bright line precedence for award of both entitlements and merely presents this as it relates to the instant appeal. See ***Hime v. McDonald,*** 28

Vet.App. 1, 7 n.1 (2016) (opining that a Board decision might be "used to demonstrate that evidence exists to support a particular fact or occurrence").

As such, Movant submits at least one, and quite possibly both, SMC regulations are for application based on his rating decision code sheet. Movant benefits from the sheer simplicity of his argument. He relies on the clear and unequivocal phraseology in the preamble of both §3.350(f)(3) and (4)- to wit:

"In addition to the statutory rates payable under 38 U.S.C. 1114 (l) through (n) and the intermediate or next higher rate provisions outlined above".

The phrase refers exclusively to any and all SMC entitlements awarded in 38 U.S.C. §1114, or under the Secretary's regulation under §3.350. Thus, any additional award of 50% or more derived from a single disability or multiple disabilities combining to 50% or more, will afford entitlement to the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114, but not above the (o) rate. However, §3.350(f)(4) states the exact same thing *in haec verba*. Absent a disjunctive phrase forbidding the application in either or both subsections of §3.350(f)(3) and (4), the clear and uncontestable meaning is unarguable. Each subsection clearly states the entitlement to an increase of one half step or one full step will only be afforded once. The preamble is inviolate. "In addition to" puts the adjudicator on notice that these two regulations are unique and are applicable at any time the requirements are met. In fact, the only stricture is that these regulations are not for application if they would result in a rating higher than the maximum rate of SMC at the (o) rate.

4.) <u>Independently Rated Disabilities</u>

The April 28, 2018, rating decision narrative, on pages 2 and 5 discussed the award of Special Monthly Compensation at the (s) rate for certain, *specific additional service connected disabilities* of peripheral neuropathy, sciatic nerve, left lower extremity, peripheral neuropathy, femoral nerve, left lower extremity, peripheral neuropathy, sciatic nerve, right lower extremity, diabetes mellitus

type II, peripheral neuropathy, femoral nerve, right lower extremity, allergic rhinitis, sinusitis *independently ratable* at 60% or more from 2/12/2018. Please note the emphasis in the above italicized phrases "additional service connected disabilities" and "independently ratable".

§3.350(i) states:

> **(i)** ***Total plus 60 percent, or housebound; 38 U.S.C. 1114(s).*** The special monthly compensation provided by 38 U.S.C. 1114(s) is payable where the veteran has a single service-connected disability rated as 100 percent and,
>
> **(1)** ***Has additional service-connected disability or disabilities independently ratable*** at 60 percent, separate and distinct from the 100 percent service-connected disability and ***involving different anatomical segments or bodily systems***, or
>
> **(2)** Is permanently housebound by reason of service-connected disability or disabilities. This requirement is met when the veteran is substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime.

Appellant's April 26, 2018 rating decision code sheet clearly and unmistakably states on pages 2-3:

"SPECIAL MONTHLY COMPENSATION:

S-1 Entitled to special monthly compensation under 38 U.S.C. 1114, subsection (s) and 38 CFR 3.350(i) on account of Chronic Obstructive Pulmonary Disease and Asthma (previously rated as DC 6602) rated 100 percent and *additional service-connected disabilities* of peripheral neuropathy, sciatic nerve, left lower extremity, peripheral neuropathy, femoral nerve, left lower extremity, peripheral neuropathy, sciatic nerve, right lower extremity, diabetes mellitus type II, peripheral neuropathy, femoral nerve, right lower extremity, allergic rhinitis, sinusitis *independently ratable* at 60% or more from 2/12/2018." (emphasis added).

It is presumed the Secretary knows how to write his regulations. It is equally presumed that the regulation, §3.350(i)(1), is unambiguous. 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."

The Secretary's April 28, 2018, rating decision and accompanying code sheet unequivocally held that Movant's additional service-connected disabilities, as summarized in the narrative for the award of housebound, were independently ratable and involved different anatomical segments or bodily systems. This finding of fact comprehended that Movant's peripheral neuropathies in his lower extremities, his diabetes mellitus type II, his sinusitis and allergic rhinitis were separate and distinct disabilities apart from his Chronic Obstructive Pulmonary Disease- or COPD as it is known. This is a favorable finding of fact and cannot be disturbed absent an act of commission or omission by 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). Nothing in the Evidence of record would lead reasonable minds to find otherwise.

5.) <u>The February 24, 2020 Board Decision</u>

The BVA Board Member specifically states on page four of the February 24, 2020 BVA decision:

"The examiner noted that the Veteran's ability to protect himself from daily hazards was limited due to mild short-term memory loss and intermittent imbalance that affects the ability to ambulate."

"In this case, the aid and attendance of another or housebound examination report establishes that the Veteran required aid and attendance of others. Specifically, the examiner concluded the Veteran required the assistance of another for his activities of everyday living, such as hygiene needs, fixing meals, and financial management.*"*

"Thus, the evidence supports that the Veteran has mental incapacity and physical limitations due to service- connected disabilities that requires care or assistance on a regular basis to protect him from hazards or dangers incident to his daily environment."

The March 4, 2020 rating decision states on page 3:

"The Board finds that the aid and attendance or housebound examination conducted on March 3, 2019 showed you required aid and attendance due to diabetes, respiratory disability, psychiatric disability, and peripheral neuropathy."

Nowhere in the four corners of the BVA decision can it be read that the Board chairman found Movant's previously independently ratable disabilities were solely contributory to the need for aid and attendance of another. In any event, this could never be fatal to Movant's CUE contention as the aforementioned, previously independently ratable disabilities involve different anatomical segments or bodily systems. §3.350(i)(1). See ***Turco v. Brown***, 9 Vet. App. 222, 224 (1996) (eligibility for special monthly compensation by reason of regular need for aid and attendance requires that at least one of the factors set forth in the VA regulation is met, but not all). Movant's need for aid and attendance is multifold. As the list in §3.352(a) is nonexhaustive, the sum of his numerous disabilities need not be viewed as a whole in order to discern he qualifies.

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); see also ***Bradley v. Peake***, 22 Vet. App. 280 (2008). This duty to maximize benefits requires VA to assess all the 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 (p). 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.

Reasonable minds can only concur Movant's sinusitis (30%), allergic rhinitis (30%), Diabetes Mellitus (20%), peripheral neuropathy in all four extremities at 10% under 8520, 8526 and 8515, and DC 7345 hepatic steatosis 10% combine to more than 50% and fulfill the requirement to qualify for §3.350(f)(3). Similarly, major neurocognitive impairment under §4.130 Diagnostic Code 9326 rated 100% is a different bodily system wholly divorced from §4.97 DC 6604 Chronic Obstructive Pulmonary Disease (COPD) and supports entitlement to §3.350(f)(4).

Prior to his award of SMC at the (l) rate for aid and attendance of another, appellant was rated for SMC at the (s) rate wherein the Secretary considered certain other ratings as ***separate and distinct*** and not involving any other bodily systems. As this was the correct legal standard of review in 2018, there can be no doubt the same holds true in the instant case.

While the above "separate and distinct" argument has been proffered, for the most part, in defense of entitlement to §3.350(f)(3), the exact same argument can be, and is, advanced as a specific error under ***Fugo*** *supra* for §3.350(f)(4). The award of entitlement on a secondary basis for the condition of major neurocognitive impairment under §4.130 Diagnostic Code 9326 is a different bodily system wholly divorced from §4.97 DC 6604 Chronic Obstructive Pulmonary Disease (COPD). As such, it is a different "condition".

The Troph Court has already deemed the statutory construction of SMC (s)(1) as clearly and unmistakably unambiguous. ***Troph*** *supra.* The legal standard of review that appellant's COPD be separate and distinct from his major neurocognitive disorder has been met and entitlement to an increase of one

step from SMC at the (l) rate for aid and attendance of another under §3.350(b)(3) to SMC at the (m)rate under §3.350(f)(4) is in order and that is the end of the matter. See also §3.103(a). "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)

Absent the showing of an act of omission or commission on the part of the Movant, the ancillary, inferred issue of entitlement to the increases afforded severely disabled Veterans under §3.350(f)(3)(4) is for application. See ***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].

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); see also ***Bradley v. Peake***, 22 Vet. App. 280 (2008). This duty to maximize benefits requires VA to assess all the 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 (p). 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 2011, the Court of Appeals for Veterans Claims (hereinafter CAVC or the Court) decided ***Breniser v. Shinseki***, 25 Vet.App. 64, 79 (2011). Breniser dealt with the concept of the term "condition". Throughout VA jurisprudence, an underlying precept forbidding pyramiding is clearly enunciated. §4.14. 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." Id. at 79.

The award of SMC at the (s) rate under §3.350(i)(1) was awarded on February 12, 2018, for specific additional service connected disabilities of allergic rhinitis, diabetes mellitus type II, sinusitis, and peripheral neuropathy independently ratable at 60% or more.

Interestingly, Movant's sinusitis (formerly DC 6604 in 2007) is now considered to be associated with his COPD, asthma and sleep apnea (previously rated as asthma). Likewise, his other independently ratable service connected disabilities of allergic rhinitis, diabetes mellitus II, and peripheral neuropathies of the lower extremities have all now been similarly recharacterized. Either the April 26, 2018, rating decision granting entitlement to SMC at the (s) rate was clearly and unmistakably wrong or the March 4, 2020 rating decision holding that all of Movant's formerly independent service connected diseases are now the predicate for his aid and attendance grant is clearly and unmistakably erroneous. The Secretary cannot have his cake and eat it too. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" (***quoting Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.,*** 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))); ***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).

Summary

The Secretary is free to arrange Movant's disabilities in any order. He is free to associate like-diseases together and classify them as secondaries to service connected ones. What he is not free to do is recharacterize the diseases as no longer being independently ratable absent medical diagnoses stating as much. This is a gross procedural violation of due process and not permitted under color of law. See ***Colvin v. Derwinski***, 1 Vet.App. 171, 175 (1991) (While the Board is not required to accept the medical authority supporting a claim, it must provide its reasons for rejecting such evidence and, more importantly, must provide a

medical basis other than its own unsubstantiated conclusions to support its ultimate decision).

Movant's additional, independently ratable service connected diseases of peripheral neuropathy, sciatic nerve, left lower extremity, peripheral neuropathy, femoral nerve, left lower extremity, peripheral neuropathy, sciatic nerve, right lower extremity, diabetes mellitus type II, peripheral neuropathy, femoral nerve, right lower extremity, allergic rhinitis, sinusitis independently ratable at 60% or more in 2/12/2018 can only be seen to still be independently ratable in 2021. Further, Movant's 100 percent rating for a major cognitive disorder can only be viewed equally as a separate and distinct bodily system.

SMC is an ancillary benefit and the Secretary errs when he fails to infer all the 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 (p). ***Akles*** *supra*.

Respectfully submitted,

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