



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

LORI [REDACTED]

Represented by

Gordon A. Graham, Agent

SS [REDACTED]

Docket No. 200123-63335

Advanced on the Docket

DATE: December 17, 2021

ORDER

Entitlement to Special Monthly Compensation (SMC) under 38 U.S.C. § 1114(o) is granted for the period on appeal, and, in turn, entitlement to SMC under 38 U.S.C. § 1114(r)(1) also is granted for the period on appeal.

Entitlement to SMC under 38 U.S.C. § 1114(r)(1), however, is denied.

(r)(2) (TYPO)

FINDINGS OF FACT

1. Due to service-connected right-side paralysis owing to multiple sclerosis (MS), the Veteran is so helpless as to need regular aid and attendance (A&A).
2. Also, due to the following service-connected disabilities: left upper and lower extremity paresthesias, neurogenic bladder, and paresthesia of the scalp also associated with the MS, as well as adjustment disorder (including causing impaired memory and impaired cognitive processing), bruxism with temporomandibular joint (TMJ) dysfunction, irritable bowel syndrome (IBS), and migraine headaches, the Veteran is also so helpless as to require regular A&A.
3. The Veteran does not require the services of a licensed or skilled home health care professional; she is not permanently housebound and not needing a higher level of care than regular A&A due to her service-connected disabilities.

CONCLUSIONS OF LAW

1. The criteria are met for entitlement to SMC under 38 U.S.C. § 1114(o). 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350, 3.352, 4.63.
2. The criteria also are met for entitlement to an additional monthly allowance based on the need for regular A&A under 38 U.S.C. § 1114(r)(1). 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350, 3.352.
3. However, the criteria conversely are not met for entitlement to an additional monthly allowance based on the need for a higher level of A&A under 38 U.S.C. § 1114(r)(2). 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350, 3.352.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

On her VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement (NOD)), the Veteran elected the hearing option, and she since had her hearing in May 2021, and a transcript of the proceeding is of record. Therefore, in deciding this appeal, the Board may only consider the evidence of record at the time of the Agency of Original Jurisdiction (AOJ) decision that she has appealed (which was in September 2019), as well as any additional evidence that she or her representative submitted during the hearing or within 90 days after it. *See* 38 C.F.R. § 20.302(a).

1. Entitlement to SMC under 38 U.S.C. § 1114(o) is granted, and, in turn, entitlement to SMC under 38 U.S.C. § 1114(r)(1) also is granted.

The Veteran is currently in receipt of several types of SMC under the provisions of 38 U.S.C. § 1114 and 38 C.F.R. §§ 3.350, 3.352 owing to disabilities directly incurred during her service and that developed secondary to her service-connected MS. She contends that she is entitled to a greater level of SMC and, for the following reasons and bases, the Board agrees.

SMC is authorized in certain circumstances in addition to compensation for service-connected disabilities. 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350, 3.352. Additionally, SMC is authorized under subsections (k) through (s), with the rate amounts increasing the later in the alphabet the letter appears (except for the "s" rate). SMC at the "k" and "r" rates are paid, in addition to any other SMC rates, with certain monetary limits, with "k" being the basic level and "r" being the highest level.

The Veteran contends that she is entitled to SMC at the "r" rate in addition to her current SMC levels. Alternatively, she contends that she is otherwise entitled to the maximum available SMC pursuant to VA's duty to maximize awards, to also include payment at the "o" rate.

Currently, the Veteran is in receipt of SMC under subsection "m" based on the loss of use of one arm and one leg at levels, or with complications, preventing natural elbow and knee action with prosthesis in place. 38 U.S.C. § 1114(m). She is also in receipt of SMC under subsection "p" for additional disabilities rated independently at 50 percent or more. 38 U.S.C. § 1114(p).

SMC

SMC at the 38 U.S.C. § 1114(l) level ("SMC (L)") is warranted if a veteran, as a result of service-connected disability, has an anatomical loss or loss of use of both feet, or of one hand and one foot; has blindness in both eyes with visual acuity of 5/200 or less (or concentric contraction of the field of vision beyond 5 degrees in both eyes); is permanently bedridden; or is so helpless as to be in need of regular aid and attendance of another person

As set forth in 38 U.S.C. § 1114(m), SMC (M) is warranted if a veteran, as a result of a service-connected disability, has suffered the anatomical loss or loss of use of both hands, or of both legs at a level, or with complications, preventing natural knee action with prosthesis in place, or of one arm and one leg at levels, or with complications, preventing natural elbow and knee action with prosthesis in place, or has suffered blindness in both eyes having only light perception, or has suffered

blindness in both eyes, rendering such veteran so helpless as to be in need of regular aid and attendance.

SMC at the 38 U.S.C. § 1114(n) level, SMC (N), is warranted if a veteran, as the result of a service-connected disability, has suffered the anatomical loss of use of both arms at levels, or with complications, preventing elbow action with prostheses in place, has suffered the anatomical loss of both legs so near the hip as to prevent the use of prosthetic appliances. 38 U.S.C. § 1114(n).

SMC (N) is also warranted if a veteran's service-connected disability has caused him to suffer anatomical loss of one arm and one leg so near the shoulder and hip as to prevent the use of prosthetic appliances, or to suffer blindness without light perception in both eyes. *Id.*

SMC at 38 U.S.C. § 1114(o) level, SMC (O), is warranted if a veteran has suffered disability under conditions which would entitle him to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. § 1114(l) through (n). 38 U.S.C. § 1114(o); 38 C.F.R. § 3.350(e)(1)(ii). For combinations, determinations for entitlement under § 1114(o) must be based upon separate and distinct disabilities. That requires, for example, 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. 38 C.F.R. § 3.350(e)(3).

If the 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 be taken as entitling a veteran to the maximum benefit. The fact that two separate and distinct entitling disabilities, such as 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).

Next, 38 U.S.C. § 1114(p) provides for "intermediate" SMC rates between the different subsections, with the maximum SMC not exceeding that prescribed at the 38 U.S.C. § 1114(o) rate. 38 U.S.C. § 1114(p); 38 C.F.R. § 3.350(f). Meaning, in addition to the statutory rates payable under 38 U.S.C. §§ 1114(l) through (n) and the intermediate or next-higher rate provisions set forth under 38 U.S.C. § 1114(p), 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 the next-higher intermediate rate, then to the next-higher statutory rate under 38 U.S.C. § 1114, but not above the subsection "o" rate. 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 of 38 U.S.C. § 1114(p). See 38 C.F.R. § 3.350(f)(3). Additional disability or disabilities independently ratable at 50 percent or more warrants the assignment of the next highest half step rate. 38 C.F.R. § 3.350(f)(3). In no event can the rate be higher than (o), however. *Id.*

Under 38 U.S.C. § 1114(r)(1), ("SMC (R-1)"), a veteran receiving the maximum rate under 38 U.S.C. § 1114(o) or (p) who is also 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 the United States Government's expense. 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. 38 C.F.R. § 3.350(h)(1).

The amount of the additional allowance payable to a veteran in need of regular aid and attendance is specified in 38 U.S.C. § 1114(r)(1). The amount of the additional allowance payable to a veteran in need of a higher level of care is specified in 38 U.S.C. § 1114(r)(2). The higher-level aid and attendance allowance authorized by 38 U.S.C. § 1114(r)(2) is payable in lieu of the regular aid and attendance allowance authorized by 38 U.S.C. § 1114(r)(1). 38 C.F.R. § 3.350(h)(3).

Determinations as to need for A&A must be based on actual requirement of personal assistance from others. In making such determinations, consideration is given to such conditions as: inability of claimant to dress or undress herself or to keep herself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid; inability of claimant to feed herself through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment.

"Bedridden" will be a proper basis for the determination and is defined as that condition which, through its essential character, actually requires that the claimant remain in bed. It is not required that all the disabling conditions enumerated above be found to exist before a favorable rating may be made. The particular personal functions that a veteran is unable to perform should be considered in connection with his/her condition as a whole. It is only necessary the evidence establish a veteran is so helpless as to need regular A&A, not that there be a constant need. 38 C.F.R. § 3.352.

A veteran is entitled to the higher level A&A allowance authorized by 38 U.S.C. § 1114(r)(2) and 38 C.F.R. § 3.350(h) (in other words, SMC (R-2)) in lieu of the regular A&A allowance when all of the following conditions are met: (i) a veteran is entitled to the compensation authorized under 38 U.S.C. § 1114(o) or the maximum rate of compensation authorized under 38 U.S.C. § 1114(p); (ii) a veteran meets the requirements for entitlement to the regular aid and attendance allowance under § 3.352(a); (iii) a veteran needs a "higher level of care" (as defined in § 3.352(b)(2)) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care a veteran would require hospitalization, nursing home care, or other residential institutional care. 38 C.F.R. § 3.352(b)(1)(i-iii).

Need for a higher level of care shall be considered to be need for personal health-care services provided on a daily basis in a veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional. Personal health-care services include (but are not limited to) such services as physical therapy, administration of injections, placement of indwelling catheters, and the changing of sterile dressings, or like functions which require professional health-care training or the regular supervision of a trained health-care professional to perform. A licensed health-care professional includes (but is not limited to) a Doctor of Medicine or osteopathy, a registered nurse, a licensed practical nurse, or a physical therapist licensed to practice by a state or political subdivision. 38 C.F.R. § 3.352(b)(2).

The term "under the regular supervision of a licensed health-care professional" means an unlicensed person performing personal health-care services is following a regimen of personal health-care services prescribed by a health-care professional, and the health-care professional consults with the unlicensed person providing the health-care services at least once each month to monitor the prescribed regimen. The consultation need not be in person; a telephone call will suffice. A person performing personal health-care services who is a relative or other member of a veteran's household is not exempted from the requirement that he or she be a licensed health-care professional or be providing such care under the regular supervision of a licensed health-care professional. The performance of the necessary aid and attendance service by a relative of the beneficiary or other member of his or her household will not prevent the granting of the additional allowance. 38 C.F.R. § 3.352(b)(2-4), (c).

The requirements for establishing the need for a higher level of care are to be strictly construed. The higher-level A&A allowance is to be granted only when a veteran's need is clearly established, and the amount of services required by a veteran on a daily basis is substantial. 38 C.F.R. § 3.352(b)(5).

A veteran who has a service-connected disability rated as 100 percent disabling and (1) has an additional service-connected disability or disabilities independently rated at 60 percent or more, or (2) by reason of such service-connected disability or disabilities is permanently housebound, shall receive SMC under the provisions of 38 U.S.C. § 1114(s). 38 C.F.R. § 3.350(h)(3)(i).

Analysis

The Board sees the Veteran was first granted SMC based on her need for regular A&A in a January 2013 rating decision. The VA regional office (RO) cited a medical opinion from Dr. H indicating the Veteran could not walk unaided and required a right foot brace due to persistent right-sided weakness and right-sided foot drop. Thus SMC (L-1) was awarded. The RO further noted the Veteran had additional disabilities rated independently at 50 percent or more and, consequently, also awarded SMC (P-2) under 38 U.S.C. § 1114, subsection (p) and 38 C.F.R. § 3.350(f)(3) at the rate intermediate between subsection (l) and subsection (m) on account of entitlement to SMC (L-1). In other words, the Veteran was awarded SMC because of her MS complications causing right-sided weakness (and, thus, the need for A&A) and was awarded additional SMC based on having other disabilities, such as neurogenic bladder, independently ratable at 50 percent or more.

In a June 2015 rating decision, the RO granted SMC (L-2) under 38 U.S.C. § 1114, subsection (p) and 38 C.F.R. § 3.350(f)(1) at the rate intermediate between subsection (l) and subsection (m) on account of the loss of use of one hand with the loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis. In other words, the RO increased the Veteran's SMC (L-1) award to SMC (L-2) based on her loss of use of her right hand and right foot due to complete paralysis, as was noted during her March 2015 VA examination. To reiterate, she previously had been awarded SMC (L-1) based on her severe incomplete paralysis and then was awarded the higher SMC (L-2) based on a finding of complete paralysis pursuant to the results of her March 2015 VA examination.

Those rating decisions are the subject of a clear and unmistakable evidence (CUE) motion that is separately on appeal. Consequently, under current AMA regulations, the Board does not have jurisdiction to address this portion of the argument submitted by the Veteran's representative.

Most recently, the Veteran filed for an increase in her SMC award and has requested consideration under SMC (O) and, in turn, SMC (R-1). In this regard, 38 U.S.C. § 1114(r)(1) provides that, if a veteran is entitled to SMC (O) and is also needing A&A, she shall be paid an additional amount of SMC pursuant to 38 U.S.C. § 1114(r)(2) and 38 C.F.R. § 3.350(h).

As noted, SMC (O) requires that the Veteran suffer disability under conditions entitling her to two or more of the rates provided in one or more subsections (l) through (n) of 38 U.S.C. § 1114. SMC (O) may also be awarded for anatomical loss of both arms so near the shoulder as to prevent use of a prosthetic appliance; bilateral deafness rated at 60 percent or more (when the hearing impairment in either one or both ears is service-connected) in combination with service-connected blindness with bilateral visual acuity 20/200 or less; or service-connected total deafness in one ear or bilateral deafness rated at 40 percent or more (when the hearing impairment in either one or both ears is service-connected) in combination with service-connected blindness of both eyes having only light perception or less. 38 U.S.C. § 1114 (o); 38 C.F.R. § 3.350 (e)(1). The Veteran is not service connected for hearing or visual impairment and has not suffered anatomical loss of both arms; therefore, the next way for her to qualify for SMC (O) rate is to merit two or more of the rates (l) through (n), with no disability being considered twice.

With respect to two or more of the rates (l) through (n) being warranted for SMC at the (o) rate, SMC at the (l) rate is payable for: (1) anatomical loss or loss of use of both feet; (2) anatomical loss or loss of use of one hand and one foot; (3) blindness in both eyes with visual acuity of 5/200 or less; (4) being permanently bedridden; or (5) being so helpless as to be in need of regular aid and attendance. 38 U.S.C. § 1114(l); 38 C.F.R. § 3.350(b). 38 C.F.R. § 3.350(b).

While the Veteran is currently in receipt of the rate intermediate between subsection (l) and subsection (m) for loss of use of one hand and one foot, owing to the paralysis of her right side, she has not lost the use of *both* feet. The Board does, however, note that she was observed to have mild numbness and paresthesia in her left upper and lower extremities during her March 2015 VA examination. Similarly, a VA treatment note from December 2018 indicates she had left lower extremity weakness in her hip flexion and dorsiflexion (graded 4/5+) and deep tendon reflexes were assessed at 3+/4+ bilaterally (therefore also indicating left-sided weakness). A treatment note from September 2019 also indicates she required the use of a left leg brace during a clinic visit. Further, during her August 2019 VA examination for Housebound (HB) Status or permanent Need for Regular A&A, the examiner commented that the Veteran's trigeminal neuralgia, left suboccipital craniectomy, and neurogenic bladder (in other words, her other MS-related conditions in addition to her right-side paralysis) all "contribute to her inability to dress/undress herself, grooming, bathing, ambulation, food/meal preparation, and toileting."

The Veteran also testified during her May 2021 hearing that her damaged trigeminal nerve (for which she is also service connected) has caused left-side facial numbness making it difficult to chew and eat. She also testified that her left leg numbness makes it difficult to walk, stand, or move without assistance.

In addition to impairments resulting from her MS, the Veteran is also service connected for migraine headaches and major depressive disorder, which also contribute to her helplessness and need for A&A. For example, during an August 2019 VA examination, she was determined to be able to manage her finances; however, during an August 2019 Home Health Evaluation, she was noted to have moderate cognitive impairment requiring supervision due to wandering.

She was also noted to have incontinence more than 3 times a week requiring assistance with her catheter and was determined to be totally dependent on another person to manage her medications, health appointments, and shopping (among other important activities of daily living such as bathing, grooming, and meal-prep).

Consequently, with respect to being so helpless as to need regular A&A without consideration of the Veteran's service-connected right upper and lower extremity disabilities, the Board finds that her additional service-connected disabilities also necessitate regular A&A. The fact that two separate and distinct entitling disabilities, such as here loss of use of right upper and lower extremities and left-sided weakness in combination with neurogenic bladder, etc., result from a common etiological agent, for example, MS, will not preclude maximum entitlement. 38 C.F.R. § 3.350(e).

The aforementioned medical and lay evidence makes clear that the Veteran requires substantial assistance with dressing/undressing, grooming, bathing, feeding, managing her medication, and toileting. This has been attributed to her service-connected right upper and lower extremity paralysis and has also been attributed to her other service-connected disabilities secondary to her MS diagnosis in combination with her other service-connected disabilities, to include her major depressive disorder.

Based upon the foregoing, the Board concludes that the Veteran is, therefore, separately entitled to SMC at 38 U.S.C. § 1114(l) rate as the result of her other service-connected disabilities secondary to her MS diagnosis (such as her left-sided weakness) in combination with her other service-connected disabilities, to include her major depressive disorder. The evidence demonstrates that the Veteran's left upper and lower extremity paresthesias, neurogenic bladder, and paresthesia of the scalp also associated with MS, as well as adjustment disorder (to include impaired memory and impaired cognitive processing), bruxism with TMJ dysfunction, IBS, and migraine headaches, etc. result in the need for regular A&A. Thus, because the Veteran has suffered disability under conditions that would entitle her to two or more of the rates provided for in 38 U.S.C. § 1114(l)-(n), she is entitled to SMC at the 38 U.S.C. § 1114(o) rate.

As noted, 38 U.S.C. § 1114(r)(1) provides for increased SMC if a Veteran is entitled to SMC at the 38 U.S.C. § 1114(o) rate and is in the need of regular aid and attendance. Here, the Veteran has been found entitled to SMC at the "o" rate, and as being in need of regular aid and attendance. Accordingly, entitlement to increased SMC at the 38 U.S.C. § 1114(r)(1) is also granted.

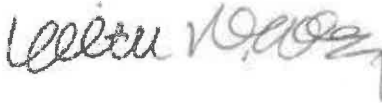
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2. Entitlement to SMC under 38 U.S.C. § 1114(r)(1), however, is denied.

38 U.S.C. § 1114(r)(2) provides for a higher level of SMC if, in addition to the need for regular aid and attendance, a veteran needs a higher level of care. "Higher level of care" requires, inter alia, that there is a need for personal healthcare services on a daily basis, provided the person is licensed to provide such services or which provides the services under the supervision of a licensed-health care professional. Personal healthcare services include services such as physical therapy, administration of injections, placement of catheters, the changing of dressings, or "like functions which require professional healthcare training or the regular supervision of a trained healthcare professional to perform." 38 C.F.R. § 3.352(b)(2).

Here, there is no indication that personal healthcare is clearly needed. The Board acknowledges that the Veteran has received support with bathing, grooming, medication management, and meal-prep from a home health aide and home health nurse (according to an August 2019 VA examination) in addition to her husband; however, even if the person that performs these services is licensed, or supervised by a licensed professional, the services provided are not similar to functions that require professional healthcare training or the regular supervision of a professional. For example, the August 2019 VA examiner noted that the home health nurse typically assisted with morning grooming, medications, as well as breakfast and lunch prep. While the Veteran is noted to require an Natalizumab infusion every 4 weeks, treatment notes indicate she attends a clinic for this procedure. Regarding assistance with daily catheterization, it appears her husband, rather than a nurse, assists.

Consequently, the need for a higher level of care is not shown. The Board especially acknowledges the Veteran's husband's significant contributions to his wife's care, which are certainly considered in the award of increased pension granted at the 38 U.S.C. § 1114(r)(1) rate. However, he is not a licensed healthcare professional, and this care is not apparently given under the supervision of a licensed professional, as defined above. 38 C.F.R. § 3.352. The Board finds that the Veteran is not entitled to a higher level of monthly aid and attendance under the provisions of 38 U.S.C. § 1114(r)(2). 38 C.F.R. § 3.350(h).



KEITH W. ALLEN
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

C. B. Kucera

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.