BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

Represented by
Gordon A. Graham, Agent

SS XXX XX[redacted]
Docket No. 220711-258804
Advanced on the Docket

DATE: December 12, 2022

ORDER

Entitlement to special monthly compensation based on the regular need for the aid and attendance of another person (SMC A&A) from December 7, 2021, but no earlier, is granted, subject to controlling regulations governing the payment of monetary awards.

FINDINGS OF FACT

1. In the appealed June 2022 rating decision, the agency of original jurisdiction (AOJ) made a favorable finding that the Veteran required aid and attendance, and the additional evidence does not include clear and unmistakable evidence to rebut this favorable finding by the AOJ. The evidence also reflects that the Veteran requires aid and attendance due to service-connected disability.

2. The earliest date during the claims period that it is factually ascertainable that the Veteran had a regular need for aid and attendance is December 7, 2021.

CONCLUSION OF LAW

With reasonable doubt resolved in favor of the Veteran, from December 7, 2021, but no earlier, the criteria for SMC based on the regular need for the aid and attendance of another person due to service-connected disabilities have been met.

38 U.S.C. §§ 1114(l), 1114(s), 5107, 5110; 38 C.F.R. §§ 3.102, 3.104(c), 3.350(b), 3.350(i), 3.352(a), 3.400, 20.801(a).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served in the United States Air Force from October 1972 to June 1976.

This appeal is processed under the Veterans Appeals Improvement and Modernization Act of 2017 (Appeals Modernization Act, AMA). The AMA created a new framework for Veterans dissatisfied with VA's decision on their claim to seek review.

This case comes before the Board of Veterans' Appeals (Board) on appeal of a June 2022 rating decision of a Regional Office (RO) of the Department of Veterans Affairs (VA), which in relevant part, denied entitlement to SMC based on aid and attendance/ housebound status.

In July 2022, the Veteran filed a VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement, NOD) in response to the above rating decision and identified entitlement to aid and attendance of another with citations to various aid and attendance regulations as the appealed issue. He selected the direct review docket. Since this is a direct docket appeal, the Board may only consider the following evidence: evidence of record as of July 6, 2022, when the agency of original jurisdiction (AOJ) issued the rating decision denying entitlement to SMC. 38 C.F.R. §§ 20.300, 20.301. The July 2022 statements accompanying the NOD are construed as arguments in support of the appeal and may be considered.

Laws and regulations for SMC A&A

SMC provides for additional levels of compensation above the basic levels of compensation afforded by the schedular rating criteria in 38 C.F.R. Part 4. These additional levels of compensation are awarded for various types of losses or levels of impairment, due solely to service-connected disabilities, and for specific combinations of such impairments. The different types of SMC available are

commonly referred to by their alphabetic designations, such as SMC(k), SMC(l), etc., which correspond to the paragraphs of 38 U.S.C. § 1114 which provides the statutory authority for SMC. These same paragraphs are codified in VA regulations, predominantly at 38 C.F.R. § 3.350(a)-(i).

SMC at the aid and attendance rate is payable when a veteran, due to service-connected disability, has suffered the anatomical loss or loss of use of both feet or one hand and one foot, or is blind in both eyes, or is permanently bedridden or so helpless as to need regular aid and attendance. *See* 38 U.S.C. § 1114(l); 38 C.F.R. § 3.350(b). In this matter, the record does not reflect that the Veteran has the anatomical loss, or loss of both feet, or one hand and one foot, or is blind in both eyes. *See* 38 U.S.C. § 1114(l); 38 C.F.R. § 3.350(b). Thus, the question is whether he is permanently bedridden or so helpless as to be in need of regular attendance due to his service-connected disabilities.

Pursuant to 38 C.F.R. § 3.350(b)(3) and (4), the criteria for determining that a veteran is so helpless as to need regular aid and attendance, including a determination that he is permanently bedridden, are contained in 38 C.F.R. § 3.352 (a). That regulation provides that the following will be accorded consideration in determining the need for regular aid and attendance: inability of a claimant to dress or undress himself, or to keep himself 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 to feed himself through the 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 him from hazards or dangers incident to his daily environment.

"Bedridden" is defined as that condition, which, through its essential character, requires that a claimant remain in bed, and is a proper basis for this determination. The fact that a claimant has voluntarily taken to bed or that a physician has prescribed rest in bed for the greater or lesser part of the day to promote convalescence or cure will not suffice.

It is not required that all the above disabling conditions 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 condition as a whole. It is only necessary that the evidence establish that a veteran is so helpless as to need regular aid and attendance, not that there is a constant need. Determinations that a veteran is so helpless as to need regular aid and attendance will not be based solely upon an opinion that his condition is such as would require him to be in bed. They must be based on the actual requirement of personal assistance from others. *See* 38 C.F.R. § 3.352(a).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the benefit of the doubt shall be given to the claimant. 38 U.S.C. § 5107(b); 38 C.F.R. § 4.3.

Factual background

Social Security Administration (SSA) records reflected that the Veteran had a primary disability of chronic liver disease and secondary diagnosis of disorder of back from July 2015 until October 2016. *See* May 2017 SSA decision.

In February 2019, the Veteran had a VA primary care consultation. He had a history of liver cirrhosis with portal hypertension. He was compliant with his current medication regimen. Physical examination was unremarkable. The clinician noted the history of cirrhosis with portal hypertension and hepatitis C.

August 2019 VA primary care records included clinical findings were substantially similar from February 2019. An addendum reflected that the laboratory studies showed decreased platelet consistent with previous values and all other findings were within normal limits (WNL).

November 2019 VA liver clinic records reflected that the Veteran denied any changes in mental alertness, numbness/ weakness, or confusion. Physical examination was unremarkable. Laboratory tests were reviewed. The hepatologist reported that the Veteran had been treated and cured from hepatitis C in 2016 and continued treatment for decompensating cirrhosis. He had improvement in liver

function following hepatitis C treatment. He reported feeling more energetic and active. He did not have liver related symptoms. The clinician assessed that the Veteran was in the long process of reversing cirrhosis. There was no new liver injury agent. The clinician recommended cirrhosis management.

April 2020 VA liver clinic records reflected that the Veteran had a phone consultation due to COVID-19 precautions. Review of symptoms showed that the Veteran again denied any changes in mental alertness, numbness/ weakness, or confusion. The assessment and recommendations were substantially similar with the November 2019 consultation.

October 2020 VA treatment records showed that the Veteran had a preoperative consultation for right inguinal hernia repair. For functional status, the Veteran reported being able to climb a flight of stairs, shop for groceries and walk his dog. However, he did not have the stamina for yardwork. He reported he could walk about a half a mile. He had occasional palpitations and episodes where his throat closed. Current review of symptoms was notable for shortness of breath with subjective description of throat closing, palpitation, urinary frequency and nocturia, and muscles aches. Physical examination was unremarkable. The physician recommended close monitoring surrounding surgery.

At the November 2020 VA liver examination, a nurse practitioner (NP) assessed hepatitis C and cirrhosis of the liver with an October 2015 onset. The Veteran described experiencing dull burning pain in the right upper quadrant with fullness. He had constant ache in upper back and shoulders as well as bilateral leg and feet swelling, vein discoloration, stomach pain, cramping, fatigue, and insomnia. He had less than one week of incapacitating episodes over the past year. Current cirrhosis symptoms included abdominal pain on an intermittent basis and portal hypertension. Diagnostic testing and laboratory studies were considered. Functional impact was reported as limited activity, ability to complete chores, squat, and run. He had limited focus due to lack of endurance. The NP reported that liver cirrhosis was a progression of previously diagnosed hepatitis C.

In a January 2021 addendum, the NP clarified that the Veteran's liver disease led to intermittent fatigue, daily arthralgia, daily right upper quadrant pain, moderate

constant aching pain in his upper back and shoulders, intermittent moderate swelling in his lower extremities, intermittent moderate varicose veins, intermittent moderate stomach pain, and moderate daily insomnia.

February 2021 VA treatment records reflected that the Veteran's wife contacted the clinic over concern about the Veteran's inability to sleep. She stated the Veteran slept at most two to three hours per night. He was hesitant to try medication because of his liver problems.

March 2021 VA liver clinic records reflected that the Veteran denied any major changes to his health and reported feeling well. He had minimal swelling of his legs and difficulty staying asleep. His wife reported that the Veteran was slightly more confused than normal. He would forget appointments or previously completed activities. However, he was always oriented to time and place. Laboratory studies were reviewed. The clinician continued the previous assessment and reported that there was no apparent decompensation since the last visit. For ascites/ edema, he noted reports of trace edema in lower extremities but did not recommend a diuretic regimen. Rather, he advised the Veteran about maintaining a low sodium diet. He noted possible minimal hepatic encephalopathy (HE) versus grade one based upon the Veteran's reported insomnia and memory problems. He provided medication. In an addendum, another physician reported discussing the Veteran's case, and overall, the Veteran remained stable with no major decomposition.

July 2021 VA primary care records showed that the Veteran complained about insomnia. Physical examination noted that the Veteran presented as well developed, well-nourished and in no acute distress (nad). Laboratory studies were reviewed. The clinician referred the Veteran to the sleep clinic.

September 2021 liver clinic records noted that the insomnia medication was ineffective. The Veteran reported having some confusion and that it had been going on for many years. He described it as forgetfulness. He was always oriented to time and place. He had dysphagia with solid foods. He continued to have minimal leg swelling. Physical examination showed that the Veteran presented as well appearing and in no acute distress. Abdomen showed left liver lobe five

centimeters below rib and right liver lobe one centimeter below rib. Lower extremities were notable for trace edema. Laboratory studies were reviewed. The assessment recommendations were substantially similar to those given in March 2021. For HE, the clinician reported insomnia was unlikely to represent HE.

November 2021 sleep clinic records reported that the Veteran had worsening insomnia over the past six months. He also had a history of decompensated cirrhosis which likely contributed to his sleep difficulties.

November 2021 gastroenterology clinic records included a weight loss consultation. The Veteran complained about solid food dysphagia. He stated his insomnia symptoms were the most bothersome with liver symptoms following. Prior laboratory testing was reviewed. The clinician recommended dysphagia management.

December 7, 2021 VA liver clinic records showed that the Veteran's wife contacted the VA clinic. She was concerned about the Veteran's confusion, forgetfulness, and paranoia. The clinician recommended updated laboratory study and then follow-up consultations.

Subsequent December 2021 liver clinic records reflected that the Veteran's confusion was possibly related to HE since he stopped lactulose medication.

On December 15, 2021, the Veteran filed Veteran's Application for Increased Compensation Based On Unemployability via VA Form 21-8940. He reported disability from hepatitis C and cirrhosis residuals. He last worked full time in June 2019 and became too disabled to work in September 2015. He had worked as a driver on a part time basis from 2016 to 2020. He had a high school education.

January 2022 VA primary care clinic records showed that the Veteran complained about intermittent right upper abdominal pain and right sided abdominal pain with shooting pain. He had an extensive history for liver disease. Review of systems was notable for generalized musculoskeletal weakness. Physical examination showed slow gait and movement. In pertinent part, the clinician recommended continued follow up with the liver clinic.

In February 2022, a Nurse Practitioner (NP) completed a Medical Opinion Disability Benefit Questionnaire (DBQ) for the Veteran based upon review of the record. She opined that the Veteran was unable to perform sedentary work. She noted the December 2021 HE report. Because of confusion, the Veteran would be unable to perform occupational tasks.

March 2022 VA liver clinic records included reports from the Veteran describing his health as okay. He had intermittent right-side ache and notable dysphagia type symptoms. He had difficulty sleeping and associated fatigue. His wife reported that the Veteran had memory troubles and could not remember dates or appointments. He misplaced things at home. He was advised to take lactulose for HE. Physical examination showed the Veteran to be well-appearing and in no acute distress. He was fully alert and oriented. The assessment was substantially similar to the December 2021 VA liver clinic records.

In April 2022, the representative requested SMC A&A. He stated that the Veteran was no longer able to monitor his medication and required A&A due to his medical disabilities and cognitive decline.

In April 2022, another NP completed a liver DBQ based upon review of the record and physical examination. He reported that the chronic fatigue and abdominal discomfort precluded the Veteran's ability to perform any activities on a regular and sustained basis. The Veteran may face cognitive challenges, such as difficulties processing information, remembering, concentrating, and focusing due to HE. Also due to associated anemia, the Veteran was prone to injuries.

In April 2022, a psychologist completed a mental disorder DBQ for the Veteran based upon clinical interview. The psychologist diagnosed insomnia. In relevant part, the Veteran's wife reported that he took an early retirement due to poor health. He later went back to work part time, but then had to stop due to poor health. The psychologist commented that appeared the Veteran had difficulties with comprehension and memory. She had to ask the Veteran questions multiple times and reword them. The Veteran struggled to answer questions about his childhood.

In June 2022, a certified physician's assistant (PA-C) completed a SMC examination for the Veteran. The disability that restricted activities/ function was listed as HE. The Veteran was able to feed himself, but unable to prepare his own meals. He did not require assistance with bathing and hygiene. He was not legally blind. He did not require nursing home care. He required medication management. He had to take multiple medications and sometimes did not recall what medication to take and at what time. The Veteran's wife had to prompt the Veteran to take medication. The PA-C assessed that the Veteran had the mental capacity to manage his benefit payments. The Veteran's general appearance was appropriate. He had slight difficulty hearing but would respond when prompted by his wife. Speech and affect were normal. His wife reported he could perform activities but had issues with dizziness and needed assistance to prevent falls. There were no restrictions for movement. The PA-C assessed that the Veteran was able to participate in most activities but had dizziness and weakness that limited his physical activity.

In the June 2022 rating decision, the RO included a favorable finding that the Veteran required A&A. It cited the VA SMC A&A examination report as including findings that the Veteran required assistance with preparation of meals, bathing and other hygiene needs, and medication management.

In July 2022, the representative requested SMC A&A. He observed that the June 2022 rating decision provided a favorable finding about the Veteran requiring aid and attendance. He clarified that the Veteran contended his service-connected liver disabilities resulted in impaired mental acuity from HE and resulted in a factual need for aid and attendance. He cited February 2022 VA treatment records concerning HE. He also noted that the Veteran did not have to meet every one of the criteria for SMC A&A under 38 C.F.R. § 3.352(a). He asserted the June 2022 SMC examination report showed an inability to protect himself from the ordinary hazards of his daily environment due to his inability to remember his medication regimen, dizziness, and inability to drive. He also cited the Veteran's spouse's report as probative evidence of the Veteran's cognitive decline. He asserted that the beneficial effects of medication should not be considered since it is not contemplated under the applicable liver disease rating criteria. 38 C.F.R. § 4.114, DC 7312.

Analysis

For the following reasons, the Board finds that entitlement to SMC A&A from December 6, 2021, but no earlier, is warranted.

As an initial matter, the Board must determine the rating period at issue. The Veteran has continuously pursued a higher rating claim for liver disease from the March 21, 2019 service connection claim. A January 2021 rating decision awarded service connection for cirrhosis of the liver with abdominal varices, portal hypertension and splenomegaly with a 30 percent rating effective March 21, 2019. The Veteran filed a NOD in February 2021. The Board denied a higher initial rating for service connected liver disability in December 2021. However, the Veteran filed a February 2022 supplemental claim for a total rating for service-connected cirrhosis of the liver. The RO then issued the appealed June 2022 rating decision, which implicitly found new and relevant evidence had been submitted by readjudicating the claim and awarding a total disability rating based upon individual unemployability (TDIU) from December 6, 2021. Since the Veteran continuously pursued a higher rating claim for cirrhosis of the liver since March 21, 2019, it is the appropriate period of consideration for the requested SMC A&A benefit on appeal. *Bradley v. Peake*, 22 Vet. App. 280, 294 (2008) (*citing Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991)); 38 C.F.R. § 3.2500(c) (providing for continuous pursuit of a claim by filing a supplemental claim following notice of a decision on an initial claim or supplemental claim); 38 C.F.R. § 3.2500(h)(1) (the effective date will be fixed in accordance with the date of receipt of the initial claim or the date entitlement arose, whichever is later, if a claimant continuously pursues an issue).

The representative points out that the RO made a favorable finding that the Veteran required aid and attendance in the appealed June 2022 rating decision. It listed as a favorable finding that the Veteran required aid and attendance and cited that the VA SMC A&A examination confirmed a need for assistance with preparation of meals, bathing and other hygiene needs, and medication management. This favorable finding determination by the RO is binding on the Board in the absence of clear and unmistakable error. 38 C.F.R. §§ 3.104(c), 20.801. Review of the June 2022 VA SMC A&A examination reflects that the Veteran did not require assistance

bathing and other hygiene needs but did require assistance with preparation of meals and medication management. Although the RO misstates the need for bathing and hygiene assistance from the June 2022 SMC examination report, the other RO findings from the SMC examination report are correct. The additional evidence does not indicate the June 2022 SMC examination is an inaccurate report on the Veteran's ability to complete activities of daily living. Thus, the favorable finding from the June 2022 rating decision is binding evidence that the Veteran has a need for regular aid and attendance. *Id.* The above evidence also shows that the need for aid and attendance was due to service-connected disabilities, particularly cirrhosis of the liver and insomnia.

The issue now becomes what is the earliest date that the Veteran's need for regular A&A arose. *Swain v. McDonald*, 27 Vet. App. 219, 224 (2015) (an "effective date should not be assigned mechanically based on the date of a diagnosis. Rather, all of the facts should be examined to determine the date that [the veteran's disability] first manifested"); 38 C.F.R. § 3.400. The record shows that the Veteran has experienced a significant increase in liver cirrhosis symptoms during the claims period. It cannot be stated with certainty as to precisely when symptoms associated with service-connected liver cirrhosis deteriorated to an extent that the Veteran required regular aid and attendance. However, December 7, 2021 is the date the Veteran's wife contacted VA clinicians concerning the Veteran's memory problems related to HE. The evidence following her December 7, 2021 report corroborates her account about severe HE symptoms. Accordingly, the Board finds December 7, 2021 is the earliest date there is evidence about a factual ascertainable increase in symptoms consistent with a regular need for aid and attendance.

Prior to December 7, 2021, there is some evidence suggestive of memory impairment associated with HE. These reports indicate that the Veteran's HE symptoms were relatively mild. (*See* VA liver clinic records from March 2021 and September 2021; November 2020 VA liver examination report). There is no indication about a HE severity that would necessitate regular A&A. *See id.* The Board place particular weight to the November 2021 gastroenterology records. These records reflect that the clinician inquired about the Veteran's perceptions of all his medical symptoms. The Veteran responds that insomnia was his most bothersome symptoms before his liver symptoms. From these records, it is

reasonable to infer that if severe HE induced memory impairment had been present, it would have been noted in this report by either the clinician or the Veteran. *Molitor v. Shulkin*, 28 Vet. App. 397, 410 (2017) ("The absence of evidence only tends to prove the nonexistence of a fact if the fact would ordinarily have been recorded").

The evidence is thus at least evenly balanced as to whether the Veteran requires the care or assistance of another on a regular basis to protect him from the hazards or dangers incident to his daily environment from December 7, 2021, but no earlier, due to service-connected disabilities. As the reasonable doubt created by this relative equipoise in the evidence must be resolved in favor of the Veteran, entitlement to SMC A&A is warranted from December 7, 2021. 38 U.S.C. § 5107(b); 38 C.F.R. § 4.3. In all other respects, the evidence weighs persuasively against the criteria for SMC A&A prior to December 7, 2021, and the benefit of the doubt doctrine, 38 U.S.C. § 5107(b); 38 C.F.R. § 4.3, is therefore not for application for this portion of the claim. *Lynch v. McDonough*, 21 F.4th 776 (Fed. Cir. 2021) (en banc) (only when the evidence persuasively favors one side or another is the benefit of the doubt doctrine not for application).

Additional SMC rating considerations

Under 38 U.S.C. § 1114(s), SMC is payable at the housebound rate if a veteran has a single service-connected disability rated as 100 percent and either of the following are met: (1) there is 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) he is permanently housebound by reason of service-connected disability or disabilities. 38 U.S.C. § 1114(s).

As indicated above, the Veteran is now in receipt of SMC A&A under 38 U.S.C. § 1114(l) from December 7, 2021. SMC at the A&A rate is greater than SMC at the housebound rate. In consideration thereof, the Board finds that the issue of entitlement to SMC at the housebound rate set forth in 38 U.S.C. § 1114(s) is moot. *Akard v. McDonough*, No. 2021-1383, 2021 U.S. App. LEXIS 36633 (Fed. Cir. Dec. 13, 2021) (nonprecedential) (although Article III of the U.S. Constitution does

not apply to administrative bodies such as the Board, the underlying concepts apply to the extent they can be inferred from statutes and regulations).

Prior to December 6, 2021, the Veteran is not in receipt of a total rating and thus does not meet the basic eligibility criteria for consideration of SMC at the (s) rate. 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i).

Jonathan Hager

Jonathan Hager
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board C. D. Simpson, 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.