BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

IN THE CASE OF [redacted]

Appellant Represented by
Gordon A. Graham, Agent

XSS XXX XX[redacted]
Docket No. 221229-320411
Advanced on the Docket

DATE: April 20, 2023

ORDER

Entitlement to an initial rating of 60 percent from March 20, 2006, through December 2, 2014, and to a rating of 100 percent from November 29, 2018, through June 26, 2019, for ischemic heart disease status post myocardial infarction and coronary artery bypass graft is granted.

Entitlement to special monthly compensation based on loss of use of a creative organ is granted.

Entitlement to an earlier effective date of December 30, 2015, for the award of Dependents' Educational Assistance under 38 U.S.C. Chapter 35 is granted.

Entitlement to a total disability rating based on individual unemployability (TDIU) from March 20, 2006, is granted.

Entitlement to special monthly compensation based on housebound status from December 30, 2015, is granted.

FINDINGS OF FACT

1. Giving the benefit of the doubt to the appellant, the Veteran's ischemic heart disease status post myocardial infarction and coronary artery bypass graft only had

temporary or episodic improvements for the periods from March 20, 2006, through December 2, 2014, and November 29, 2018, through June 26, 2019.

2. Giving the benefit of the doubt to the appellant, the Veteran had lost the use of a creative organ due to a service-connected disability, to include diabetes mellitus type II.

3. The Veteran had a total disability that was permanent in nature from December 30, 2015.

4. The functional impairment from the Veteran's service-connected disabilities were of such severity from the date of March 20, 2006, as to effectively preclude all forms of substantially gainful employment for which his education and occupational experience would otherwise make him qualified.

5. The Veteran met the requirements for special monthly compensation based on housebound status from December 30, 2015.

CONCLUSIONS OF LAW

1. The criteria for an initial rating of 60 percent from March 20, 2006, through December 2, 2014, and to a rating of 100 percent from November 29, 2018, through June 26, 2019, for ischemic heart disease status post myocardial infarction and coronary artery bypass graft have been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.14, 4.104, Diagnostic Code 7005 (in effect prior to Sept. 30, 2021).

2. The criteria for special monthly compensation based on loss of use of a creative organ have been met. 38 U.S.C. § 1114; 38 C.F.R. § 3.102, 3.350(a)(1).

3. The criteria for an earlier effective date of December 30, 2015, for the award of Dependents' Educational Assistance under 38 U.S.C. Chapter 35 have been met. 38 U.S.C. §§ 3500, 3501, 5107, 5110; 38 C.F.R. § 3.400, 3.807.

4. The criteria for a TDIU from March 20, 2006, have been met. 38 U.S.C. §§ 1155, 5107(b); 38 C.F.R. §§ 3.102, 3.340, 3.341, 4.16.

5. The criteria for special monthly compensation based on housebound status from December 30, 2015, have been met. 38 U.S.C. §§ 1114(s), 5107; 38 C.F.R. § 3.350(i).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran had active service from January 1959 to July 1962 and from October 1962 to October 1977. He died in September 2021 and the appellant is his surviving spouse. The appellant has been substituted as the claimant with respect to the issues before the Board. *See* 38 U.S.C. § 5121A; 38 C.F.R. § 3.1000.

In the December 2022 VA Form 10182, Decision Review Request: Board Appeal, the Veteran elected the Direct Review docket. Therefore, the Board may only consider the evidence of record at the time of the agency of original jurisdiction (AOJ) decision on appeal. 38 C.F.R. § 20.301.

1. Entitlement to an initial rating in excess of 30 percent from March 20, 2006, through December 2, 2014, and to a rating in excess of 60 percent from November 29, 2018, through June 26, 2019, for ischemic heart disease status post myocardial infarction and coronary artery bypass graft

Disability ratings are based upon VA's Schedule for Rating Disabilities as set forth in 38 C.F.R. Part 4. The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity in civil occupations. 38 U.S.C. § 1155. The disability must be viewed in relation to its history. 38 C.F.R. § 4.1. A higher evaluation shall be assigned where the disability picture more nearly approximates the criteria for the next higher evaluation. 38 C.F.R. § 4.7.

In general, when an increase in the disability rating is at issue, it is the present level of disability that is of primary concern. *See Francisco v. Brown*, 7 Vet. App. 55, 58

(1994). However, consideration also must be given as to whether staged ratings should be assigned to reflect entitlement to a higher rating at any point during the pendency of the claim. *Fenderson v. West*, 12 Vet. App. 119 (1999); *Hart v. Mansfield*, 21 Vet. App. 505 (2007).

The evaluation of the same "disability" or the same "manifestations" under various diagnoses is prohibited. 38 C.F.R. § 4.14. A claimant may not be compensated twice for the same symptomatology as "such a result would overcompensate the claimant for the actual impairment of his earning capacity." *Brady v. Brown*, 4 Vet. App. 203, 206 (1993). This would result in pyramiding, contrary to the provisions of 38 C.F.R. § 4.14. However, when a veteran has separate and distinct manifestations attributable to the same injury, he should be compensated under different diagnostic codes. *Esteban v. Brown*, 6 Vet. App. 259 (1994); *Fanning v. Brown*, 4 Vet. App. 225 (1993).

The Veteran was assigned a 60 percent rating from April 22, 2003, through March 19, 2006, a 30 percent rating was assigned from March 20, 2006, through December 2, 2014, a 60 percent rating from December 3, 2014, through December 29, 2015, a 100 percent rating from December 30, 2015, through November 28, 2018, a 60 percent rating from November 29, 2018, through June 26, 2019, and a 100 percent rating from June 27, 2019.

The December 2022 VA Form 10182 states that the Veteran is seeking a 60 percent rating from April 22, 2003, through December 2015 and a 100 percent thereafter. The initially assigned ratings are on appeal, and as noted above, there are periods for which the 60 and 100 percent ratings sought are already in effect. Therefore, the issue has been stated as above rather than as a rating reduction claim under special procedures which are set forth under 38 C.F.R. § 3.105(e). Since the 60 percent rating was in effect for less than five years prior to March 20, 2006, and the 100 percent rating was in effect for less than five years prior to November 29, 2018, the provisions of 38 C.F.R. § 3.344(a) do not apply to this rating.

During the pendency of the appeal, the applicable rating criteria were amended, effective September 30, 2021. 86 Fed. Reg. 54089 (Sept. 30, 2021); 86 FR 62095

(Nov. 14, 2021). Since the period on appeal is prior to the effective date of the revised criteria, only the old rating criteria will be considered herein.

Under the rating criteria in effect at the time of the claim, Diagnostic Code 7005 provided ratings for arteriosclerotic heart disease (coronary artery disease) and requires documented coronary artery disease.

Arteriosclerotic heart disease resulting in workload of greater than 5 METs but not greater than 7 METs results in dyspnea, fatigue, angina, dizziness, or syncope, or; evidence of cardiac hypertrophy or dilatation on electrocardiogram, echocardiogram, or X-ray, was rated 30 percent disabling.

Arteriosclerotic heart disease resulting in more than one episode of acute congestive heart failure in the past year, or; workload of greater than 3 METs but not greater than 5 METs results in dyspnea, fatigue, angina, dizziness, or syncope, or; left ventricular dysfunction with an ejection fraction of 30 to 50 percent, was rated 60 percent disabling.

Arteriosclerotic heart disease resulting in chronic congestive heart failure, or; workload of 3 METs or less results in dyspnea, fatigue, angina, dizziness, or syncope, or left ventricular dysfunction with an ejection fraction of less than 30 percent, was rated 100 percent disabling.

A Note to Diagnostic Code 7005 provided that, if nonservice-connected arteriosclerotic heart disease is superimposed on service-connected valvular or other non-arteriosclerotic heart disease, the adjudicator was to request a medical opinion as to which condition is causing the current signs and symptoms. 38 C.F.R. § 4.104 (in effect prior to Sept. 30, 2021).

A March 17, 2006, sonographic image of the aorta was normal. On March 20, 2006, the Veteran underwent an echocardiogram. The study was technically difficult, and the physician suggested a multiple-gated acquisition (MUGA) scan to better evaluate the left ventricular systolic function. The left ventricle was borderline dilated and left ventricular ejection fraction was grossly normal. There was moderate septal hypokinesis, and the left atrium was mildly dilated. The right

atrium was borderline dilated, and there was aortic sclerosis without stenosis. The posterior mitral leaflet was thickened/calcified with a restricted opening, and there was mild aortic root dilation.

The systolic function was 45 to 50 percent on a March 13, 2014, echocardiogram. Private treatment records show that on a December 3, 2014, echocardiogram there was moderately decreased left ventricular systolic function, and the estimated LV ejection fraction was 35 to 40 percent.

At November 2016 private internal medicine treatment it was noted that the Veteran's ejection fraction was 25 percent in spite of medications. The Veteran was able to walk mile and did not report side effects.

At February 2018 private treatment the Veteran reported some chest discomfort, and it was noted that he had ischemic cardiomyopathy with an ejection fraction of 20 percent. It was noted at May 2018 private treatment that the Veteran had unstable angina that led to cardiac catheterization and atherosclerosis when a stent could not be placed. At July 2019 private treatment it was noted that the Veteran had recently been hospitalized for atrial flutter and non-ST-segment elevation myocardial infarction. The LVEF was down to less than 20 percent.

In February 2021, Dr. S.P. wrote that he had treated the Veteran for coronary artery disease for the last seven years. The Veteran's LVEF was measured multiple times via left heart catheterization and echocardiogram. Measurement of the right ventricular ejection fraction, which would be measured by an MRI, had not occurred, or been warranted. The references to EF in the medical records referred to left ventricular function only.

The Veteran had a VA examination in July 2021, and the examiner wrote that the Veteran continued to have intermittent chest pain and fatigue since the coronary artery bypass graft. The examiner noted the record is vague regarding heart symptoms from 2006 to 2014. December 5, 2014, showed worsening of valvular stenosis but did not show anything regarding ischemic heart disease. The Veteran eventually underwent valve replacement which improved the symptoms of angina and dyspnea. The examiner noted that this was related to valvular heart disease but

not ischemic heart disease. The Veteran did not really have symptoms of ischemic heart disease, and symptoms of valvular stenosis mimicked ischemic heart disease symptoms.

In August 2022, Dr. M.R., a private physician, reviewed the record and noted that a MUGA is a more advanced and accurate imaging test than an echocardiogram to see how the heart is functioning, including measuring LVEF. It was further noted that the March 2006 private treatment records show that the MUGA scan was performed and do not mention METs capacity or whether there had been episodes of congestive heart failure in the past year. Dr. R felt that the treatment records show that the March 2006 treating physician did not feel that the echocardiogram was sufficient to evaluate LVEF. The records from 2009 indicate that ischemic heart disease had progressed and worsened based on the Veteran needing coronary stenting.

Regarding the period from March 20, 2006, through December 2, 2014, the Board finds that the Veteran was entitled to a rating of 60 percent. The LVEF was noted to be grossly normal in the March 2006 echocardiogram report. However, the report also suggests a MUGA scan to better evaluate left ventricular systolic function. The record does not show that the Veteran received a MUGA scan. The August 2022 physician opinion further indicates that the March 2006 treating physician did not feel that the echocardiogram was sufficient to evaluate LVEF. The record does contain valid test results or other medical records for the period from March 20, 2006, through December 2, 2014, showing that there had been improvement, such as the Veteran having no worse than arteriosclerotic heart disease resulting in workload of greater than 5 METs but not greater than 7 METs results in dyspnea, fatigue, angina, dizziness, or syncope. Therefore, the assignment of the 30 percent rating was improper, and a 60 percent rating is granted for this period. *See* 38 C.F.R. § 4.104, Diagnostic Code 7005 (in effect prior to Sept. 30, 2021). Furthermore, the December 2022 VA Form 10182 indicates that the appellant is seeking a 60 percent rating for this period. Therefore, the grant of a 60 percent rating from March 20, 2006, through December 2, 2014, is a complete grant of the benefits sought on appeal.

Regarding the period from November 29, 2018, through June 26, 2019, in February 2018 the LVEF was 20 percent. It was noted at May 2018 private treatment that the Veteran had unstable angina that led to cardiac catheterization and atherosclerosis when a stent could not be placed. In July 2019 the LVEF was down to less than 20 percent. These ejection fractions are far below the 30 percent or below threshold for a 100 percent rating. *See* 38 C.F.R. § 4.104, Diagnostic Code 7005 (in effect prior to Sept. 30, 2021). Any improvement in the interim appears to have been intermittent and not representative of the severity of the Veteran's ischemic heart disease. Therefore, an evaluation of 100 percent is granted from November 29, 2018, through June 26, 2019.

2. Entitlement to special monthly compensation based on loss of use of a creative organ

Under 38 U.S.C. § 1114(k) and 38 C.F.R. § 3.350(a)(1), special monthly compensation may be paid for loss of use of a creative organ. Loss of a creative organ will be shown by acquired absence of one or both testicles (other than undescended testicles) or ovaries or other creative organ. The General Counsel has provided an opinion that special monthly compensation is awarded for either anatomical loss or loss of use of a creative organ. VAOPGCPREC 93-90; VAOPGCPREC 5-89. Special monthly compensation is payable at a specified rate if the Veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of one or more creative organs. *See* 38 U.S.C. § 1114(k); 38 C.F.R. § 3.350(a). The statute is interpreted as including erectile dysfunction as loss of use of a creative organ.

The Veteran had an examination arranged through VA in July 2021 at which he was diagnosed with erectile dysfunction. In October 2021, the examiner opined that it was at least as likely as not that the service-connected diabetes aggravated the Veteran's erectile dysfunction. Erectile dysfunction was noted to be a complication of diabetes, and the Veteran had had diabetes since 1999. The examiner noted it was natural that erectile dysfunction would ensue after so many years of diabetes. However, the examiner also opined that erectile dysfunction was less likely due to diabetes and that the Veteran had had erectile dysfunction since 1999. Diabetes

was diagnosed around the same time, and they had no relationship to each other because of the short timeline.

In May 2022 another examiner opined that she could not determine a baseline level of severity regarding erectile dysfunction prior to the period when it was aggravated by diabetes. The examiner opined that the medical record demonstrated that it was less likely than not that erectile dysfunction had been aggravated beyond its natural progression. Instead, it had followed the natural progression of erectile dysfunction without any events or complications outside of what is considered typical.

In August 2022 Dr. R opined that the Veteran's diabetes mellitus type II had aggravated erectile dysfunction beyond its natural progression and that ischemic heart disease and depression contributed to the development and/or aggravation of erectile dysfunction. Dr. R cited medical literature regarding there being a correlation between erectile dysfunction and diabetes, heart disease, and depression.

The opinions of the October 2021 VA examiner are of little probative value because of their contradictory nature and internal inconsistencies. Regarding the opinions of the May 2022 examiner and Dr. R, greater probative value is given to Dr. R's opinion because it considers the Veteran's history and medical literature related to the service-connected diabetes, ischemic heart disease, and depression. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008) ("…[M]ost of the probative value of a medical opinion comes from its reasoning" and the Board "must be able to conclude that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion.").

The Board finds that after affording the Veteran the benefit of the doubt, he lost the use of a creative organ secondary to his service-connected disabilities, including diabetes mellitus type II. *See* 38 U.S.C. § 1114(k); 38 C.F.R. § 3.350(a).

3. Entitlement to an earlier effective date than June 27, 2019, for the award of Dependents' Educational Assistance under 38 U.S.C. Chapter 35

Except as provided in subsections (b) and (c), effective dates relating to awards under Chapter 35 shall, to the extent feasible, correspond to effective dates relating to awards of disability compensation. 38 U.S.C. § 5113. Subsection (b) provides that when determining the effective date of an award under Chapter 35 for an individual described in paragraph (b)(2) of 38 U.S.C. § 5113, based on an original claim, VA may consider the individual's application as having been filed on the eligibility date of the individual if that eligibility date is more than one year before the date of the initial rating decision. For these purposes, "eligibility date" means the date on which the individual became an eligible person as defined by 38 U.S.C. § 3501(a)(1), and "initial rating decision" means a decision by VA that establishes the veteran's total disability as permanent in nature. 38 U.S.C. § 5113(b)(3).

The conditions for basic eligibility for Dependents' Educational Assistance (DEA) include: (1) the Veteran's discharge from service under conditions other than dishonorable; (2) the Veteran has a permanent total service-connected disability, or (3) there was a permanent total service-connected disability in existence at the time of the Veteran's death. 38 C.F.R. § 3.807(a). Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation. Total disability may or may not be permanent. 38 C.F.R. § 3.340(a). Permanence of disability will be taken to exist when such impairment is reasonably certain to continue throughout the life of the disabled person. 38 C.F.R. § 3.340(b). The term "total disability permanent in nature" for the purpose of DEA benefits means any disability rated total for the purposes of disability compensation which is based on impairment reasonably certain to continue throughout the life of the disabled person. 38 U.S.C. § 3501(a)(7).

Entitlement to basic eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35 is granted effective December 30, 2015, the date that a total disability rating went into effect under the present decision. The Veteran did not meet the criteria prior to that date because a total disability was not in effect. *See* 38 C.F.R. § 3.807(a).

4. Entitlement to a TDIU

It is the established policy of VA that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled. 38 C.F.R. § 4.16(b). A TDIU will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation.

Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that if there is only one such disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more such disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. 38 C.F.R. § 4.16(a). For the purpose of determining whether there is one disability evaluated at 60 percent, or one disability evaluated at 40 percent where the combined rating of all service-connected disabilities is 70 percent or greater, disabilities resulting from a common etiology will be considered as "one disability."

Where these percentage requirements are not met, entitlement to benefits on an extraschedular basis may be considered when a veteran is unable to secure and follow a substantially gainful occupation by reason of service-connected disability. *See* 38 C.F.R. § 4.16(b). The Board does not have the authority to assign an extraschedular TDIU in the first instance. *See Bowling v. Principi*, 15 Vet. App. 1 (2001). In determining whether unemployability exists, consideration may be given to the veteran's level of education, special training, and previous work experience, but may not be given to his or her age or to any impairment caused by nonservice-connected disabilities. 38 C.F.R. §§ 3.341, 4.16, 4.19.

The central inquiry is, "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestad v. Brown*, 5 Vet. App. 524, 529 (1993). Neither nonservice-connected disabilities nor advancing

age may be considered in the determination. 38 C.F.R. §§ 3.341, 4.19; *Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993).

In *Rice v. Shinseki*, 22 Vet. App. 447 (2009), the Court of Appeals for Veterans Claims held that a claim of entitlement to a TDIU is part of an increased rating claim when such claim is expressly raised by the Veteran or reasonably raised by the record. The Court further held that when evidence of unemployability is submitted at the same time that the Veteran is appealing the initial rating assigned for a disability, the claim for TDIU will be considered part and parcel of the claim for benefits for the underlying disability. *Id.* The Board is considering TDIU herein because it has been raised by the record in the adjudication of the claim for increased ratings for ischemic heart disease. TDIU is being considered from March 20, 2006, which is the beginning of the period under appeal for an increased rating.

Under the present decision, for the period from March 20, 2006, through December 29, 2015, service connection is in effect for ischemic heart disease status post myocardial infarction and coronary artery bypass graft, rated 60 percent; unspecified depressive disorder, rated 50 percent; diabetes mellitus type II with left lower extremity peripheral vascular disease, rated 20 percent; hypothyroidism, rated 10 percent; left lower extremity peripheral neuropathy, rated 10 percent; right lower extremity peripheral neuropathy, rated 10 percent; and a chest scar, rated noncompensable. The combined rating was 90 percent.

At a November 2002 VA mental disorders examination, the VA examiner opined that the Veteran's psychological distress presented mild to modest difficulties in an occupational setting. The Veteran was diagnosed with depression due to his heart condition. At a December 2002 VA heart examination, the Veteran reported that at that time he worked as a manager of a lumber company and worked a full day without any problems. He was able to walk half a mile with ease at a "very good pace" without chest pain.

At April 2003 private treatment, the LVEF was estimated to be 40 percent based on an echocardiogram. As discussed above, the August 2022 physician opinion indicates that the March 2006 treating physician did not feel that the March 2006

echocardiogram was sufficient to evaluate LVEF. Therefore, the March 2006 echocardiogram results showing grossly normal left ventricular function is not indicative of the Veteran's functional ability in an occupational setting.

The Veteran reported at April 2003 treatment that he would get "down in the dumps" and stayed that way for days. His mood was less low with paroxetine. It was noted that in July 2003 he would be decreasing his work to 15 hours a week due to partial retirement.

At December 2014 private treatment it was noted that the Veteran had significant symptoms of angina that were lifestyle limiting. An October 2021 VA examiner noted that in 2013 the Veteran stated that he had numbness and tingling in his feet.

The Board notes that symptoms from ischemic heart disease would have caused unpredictable absenteeism. Furthermore, the Veteran's depression and bilateral lower extremity peripheral neuropathy affected his ability to perform occupational tasks.

In light of the above, the Board finds that the most competent and probative evidence demonstrates that it is at least as likely as not that the Veteran was unemployable due solely to the combined effect of the service-connected disabilities from March 20, 2006.

5. Entitlement to special monthly compensation based on housebound status prior to June 27, 2019

Special monthly compensation may be awarded at the housebound rate if a veteran has a single service-connected disability rated as total and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or (2) by reason of service-connected disability or disabilities, is permanently housebound. 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i). The requirement for a single disability rated as total can be satisfied on the basis of qualifying for a TDIU based on a single disability. *See id.; See Bradley v. Peake*, 22 Vet. App. 280 (2008). A veteran will be determined to be permanently housebound when he is substantially confined to his house (or ward or clinical

areas, if institutionalized) or immediate premises due to disability or disabilities when it is reasonably certain that such a condition will remain throughout the Veteran's lifetime. 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i).

Currently, special monthly compensation based on housebound status is in effect from June 27, 2019. Under the present decision, a 100 percent rating for ischemic heart disease status post myocardial infarction and coronary artery bypass graft is in effect from December 30, 2015. Furthermore, the other service-connected disabilities are independently rated 70 percent from that date. Therefore, the Veteran qualifies for special monthly compensation based on housebound status from December 30, 2015, on the basis of qualifying for a single disability at 100 percent and other disabilities independently rated at least 60 percent. *See* 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i); *See Bradley*, 22 Vet. App. at 280. While the Board has further considered entitlement to SMC prior to that date, since TDIU was granted based on the combined effects of his service-connected disabilities prior to December 30, 2015, and the evidence of record does not show that one of those disabilities by itself rendered the Veteran unemployable, entitlement to SMC under 38 U.S.C. § 1114(s) prior to that date is not warranted.

Michael J. Skaltsounis
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board — Scott Shoreman, 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.