



Submission of Documents to Department Of Veterans Affairs

**Board Of Veterans Appeals
Litigation & Support Division
P.O. Box 27063
Washington, D.C 20038**

FAX: (844) 678-8979

Please index this submission as one .pdf

Veteran: [REDACTED]	VSC: VBACOL319
C-File or SSN: C [REDACTED]	
Street Address: [REDACTED]	
City, State, Zip: [REDACTED]	

Date: 5/24/2023	ATTN: Litigation and Support***AOD***
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From: Gordon A. Graham	Exclusive Contact Requested
Title: Nonattorney Practitioner VA #39029 POA Code E1P	
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Type of Document Submitted:	
<input type="checkbox"/> Request for Board Hearing at VA Central Office in D.C.(Rule 703)	
<input checked="" type="checkbox"/> Request for Advancement of the Docket (Rule 902)	
<input type="checkbox"/> Request for Copy of Hearing Transcript (Rule 712)	
<input type="checkbox"/> Submission of New and Relevant Evidence associated with the Instant Appeal	
<input checked="" type="checkbox"/> VAF 10182 NOTICE OF DISAGREEMENT (BVA Review)	
<input type="checkbox"/> Motion for Reconsideration (Rule1002)	
<input checked="" type="checkbox"/> Other Fourteen (14) pages of legal brief	

Number of Pages Submitted (NOT including this cover sheet): Fifteen (15) Pages
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Department of Veterans Affairs

**DECISION REVIEW REQUEST: BOARD APPEAL
(NOTICE OF DISAGREEMENT)**

PART I - PERSONAL INFORMATION

1. VETERAN'S NAME (*First, middle initial, last*)

2. VETERAN'S SOCIAL SECURITY NUMBER

3. VETERAN'S VA FILE NUMBER (if different than their SSN)

4. VETERAN'S DATE OF BIRTH

5. IF I AM NOT THE VETERAN, MY NAME IS (First, middle initial, last) 6/633 -

6. MY DATE OF BIRTH (If I am not the Voter)

7. MY PREFERRED MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

I AM HOMELESS

**8. MY PREFERRED TELEPHONE
NUMBER (Include Area Code)**

(253) 313-5377

9. MY PREFERRED E-MAIL ADDRESS

10. MY REPRESENTATIVE'S NAME
Gordon A. Graham
VA #39029

PART II - BOARD REVIEW OPTION (Check only one)

11. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select.
(For additional explanation of your options, please see the attached information and instructions.)

11A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal.
(Choosing this option often results in the Board issuing its decision most quickly.)

11B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will provide within the next 90 days, but I do not want a Board hearing. *(Choosing this option may add delay to issuance of a Board decision.)*

11C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. *(Choosing this option may add delay to issuance of a Board decision.)*

PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD

12. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement.

Check here if you attached additional sheets. Include the Veteran's last name and last 4-digits of the Social Security number. 14 pages

Check the SOC/SSOC Opt in box if any issue listed below is being withdrawn from the legacy appeals process. <input checked="" type="checkbox"/> Opt In from SOC/SSOC	
A. Specific Issue(s)	B. Date of Decision
Entitlement to a higher original (initial) rating under §4.124a DC 8004 with staged Fenderson rating to include subjective symptoms	4/25/2023
***PLEASE FLASH VETERAN FOR TERMINALLY ILL ***	

PART IV - CERTIFICATION AND SIGNATURE

I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

13. SIGNATURE (Appellant or appointed representative) (Ink signature)

14. DATE SIGNED

Gordon A. Graham VA #39029 POA Code E1P

5/24/2023



Gordon A. Graham #39029

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

May 24, 2023

Re: [REDACTED] [REDACTED]
Flashed for Terminally Ill

Extra Pages for VAF 10182

Appellant, through counsel, now files his second Notice of Disagreement with the Secretary's rating decision (RD) of April 26, 2022, assigning a minimum 30% rating for his initial, original September 11, 2002, claim for paralysis agitans under §4.124a.

A new longitudinal review of the Veteran's claims file reveals a wealth of available medical information supporting the award of individual ratings under the auspices of §4.25(b) by operation of the correct regulation. This information was resubmitted to inform the Secretary of the contemporary status of the Veteran's actual medical condition at the time of his application for benefits. As the claim is complicated, Appellant will provide a brief history to clarify the nature of the disagreement.

History of the Instant Claim

9/11/2002—Veteran files VAF 21-526 Original claim for Agent Orange exposure.

11/20/2002--VA form 21-4138 submitted under oath attesting to "Disabilities: Tingling, numbness, pain & twitching in arms, hands, legs and feet. Tremoring hands. My hands don't want to do what my brain says to do."

3/17/2003—Rating Decision denying service connection for "hands shaking with hand/brain communications problems".

6/18/2010—Veteran reopens old claim for shaking hands claimed as myoclonus.

10/28/2010—Rating decision denying service connection for myoclonus.

2/09/2011—Veteran refiles yet again for Paralysis Agitans under DC 8004 based on recent inclusion as an herbicide presumptive.

10/25/2011—Rating Decision awards service connection for paralysis agitans (Parkinson's disease) under DC 8004 at 30%.

2/01/2012— Following NOD, RD awards, *inter alia*, 50% for right upper extremity, 20% for Left upper extremity, 20% for left lower extremity, 10% for right lower extremity, 30% for a major depressive disorder, 10% for balance impairment, 10% for speech impairment, 10% for constipation, 0% for erectile dysfunction and Special Monthly Compensation (SMC) for loss of use of a creative organ (SMC K).

8/15/2015 – Rating Decision denies earlier effective date for paralysis agitans.

8/13/2016—Statement of the Case (SOC) issued confirming and continuing the effective date to the reopening of the original claim.

3/24/2021—Supplemental claim filed for earlier effective date for award of paralysis agitans under authority of §3.816(c)(2)(i)(ii)(2021).

7/26/2021—Rating Decision denies entitlement to earlier effective date for entitlement to paralysis agitans.

4/19/2022—BVA decision Docket No. 211118-199054 grants earlier effective date of September 11, 2002, for entitlement to Parkinson's Disease.

4/26/2022—Rating decision (RD) awards 30% (minimum) under §4.124a DC 8004 for “ascertainable residuals” with no c&p or staged ratings.

6/15/2022--Veteran submits supplemental claim for earlier effective date with new and relevant evidence with duplicate PMRs . 2000-2008 medical reports document bilateral tremors and restless leg syndrome(11/16/1999), anxiety (12/27/2000) , vertigo (5/16/2002), and finally depression, anxiety, panic attacks(tingling in arms and cramps in legs-worse at night).

6/29/2022—RD confirms and continues award of 30% from September 11, 2002 to April 15, 2011.

7/06/2022-- Appellant files new VAF 10182 contesting the minimum award of 30% under 4.124a DC 8004.

12/19/2022-- BVA decision No. 220706-256541 is issued remanding the claim yet again for development via new retrospective c&p examination to identify all residual conditions/manifestations from 9/11/2002 to 4/15/2011.

1/15/2023-- VA clinician Vanessa Ohakam, NP conducts Acceptable Clinical Evidence (ACE) review of claims file and records current (2023) residuals and manifestations of Veteran's Parkinson's disease only.

2/09/2023—Addendum c&p ACE records review conducted by Patricia Memon, PA-C, opining that Parkinson's-like tremors did not begin until 2006.

3/23/2023— VA clinician Thomas Dykes, M.D. (Obstetrics and Gynecology) completes ACE review of claims file and proffers medical opinion that Parkinson's manifestations/residuals were symptoms of subdural hematoma.

3/31/2023— VA issues RD confirming and continuing 30% rating for retrospective period from 2002 to 2011.

4/25/2023— HLR RD confirms and continues 30% rating for minimal residuals of Parkinsons disease from 2002 to 2011.

This notice of disagreement ensues.

The Legal Landscape

As an initial matter in the retrospective quest from September 11, 2002, to April 15, 2011, for residuals, symptoms or manifestations, both objective and subjective, of the Veteran's Parkinson's disease, the Trier of fact is asked look to the previous BVA decisions which both granted service connection back to 2002 as well as what has been requested on remand more recently. Appellant will address that in his Discussion.

Part IV of the VA's Schedule of Rating Disabilities (VASRD) contains ratings instructions and criteria for same regarding Parkinson's Disease under §4.124a Diagnostic Code (DC) 8004. The generalized instructions in the preamble to the DCs instruct the VA examiner in the basics and dictate which codes will be used. To wit:

[With the exceptions noted, disability from the following diseases and their residuals may be rated from 10 percent to 100 percent in proportion to the impairment of motor, sensory, or mental function. Consider especially psychotic manifestations, complete or partial loss of use of one or more extremities, speech disturbances, impairment of vision, disturbances of gait, tremors, visceral manifestations, etc., referring to the appropriate bodily system of the schedule. **With partial loss of use of one or more extremities from neurological lesions, rate by comparison with the mild, moderate, severe, or complete paralysis of peripheral nerves**]

DC 8004 Paralysis Agitans (Parkinson's Disease) provides that the absolute minimum rating for any ascertainable manifestation or symptomatology whatsoever is 30%. However, the 30% is merely the beginning minimum rating and doesn't include other applicable diagnostic codes. As evidenced by hundreds of thousands of Veterans' Rating Decision "code sheets", as well as the most recent code sheet in the Appellant's file, the Secretary has complied with his own regulation §4.25(b) which states:

(b) Except as otherwise provided in this schedule, the disabilities arising from a single disease entity, e.g., arthritis, multiple sclerosis, cerebrovascular accident, etc., are to be rated separately as are all other disabling conditions, if any. All disabilities are then to be combined as described in paragraph (a) of this section. The conversion to the nearest degree divisible by 10 will be done only once per rating decision, will follow the combining of all disabilities, and will be the last procedure in determining the combined degree of disability.

At the bottom of the ratings criteria for DCs 8000 through 8025, is Note. To wit:

Note: It is required for the minimum ratings for residuals under diagnostic codes 8000-8025, that there be ascertainable residuals. Determinations as to the presence of residuals not capable of objective verification, i.e., headaches, dizziness, fatigability, must be approached on the basis of the diagnosis recorded; subjective residuals will be accepted when consistent with the disease and not more likely attributable to other disease or no disease. It is of exceptional importance that when ratings in excess of the prescribed minimum ratings are assigned, the diagnostic codes utilized as bases of evaluation be cited, in addition to the codes identifying the diagnoses.

In the Higher Level of Review (HLR) rating decision of April 25, 2023, on page 6 of 6, the Secretary avers, in haec verba:

“Tremors of the upper extremity are evaluated under diagnostic code 8514. Under that code, a 30 percent evaluation is warranted for the following: --Moderate incomplete paralysis of the major extremity (38 CFR 4.124a).

Discussion

The Veteran, absent competent legal counsel, has pursued his claims for Parkinson's disease sporadically since the award of service connection in 2011. The evidence of record is fragmented but paints an indelible picture of

symptoms and residuals recognized now, in retrospect, to be genuine manifestations of Parkinson's Disease.

The November 12, 2021, private independent medical opinion (IMO) submitted into evidence in the November 18, 2021, VAF 10182 was unequivocal that the evidence of record clearly and convincingly demonstrated the appellant suffered numerous manifestations of symptomatology in all four extremities consistent with Parkinson's disease.

BVA decision No. 211118-199054 granted service connection for Parkinson's disease based on several factors, including the private IMO. Most importantly, the contemporary evidence of record supported numerous instances of Parkinson's-like tremors in all four extremities, occasional balance problems, anxiety attacks, and clinical depression long before the Veteran suffered a fall in 2006 during an especially egregious episode at work.

During development of the BVA remand below, the Veteran underwent a c&p review on January 15, 2023, conducted via the ACE standard of review-i.e., records reviewed without an in-person consult. This exam, by VA clinician Vanessa Ohakam, NP, unfortunately misread the requirements for a retrospective review and merely regurgitated a synopsis of the Veteran's current symptomatology and manifestations based entirely on the available evidence of record.

An addendum was requested to comply with the BVA remand. On February 9, 2023. Patricia Memon, PA-C, opined that the medical evidence reflected the Veteran's "myoclonic" movements began in September 2006, however voluminous evidence in the VBMS claims folder, as well as a summary of the evidence reviewed in the private IMO show that the VA was in constructive possession of numerous medical records-both private as well as VA-that revealed the Veteran had continuously suffered exactly what he filed for in October 2002. PA-C Memon went on to recite from medical records beginning

in 2006 and only opined on those through the eventual award of service connection in 2011.

For this reason, the opinion is defective because it fails to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present. (§§4.2; 4.6; 4.7; 4.10). Moreover, the addendum fails to grasp the fact that the Board had already granted service connection for Parkinson's disease effective September 2002 based on "tingling, numbness, pain + twitching in arms, legs, hands and feet." *Clemons* *infra*.

As a matter of law, a Veteran is capable of opining on that which comes to him via his five senses. See *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (noting general competence of laypersons to testify as to symptoms but not medical diagnoses). A claim for VA disability benefits generally requires an intent to seek benefits expressed in writing that identifies the particular benefits sought." *DeLisio v. Shinseki*, 25 Vet.App. 45, 53 (2011). However, recognizing that veterans are not medical experts, they are generally not expected to provide a precise medical diagnosis when filing a claim for benefits. *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009). A veteran may identify a condition in a claim simply "by referring to a body part or system that is disabled or by describing symptoms of the disability." *DeLisio*, 25 Vet.App. at 53 (internal quotation marks omitted).

On March 26, 2023, a medical opinion was proffered by VA-contracted clinician Thomas Dykes, M.D. who baldly averred that prior to May 2011, "the only documented complaint was upper extremity tremors." He further opined that "Prior to this evaluation, the veteran's only reported symptoms suggest only tremors of the upper extremities from September 2002 through the exam in 2011." Dr. Dykes opined further that "Therefore, prior to the exam in 2011, the only demonstrable effects of Parkinson's or parkinsonism were right upper extremity tremors."

When the issue involves medical diagnosis or etiology, competent medical evidence is required. See *Lathan v. Brown*, 7 Vet.App. 359, 365 (1995) (citing *Grottveit v. Brown*, 5 Vet.App. 91, 93 (1993)). Further in *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012), the Court held "If the opinion is based on an inaccurate factual premise, then it is correct to discount it entirely." (overruled on other grounds by *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021)).

Nieves-Rodriguez v Peake 22 Vet. App. 295(2008) is on point in the instant appeal - i.e., "It should now be obvious that a review of the claims file cannot compensate for lack of the reasoned analysis required in a medical opinion. It is the factually accurate, fully articulated, sound reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion." Dr. Dykes avers he reviewed the entire VA e-folder. But this fails to explain how he could overlook eight years of medical records recording numerous manifestations of Parkinson's-like symptomatology to include descriptions from 2000-2006 citing restless leg syndrome, myoclonic jerking limbs in all four extremities, rule out Parkinson's, dizziness, choreiform movements etc.

In any event, the Board, as the Trier of fact, has already determined the private IMO was more probative than prior medical examinations which declined to diagnose Parkinson's. Thus, the post hoc rationalization that symptomatology prior to May 2011 is immaterial or lacks probative value is of no consequence. As for the doctor's opinion that symptoms on or around 2006 "were not Parkinson's but were the result of a subdural hematoma." Dr. Dyke failed to consider that the Veteran fell due to his disabilities and any resultant injuries were secondary manifestations under §3.310.

Contemporary medical records too numerous to list here more than substantiate the Veteran had separably ratable disease processes which should have been addressed in a contemporary retrospective examination which never occurred. Indeed, the VBMS record shows the BVA decision was promulgated on April 19, 2022, whereas the RD was promulgated a mere five

days later on April 26, 2022 without any retrospective Fenderson staged rating whatsoever.

The Veteran was forced to request a HLR informal conference to point out this violation in the duty to assist on May 9, 2022. In spite of it, the RD was confirmed and continued with no evidentiary development to support it. The Appellant was forced to refile a supplemental claim and to excavate and present the relevant evidence the Secretary was in constructive possession of all along. This frustrates judicial review.

On June 29, 2022, the Secretary again confirmed and continued the 30% minimum rating for Parkinson's in violation of the clear and conspicuous instructions in the preamble of §4.124a (disturbances of gait, tremors) as well as the note at the bottom of DC 8004 instructing the rating official to rate subjective residuals based on the diagnosis recorded. Reasonable minds can only concur that if the claimant is unable to drive or write legibly, he suffers more than just a minimal functional impairment.

Medical experts can mutually concur that Parkinson's disease is a single disease entity with multiple manifestations. In the instant case, the Secretary conceded the Appellant suffered a host of disabilities secondary to the index disease. A code sheet dated February 1, 2012, records, *inter alia*, many Parkinson's residuals to include DC 8004-8515 for bilateral upper extremities, DC 9434 for depression, DC 8520 for bilateral lower extremities, DC 6204 for balance impairment, DC 7319 for constipation, DC 8210 and DC 7522 erectile dysfunction-all with an effective date a month earlier than the original May 11, 2011, grant of service connection. The Secretary would have us believe these all additional disabilities manifested suddenly about the time the Veteran reopened his claim in 2010.

Of immense concern is why these clearly identified symptoms from 2002 to 2011 were not rated under their own DCs under the authority of 4.25(b) in the retrospective contemporary c&p exams as requested by the Board in the

December 19, 2022 remand. For all intents and purposes, the BVA's award of entitlement to service connection for Parkinson's disease with residuals has now become the original claim. Thus, by operation of law, the August 15, 2012, RD denying an earlier effective date for the host of manifestations above and beyond the minimal award of 30% for ascertainable residuals becomes void ab initio and the award must grant these as part of the original claim. §3.400(a).

In the Higher Level of Review (HLR) rating decision of April 25, 2023, the evidence section is silent for important contemporary lay testimony located in VBMS which contradicts the findings of fact in the retrospective rating and opinion provided by VA clinician Thomas Dykes, M.D. to wit:

11/20/2002--VA form 21-4138 submitted under oath attesting to "Disabilities: Tingling, numbness, pain & twitching in arms, hands, legs and feet. Tremoring hands. My hands don't want to do what my brain says to do."

11/18/2021--Private medical opinion by Susan Lee M.D. citing slight tremor of left upper extremity in December 2000 and use of Sinemet for restless leg syndrome-now identified as Parkinson's in the April 2022 BVA decision.

6/15/2022-- submittal of duplicate Private Medical Records already part of the efolder in conjunction with supplemental claim for higher rating labeled as PMRs 2000-2008 document bilateral tremors and restless leg syndrome(11/16/1999), anxiety (12/27/2000) , vertigo (5/16/2002), and finally depression, anxiety, panic attacks (tingling in arms and cramps in legs-worse at night).

In the same Higher Level of Review (HLR) rating decision of April 25, 2023, on page 5 of 6, the Secretary states:

"While we do acknowledge the subjective symptoms reported which were documented within BVA decision date April 19, 2022, the analysis from the VA c&p examiner indicates that the only symptom that can be clearly linked to Parkinson's disease is moderate tremors of the right upper extremity. As indicated in the exam remarks above, the examiner was unable to determine when other symptoms developed without resorting to speculation. The examiner's opinion is

considered supported by appropriate rationale and is sufficient for ratings purposes.”

Likewise, in the same HLR rating decision of April 25, 2023, on page 6 of 6, the Secretary baldly declares, in haec verba:

“Tremors of the upper extremity are evaluated under diagnostic code **8514**. Under that code, a 30 percent evaluation is warranted for the following: --Moderate incomplete paralysis of the major extremity (38 CFR 4.124a).

While the Veteran is willing to concede a typographical error in the HLR RD, an examination of the December 6, 2013, rating decision code sheet shows DC **8515** as the controlling DC. And, while the Veteran is willing to further concede that the regulations concerning how to rate neurological lesions of the extremities may have changed in the interim since 2013 to employ DC 8514, this explanation simply doesn't comport with the reality of the evidence of record. The Veteran's ratings code sheet for the most recent HLR of April 25, 2023, lists DC **8513** as the correct regulation controlling §4.124a for neurological lesions of the extremities. See ***Russell v. Derwinski***, 3 Vet. App. 310, 313-14 (1992) “an error either undebatably exists or there was no error within the meaning of § 3.105(a).

See ***In re Lee***, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) (“[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.”) (quoting ***Burlington Truck Lines, Inc. v. United States***, 371 U.S. 156, 168 (1962))); ***McCray v. Wilkie***, 31 Vet.App. 243, 258 (2019) (“[T]he Secretary's impermissible post-hoc rationalization cannot make up for shortcomings in the Board's assessment of the medical opinion.”); ***Simmons v. Wilkie***, 30 Vet.App. 267, 277 (2018) (holding that the “Court cannot accept the Secretary's post-hoc rationalizations” to cure the Board's reasons or bases errors); ***Smith v. Nicholson***, 19 Vet.App. 63, 73 (2015) (“[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.”).

Appellant has done everything in his power to present the evidence, as it was known, from 2002 to 2011 and has been thwarted at every turn. Presentation of clear and convincing evidence which would be dispositive in any legal proceeding has been ignored or portrayed as less than credible. Nowhere in the four corners of the history of the claim can there be ascertained a sympathetic reading of the Veteran's evidence nor a sympathetic reading of the claims.

Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record." 38 U.S.C. § 7104(d)(1). This statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that VA decisionmakers do not exercise "naked and arbitrary power" in deciding entitlement to disability benefits. See **Yick Wo v. Hopkins**, 118 U.S. 356, 366 (1886) (Matthews, J.)

Appellant avers he has been given far less than the benefit of the doubt in his pleadings. He has been subjected to a higher level of review than permitted by law. His 30% retroactive rating is predicated on a lack of evidence of treatment, essentially. See **Savage v. Gober**, 10 Vet. App. 488, 495-98 (1997) "Symptoms, not treatment, are the essence of any evidence of continuity of symptomatology." (citing **Wilson v. Derwinski**, 2 Vet. App. 16, 19 (1991)). See also See **Saunders v. Wilkie**, 886 F.3d 1356, 1362-63 (Fed. Cir. 2018) "We have recognized that the word "disability" refers to a "functional impairment, rather than the underlying cause of the impairment."

This representative, while a VA agent, is not the equivalent of an attorney and thus the "sympathetic reading" of the claim attaches. See **Comer v. Peake**, 552 F.3d 1362, 1369 (Fed.Cir.2009) ("The VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him."). See also **Cook v. Brown**, 68 F.3d 447, 451 (Fed.Cir.1995) "[R]epresentation by an organizational aide is not equivalent to

representation by a licensed attorney. Although aides from veterans' service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans' adjudicatory system, they are not generally trained or licensed in the practice of law."

Conclusion

The pro-Veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit. See, e.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991).

The Supreme Court first articulated this canon in *Boone v. Lightner* to reflect the sound policy that we must "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575 (1943). This same policy underlies the entire veterans benefit scheme.

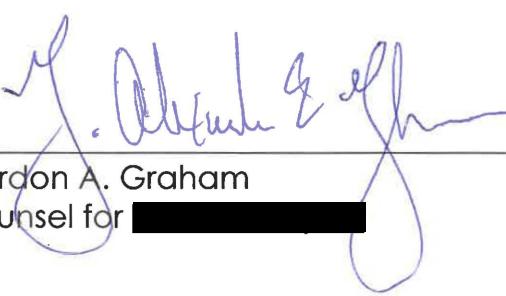
Barrett v. Principi, 363 F.3d 1316, 1320 (Fed. Cir. 2004) ("[T]he veterans benefit system is designed to award entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign."

Appellant seeks compensable ratings under §4.25(b) as promised by statute and regulation for his objective and subjective recorded diagnoses. That the Secretary is either unwilling or incapable of providing this is clearly and unmistakably adversarial. This marks the third trip to the BVA in search of those benefits promised to him by law. The Secretary has spoken. See *McWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1991). "Yet, [w]here [an] appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by [the] appellant, and ignored by [VA], to be conceded."

Appellant believes §3.400(a) is for application in the instant scenario as the BVA decision awarding service connection under §3.816(c)(2) had the inadvertent effect of granting entitlement to his *original* claim for benefits. The August 15, 2012, RD, on page 2 of 6, in the evidence section, specifically notes the review of private medical records from Capital [sic] Neurology from December 27, 2000, to September 26, 2006. Thus, it can be said that the Secretary has had constructive possession of these records all along-including during the pendency of the instant claims stream seeking an earlier effective date for *all* residuals of Parkinson's disease. See **Bell v. Derwinski**, 2 Vet. App. 611, 613 (1992) (records generated by VA facilities that may have an impact on the adjudication of a claim are considered constructively in the possession of VA adjudicators during the consideration of a claim, regardless of whether those records are physically on file).

Appellant asks for no more than his due but certainly no less. He has been declared terminally ill, both by his Parkinson's disease as well as his interstitial lung disease. He only wishes to clear up his claims and appeals before passing away. He maintains his service to America promised him this when he raised his right hand and swore to defend her in 1966.

Respectfully submitted,


Gordon A. Graham
Counsel for [REDACTED]