# 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

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|---|---|
| **Veteran:** [redacted] | **VSC:** VBAWACO349 |
| **C-File or SSN:** | CSS [redacted] |
| **Street Address:** | [redacted] |
| **City, State, Zip:** | Quinlan, TX 75474 |

| | |
|---|---|
| **Date:** 9/24/2024 | **ATTN:** Docketing Lit. & Support Division |


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|---|
| **From: Gordon A. Graham** |
| **Title: Nonattorney Practitioner VA #39029 POA Code E1P** |
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**Type of Document Submitted:**

| | |
|---|---|
| ☐ | Request for Board Hearing at VA Central Office in D.C.(Rule 703) |
| ☐ | Request for Advancement of the Docket (Rule 903) |
| ☐ | Request for Copy of Hearing Transcript (Rule 712) |
| ☐ | Submission of New and Relevant Evidence associated with the Instant Appeal |
| ☒ | VAF 10182 NOTICE OF DISAGREEMENT (BVA Review) Direct Venue |
| ☐ | Motion for Reconsideration (Rule1002) |
| ☒ | Other Appellant's legal brief of eleven (11) Pages |

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| Number of Pages Submitted (NOT including this cover sheet): Twelve (12) Pages |

OMB Approved No. 2900-0674
Respondent Burden: 30 Minutes
Expiration Date: Mar. 31, 2025

VA U.S. Department of Veterans Affairs

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

## PART I - PERSONAL INFORMATION

[redacted]

N'S DATE OF BIRTH
1988

*f I am not the Veteran)*

ERIENCING
SSNESS

| NUMBER *(Include Area Code)* | | |
|---|---|---|
| (253) 313- 5377 (law office) | gordon.graham@va.gov | Gordon A. Graham |

## PART II - BOARD REVIEW OPTION *(Check only one)*

10. 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.)*

- [X] 10A. 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.)*
- [ ] 10B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will submit to the Board with my VA Form 10182 or within the 90 days of the Board's receipt of my VA Form 10182. *(Choosing this option will extend the time it takes for the Board to decide your appeal.)*
- [ ] 10C. 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. I want the hearing type below: *(Choosing this option will extend the time it takes for the Board to decide your appeal.)*
  - [ ] Central Office Hearing *(I will attend in person in Washington, DC)*
  - [ ] Videoconference Hearing *(I will go to a Regional Office)*
  - [ ] Virtual Telehearing *(I will attend using an internet-connected device) (Important: **Provide your e-mail address** and Representative in Part I)*

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

11. 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 *(e.g., service connection, disability evaluation, or effective date of award).*

- [ ] Check here if you are including a request for an extension of time to file the VA Form 10182 due to good cause and then attach additional sheets explaining why you believe there is good cause for the extension.
- [ ] Check here if you are appealing a denial of benefits by the Veterans Health Administration (VHA).

| A. Specific Issue(s) | B. Date of Decision |
|---|---|
| Entitlement to aid and attendance of another under authority of §§3.350(b)(3); 3.351(c)(3) based on service connected seizure disorder under §4.124a DC 8911 and migraine | 8/15/2024 |
| headaches under §4.124a DC 8100. | |
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| | |
| | |

**C. Additional Issue(s)**

- [X] Check here if you attached additional sheets. Include the Veteran's last name and the file number. Eleven (11) pages legal brief

## 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.

| 12. SIGNATURE *(Appellant or appointed representative) (Ink signature)* | 13. DATE SIGNED |
|---|---|
| Gordon A. Graham VA #39029 POA E1P | 9/24/2024 |



**PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.**

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

September 24, 2024

Veteran: [redacted]
Subject: Rating Decision of 8/15/2024

## BEFORE THE DEPARTMENT OF VETERANS AFFAIRS

## Appellant's Brief to Accompany VA Form 10182 NOD

Appellant, through counsel, now files her VAF 10182 Notice of Disagreement with the August 15, 2024, rating decision (RD) denying aid and attendance of another under 38 CFR §3.350(b)(3) for her epilepsy disorder with both grand mal and petite mal seizures and the implicit denial of her near-constant, debilitating migraine headaches.

Because appellant is proceeding *pro se* with a VA Agent, she is entitled to both a sympathetic reading of her informal brief and a liberal construction of her arguments. See ***Calma v. Brown***, 9 Vet.App. 11, 15 (1996); ***De Perez v. Derwinski***, 2 Vet.App. 85, 86 (1992).

Appellant wishes to clarify the disagreement and provide the Trier of fact with a road map to the dispositive evidence weighing in her favor which has been a matter of record during the pendency of the current claim stream but doesn't seem to have been considered. Hence, Appellant seeks *de novo* review before a higher tribunal as promised in 38 USC §7104.

## History of the Claim

2/11/2022-- Veteran files claim for seizures (not found in VBMS).

3/23/2022-- RD grants service connection (SC), inter alia, for headaches at 30%.

8/16/2022--Veteran files 526 for seizure disorder and increase for headaches.

8/16/2022-- RD grants SC, *inter alia*, for seizures, petit mal at 20% and Raynaud's disease at 10%.

11/16/2022-- RD confirms and continues 20% rating for seizures and 30% for headaches.

1/04/2024-- Veteran files a VA Form 21-2680 requesting a classification and pension examination for entitlement to Special Monthly Compensation (SMC) due to her epileptic seizures with near constant debilitating headaches.

1/09/2024-- Veteran submits VAF 21-4138 Statement in Support of Claim.

7/12/2024-- RD grants 50% for migraine headaches and confirms and continues 20% rating for petit mal seizures.

7/19/2024-- Veteran files VAF 20-0996 requesting HLR with 7/12/2024 evaluation of seizure disorder.

8/15/2024-- RD denies, *inter alia*, a&a of another.

This Appeal ensues.

# The Legal Landscape

In ***Bankhead v. Shulkin***, 29 Vet.App. 10, 22 (2017), the Court held the Secretary is required to "engage in a holistic analysis" of the claimant's symptoms to determine the proper disability rating.

In ***White v. Illinois***, 502 U.S. 346, 355-56 (1992) the Court held statements made for medical diagnosis or treatment has been deemed by the Court to be exceptionally trustworthy because the declarant has a strong motive to tell the truth to receive a proper diagnosis or treatment.

"The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." ***Barrett v. Nicholson***, 466 F.3d 1038, 1044 (Fed.Cir.2006); see also ***Jaquay v Principi,*** 304 F.3d at 1280 (2002) (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. To the contrary, the VA "has the affirmative duty to assist claimants by informing veterans of the benefits available to them and assisting them in developing claims they may have.)"

The "fair process doctrine" as an obligation placed on VA to provide claimants fair process in the adjudication of their claims. This may include processes not required by statute or regulation if the principle of fair process requires an additional process because "it is implicitly required when viewed against [the]underlying concepts of procedural regularity and basic fair play of the VA benefits adjudicatory system." ***Smith v.Wilkie***,32 Vet.App.332,337 (2020).

In ***Saunders v. Wilkie***, 886 F.3d 1356, 1362–63 (Fed. Cir. 2018), the Court held "We have recognized that the word "disability" refers to a "functional impairment, rather than the underlying cause of the impairment."

In ***Turco v. Brown,*** 9 Vet. App. 222, 224 (1996), the Court held eligibility for special monthly compensation by reason of regular need for aid and attendance requires that at least one of the factors set forth in VA regulation is met, but not all.

In ***Clemons v. Shinseki***, 23 Vet. App. 1, 5 (2009), the Court held a claimant "[does] not file a claim to receive benefits only for a particular diagnosis, but for the affliction his . . . condition, whatever that is, causes him." Consequently, VA "should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim," taking into consideration "the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." VA commits error "when it fail[s] to weigh and assess the nature of the current condition the appellant suffer[s] when determining the breadth of the claim before it." ***Id***. at 6.

See ***Arneson v. Shinseki***, 24 Vet.App. 379, 387 (2011) ("In the claimant-friendly world of veterans benefits, 'the importance of systemic fairness and the appearance of fairness carries great weight.'" (quoting Hodge v. West, 155 F.3d 1356, 1363 (Fed. Cir. 1998))).

In ***Akles v. Derwinski,*** 1 Vet.App. 118, 121 (1991), the Court noted VA's policy to consider SMC where applicable). See also ***Bradley v. Peake***, 22 Vet. App. 280, 291(2008) ("Accordingly, any effective date must be based on that point in time when the evidence first supported an award of SMC, which may be well before Mr. Bradley raised the issue of his entitlement thereto. See 38 U.S.C. §§ 5110(a); 1114(s); 38 C.F.R. §3.400(o) (2008)".

In ***Moreira v. Principi***, 3 Vet.App. 522, 524 (1992) the Court held SMC is available when, "as the result of service-connected disability," a veteran suffers additional hardships above and beyond those contemplated by VA's schedule for rating disabilities. See 38 U.S.C. § 1114(k)-(t). The rate of SMC "varies according to the nature of the veteran's service-connected disabilities."


[redacted]

In ***AB v. Brown***, 6 Vet. App. 35, 38 (1993) the Court held applicable law mandates that when a veteran seeks an original or increased rating, it will generally be presumed that the maximum benefit allowed by law and regulation is sought, and it follows that such a claim remains in controversy where less than the maximum benefit available is awarded.

In ***Robinson v. Shinseki,*** 557 F.3d 1355 (Fed Cir. 2009), the Court held, using the disjunctive 'or', that the Board is required to consider all issues raised either by the claimant or by the evidence of record.

In ***Ingram v. Nicholson***, 21 Vet. App. 232, 256-57 (2007), the Court held "It is the pro se claimant who knows that symptoms he is experiencing and that are causing him disability... [and] it is the Secretary who know the provisions of title 38 and can evaluate whether there is a potential under the law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission."). A claimant may satisfy this requirement by referring to a body part or system that is disabled or by describing symptoms of the disability.

## Discussion

Because appellant is proceeding pro se with a VA Agent, she is entitled to both a sympathetic reading of her informal brief and a liberal construction of her arguments. See ***Calma v. Brown***, 9 Vet.App. 11, 15 (1996); ***De Perez v. Derwinski***, 2 Vet.App. 85, 86 (1992).

From the history of the claim stream as recorded in VBMS and listed above, the Trier of Fact can only infer that the Secretary has found tension with Appellant's request for entitlement to SMC at the L rate under §3.350(b)(3).

In the RD dated August 15, 2024, the Secretary notes in his **Introduction**, that the RD is the product of claims for increase filed on January 4, 2024, and May 29, 2024. To be anally specific, Appellant's January 2024 filing stated clearly that she was requesting entitlement to aid and attendance of another due solely to her frequent, recurrent seizures and headaches, secondary to her service connected residuals of Lyme disease.

The Appellant asks the Board to take note of the fact she was *pro se* during the pendency of the current claim stream(s) on appeal. As she was unrepresented, she can be excused for her unfamiliarity with §4.124a DC 8100 headaches. Nevertheless, it can be stated categorically that she clearly expressed dissatisfaction with the 50% total schedular rating for headaches and sought the highest and best rating attainable even if that required an extraschedular rating. As the Board is permitted to consider extraschedular entitlement, Appellant presents the argument under 38 USC §7104 on appeal. ***AB***, ***Robinson, Ingraham***, all *supra.*

On January 4, 2024, Appellant sought entitlement to aid and attendance due to the aforementioned disabilities of the residuals of the Lyme Disease to include both petit mal, as well as Grand mal seizures with extremely debilitating headaches, not otherwise specified, which were currently rated as total 50% schedular. As noted, having no knowledge of ratings criteria, she clearly and convincingly sought a higher rating.

The August 15, 2024, RD is devoid of any mention of a headaches rating. Reasonable minds can only concur that the denial of an increased rating via an extraschedular consideration was implicitly denied. In ***Adams v. Shinseki,*** 568 F.3d 956, 961-65 (Fed. Cir. 2009), the Court held "A claim for benefits, whether formal or informal, remains pending until it is finally adjudicated. 38 C.F.R. § 3.160(c); see ***Richardson v. Nicholson***, 20 Vet.App.64, 72 (2006). A claim will also be considered to be pending if the DVA has failed to notify the claimant of the denial of his claim or of his right to appeal an adverse decision. ***Cook v. Principi***, 318 F.3d 1334, 1340 (Fed. Cir. 2002) (en banc).

As both Appellant and her VA representative are not attorneys, the August 2024 RD is presumed to be an implicit denial for headaches under any scenario- both schedular or extraschedular. Given this ambiguity, Appellant avers the entitlement to an extraschedular rating for headaches is legally before the Board. 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."

Turning to the August denial of entitlement to a&a, discussed on pages 5 and 6 of the RD, the Secretary takes the Veteran on a guided safari of §3.352(a) while completely glossing over his phrase "or physical or mental incapacity which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to the daily environment." The guided tour included the well-known holding that "It is only necessary that the evidence shows that the claimant is so helpless as to need aid and attendance, not that there be a constant need."

On page 6, paragraph 2, the Secretary contends the Appellant's treating physician, the author of the Appellant's VA Form 21-2680, Andrea N. Welborn, M.D., Neurologist, failed to explain a rationale for why the Appellant needed a&a stating, *in haec verba*:

*"Your examiner indicated that you must walk with a cane due to having an unsteady gait, and you experience seizures, syncope and vertigo. This examiner did not, however, explain how your seizures and migraines cause you to need the regular aid and attendance of another person to perform your basic daily activities."*

Appellant contends this is the incorrect application of facts to law. §3.351(c)(3) is the applicable regulation for determining entitlement to aid and attendance. The regulation specifically requires that a claimant needs to establish a factual need for aid and attendance under the criteria set forth in §3.352(a). Presumably, the Appellant meets the criteria set forth in the regulation by the completion of a 21-2680 signed by competent medical authority under

Section VI: Examination Information. Dr. Welborn is a certified neurologist and also the Veteran's treating physician. See VBMS entry of February 26, 2024, Document Type Medical Treatment Record - Non Government Facility (15 pages) (last seizure 12/2023 with LOC [loss of consciousness].

While the Court does not give undue deference to the treating physician rule, per se, they are allowed to take judicial note of this fact when making a decision on weighing the significance to attach to the evidence. See ***White v. Principi***, 243 F.3d 1378 (Fed. Cir. 2001); ***Van Slack v. Brown***, 5 Vet. App. 499, 502 (1993); and ***Chisem v. Brown***, 4 Vet. App. 169 (1993) (noting that there is no "treating physician rule" requiring the Board to give additional evidentiary weight to opinions of doctors who have evaluated or treated the Veteran over time, but it is permissible for the Board to bear this length of treatment in mind when considering just how familiar with the Veteran's condition the clinician may be).

In the submitted VA 21-2680, dated January 4, 2024, Dr. Welborn opined in Box 17 that the predominant disease processes afoot were seizures and migraine headaches. In Box 18, Dr. Welborn endorsed Epilepsy and Migraine as being permanently and totally disabling. In Block 27, the neurologist noted that the Appellant required assistance with bathing/showering, tending to hygiene needs and the additional activities of laundering and meal preparation. ***Turco supra***. Most importantly, Dr. Welborn noted that the Appellant was unable to drive. By operation of law, the State of North Carolina forbids operation of a motor vehicle in a known setting of an active, chronic seizure disorder.

Interestingly, the Secretary baldly glosses over his own requested classification and pension examination where, on page 2 of 6, the examining clinician, Brandi B. Pursel, D.O. (VES), contradicts the Secretary's denial of a&a by observing the Appellant wears a back brace and wrap which requires help putting it on and which, by reason of the particular disability, cannot be done without the aid of her son or husband. See ***Sickels v. Shinseki,*** 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011) (holding that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without

Appellant is mystified as to what she lacks to successfully navigate her way to entitlement to a&a. The August 2024 RD is silent as to §3.103(f)(5). Appellant waives any procedural due process violation of the duty to assist in this regard and asks the Board to make this determination (a&a) in the first instance.

The VA frequently contends a total schedular rating or a TDIU is required to qualify for a&a. This is untrue. The only regulation requiring a 100% or TDIU, according to §3.350 is §3.350(i) (SMC at the 'S' rate). While Appellant may lack a total schedular rating for her epilepsy or a total rating for migraines on an extraschedular basis, the need for a&a has been met since she has established a diagnosed factual need for same.

As a matter of clarification, in calculating whether the Veteran was entitled to SMC at the L rate, it appears the Director's decision may have been premised on information contained in the Veterans Benefits Administration (VBA) Adjudication Procedures Manual (M21-1). The M21 suggests that SMC(l) has a schedular/extraschedular requirement. See M21-1, Part IV, Subpart ii., Chapter 2, Section H, Topic 8, Subtopics a-c. Specifically, the M21 indicates that a single disability evaluated at 100 percent disabling may be required for a grant of aid and attendance, and that without such a total disability, referral to the Director of Compensation may be warranted for extraschedular consideration.

Appellant fully well recognizes the BVA is not bound by the Secretary's Manual but merely points this out as a possible reason for the denial of SMC L under §3.350(b)(3) when all other factors have been met.

## Conclusion

Appellant feels the appeal is in equipoise and asks for the time-honored pro-Veteran canon of statutory construction most recently espoused in

***Henderson v. Shinseki,*** 562 U.S. 428,441 (2011) ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.").

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.

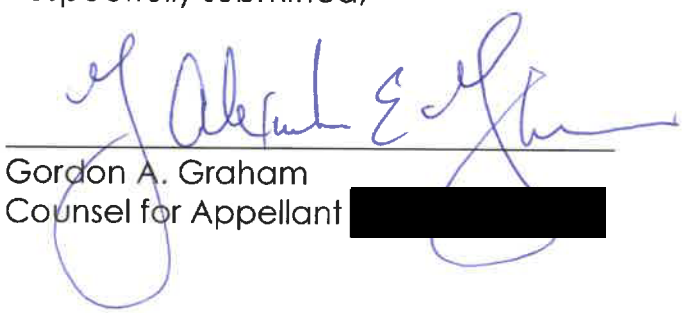
Lastly, in ***Fishgold vs. Sullivan Drydock & Repair Corp.***, 328 U.S. 275, 66 S. Ct. 1105 (1946) the Supreme Court declared that veterans laws are "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need," and the Court showed us how to do so—"construe the separate provisions of the [law]as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." The slipping stems from two words in an oft cited pro-veteran canon case, ***Brown vs. Gardner***, 115 S. Ct. 552,130 (1994 : "interpretive doubt."

Appellant also asks for consideration of an extraschedular rating that can comprehend her frequent debilitating headaches. As the August 15, 2024, adjudication can only be read to be an implicit denial, she feels it qualifies for "one decision on appeal" as promised by statue and regulation.

Pursuant to the recent single judge memorandum decision in Williams v. McDonough WL _____ CAVC 21-7363 decided June 24, 2024,

Appellant does not desire to change her direct venue Notice of Disagreement and waives consideration at this time.

Respectfully submitted,



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Counsel for Appellant [redacted]

The above legal brief is free of any Artificial Intelligence in its construction. It is the sole work product of the VA representative only.