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Veteran:
Subject: VAF 10182 Notice of Disagreement

Before the Department of Veterans Affairs
Appellant's Legal Brief

Appellant, through counsel, now files his Notice of Disagreement in the BVA AMA Direct lane with the March 19, 2025, rating decision (RD) denying, inter alia, entitlement to Special Monthly Compensation (SMC) L aid and attendance of another under §§3.350(b)(3); 3.351(c)(3); 3.352(a).

Because Appellant is proceeding *pro se*, he is entitled to both a sympathetic reading of his informal brief and a liberal construction of his arguments. See ***Calma v. Brown***, 9 Vet.App. 11, 15 (1996); ***De Perez v. Derwinski***, 2 Vet.App. 85, 86 (1992). As the Veteran's representative is merely a VA Agent , *pro se* status continues to attach to the claimant/Appellant. In ***Cook v. Brown***, 68 F.3d 447, 451 (Fed.Cir.1995), the Court held "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."

In order to clarify the argument for the above entitlement for the Trier of Fact, the Veteran will provide a brief recitation of the history of the claim leading up to the adversarial RD being appealed. All dates listed correspond with the VBMS "Date Received" column.

History of the Instant Appeal

?/?/2016-- Veteran accepted into Program of Comprehensive Assistance for Family Caregivers (PCAFC). Confirmed and continued as of today's date.

11/08/2016-- VA c&p exam Psych DBQ completed by Sara Xxxx -xxxxxx, Psy.D. diagnoses Veteran with 70% rating and endorses, for VA ratings purposes, the inability of the Veteran to keep himself ordinarily clean and presentable (neglect of personal appearance and hygiene).

7/24/2018-- Veteran files VAF 21-526 for "Special Monthly Compensation for all service connected disabilities".

7/24/2018—VA 21-2680 completed by Veteran's treating physician VA clinician Hxxxxxx Xxxxxxx, M.D. of the Miami, FL VAMC dated 4/26/2018 notes when Veteran's back pains flare, he requires aid and attendance of another in bathing and tending to other hygiene needs.

7/24/2018-- Veteran submits VAF 21-4138 noting he has been receiving VHA PCAFC Caregiver's stipend for his severe injuries for three years.

11/04/2018—DBQ LHI Medical Opinion notes neck pain and headaches incurred via head trauma on 4/20/2001 in the line of duty are less likely as not evidence and Veteran does not carry a diagnosis of TBI.

3/12/2019—DD 215 associated with claims file showing belated Combat award of the USMC Combat Action Ribbon.

5/02/2019-- Rating Decision (RD) denies, *inter alia*, entitlement to a&a. VA Examiner concedes Veteran needs a&a but declares he has no single rating of 100%.

12/09/2019-- VAF 21-2680 completed by Miami, FL VAMC psychiatrist Jxxxx Xxxxxxx, M.D. Psychiatry dated 9/19/2019 notes diagnoses of chronic PTSD, TBI and persistent depressive disorder. Endorses inability to prepare meals and requiring medication management due to memory problems related to TBI.

12/09/2019-- PTSD DBQ review c&p exam by Wende X. Xxxxxxxx, Psy.D. diagnoses Veteran with PTSD, Major Depressive disorder with psychotic symptoms; total occupational and social impairment; suicidal ideation on a continued basis following two documented attempts, obsessional rituals which interfere with routine activities, impaired impulse control, such as unprovoked irritability with periods of violence, spatial disorientation, **persistent delusions and hallucinations**, grossly inappropriate behavior, persistent danger of hurting self or others, neglect of personal appearance and hygiene and the intermittent inability to perform activities of daily living, including maintenance of minimal personal hygiene. (emphasis added to the original).

12/12/2019-- RD increased PTSD rating to 100% but denies, *inter alia*, aid and attendance.

11/08/2024-- Veteran files VAF 21-2680 completed by Katina Xxxxx-Xxxxxx, APRN Psychiatric/Mental Health, dated 10/27/2024 endorsing inability to accomplish ADLs of bathing/showering, dressing, tending to hygiene needs, toileting and medication management.

3/19/2025-- RD denies, *inter alia*, entitlement to aid and attendance of another.

This appeal ensues.

The Legal Landscape

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.

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 (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 ***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]. See also §3.103(a).

In ***Tropf v. Nicholson***, 20 Vet.App. 317, 320 (2006), the Court held "If the plain meaning of § 3.350 is clear from its text and structure, then that meaning controls and that is the end of the matter". See also 3.352(a).

38 USC §1114(l) states, in haec verba: "(l)if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of both feet, or of one hand and one foot, or is blind in both eyes, with 5/200 visual acuity or less, or is permanently bedridden **or with such significant disabilities as**

to be in need of regular aid and attendance, the monthly compensation shall be ……" (emphasis added to original statute).

38 CFR §3.352 Criteria for determining need for aid and attendance states unequivocally: "The following will be accorded consideration in determining the need for regular aid and attendance (§ 3.351(c)(3): inability of claimant to dress or undress himself (herself), or to keep himself (herself) ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); inability of claimant to feed himself (herself) through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment."… "It is not required that all of the disabling conditions enumerated in this paragraph be found to exist before a favorable rating may be made. The particular personal functions which the veteran is unable to perform should be considered in connection with his or her condition as a whole. It is only necessary that the evidence establish that the veteran is so helpless as to need regular aid and attendance, not that there be a constant need."

In ***Buie v. Shinseki,*** 24 Vet.App. 242, 250 (2010), the Court held VA's duty to maximize benefits requires VA to assess all of the claimant's disabilities without regard to the order in which they were service connected to determine whether any combination of the disabilities establishes entitlement to [SMC] under section 1114. This duty to maximize encompasses all SMCs and requires VA render a decision which grants every benefit that can be 'supported in law while protecting the interests of the Government.'

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

In ***Sizemore v. Principi,*** 18 Vet.App. 264, 275 (2004), the Court faulted the VA examiner for "expressing an opinion on whether the appellant's claimed in-service stressors have been substantiated, [which] is a matter for determination by the Board and not a medical matter"); cf. ***Colayong v. West***, 12 Vet.App. 524, 534-35 (1999) (remanding the claim for a new independent medical examination because the previous examination was obtained by "tainted process"); ***Bielby v. Brown***, 7 Vet.App. 260, 268-69 (1994) (same); see also ***Moore v. Nicholson***, 21 Vet. App. 211, 218 (2007), at 218 (contrasting the roles of medical examiners and VA adjudicators).

In ***Mitchell v. McDonald***, 27 Vet App. 431,440 (2015), the Court held that cases "must be decided on the law as we find it, not on the law as we would devise it"). See also ***Morton v. Ruiz***, 415 U.S. 199, 235, 39 L. Ed. 2d 270, 94 S. Ct. 1055 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

In ***Sickels v. Shinseki***, 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011), the Court held that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without "demonstrating why the medical examiners' reports were competent and sufficiently informed"). See also ***Ashley v. Derwinski,*** 2 Vet.App. 307, 308 (1992) (quoting ***United States v. Chem. Found., Inc***., 272 U.S. 1 (1926)) "[t]here is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties."

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.

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)-(s). The rate of SMC "varies according to the nature of the veteran's service-connected disabilities." ***Moreira v. Principi,*** 3 Vet.App. 522, 524 (1992).

In ***Breniser v. Shinseki***, 25 Vet.App. 64, 79 (2011), the Court held that a claimant who is in receipt of SMC cannot establish entitlement to a second rate of SMC under section 1114(l) based on the need for aid and attendance– and, hence, a higher rate of SMC under section 1114(o) – unless the claimant's need for aid and attendance arises from a disability other than that for which the claimant is already in receipt of SMC". ***Id***. at 83.

In ***Bell v. Derwinski,*** 2 Vet. App. 611, 613 (1992), the Court held that 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).

Part III of 38 CFR, §3.350(i)(1) Total Plus 60 percent, states, *inter alia*, The special monthly compensation provided by 38 U.S.C. 1114(s) is payable where the veteran has a single service-connected disability rated as 100 percent (or TDIU) and, (1) Has 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.

Part III of 38 CFR, §3.351 Special Monthly dependency and indemnity compensation, pension and spouse's compensation ratings, subsection (c) Aid and attendance; criteria. states, *inter alia*, "The Veteran…will be considered in need of regular aid and attendance if he…," subsection (3) Establishes a *factual need for aid and attendance under the criteria set forth in §3.352(a)*. (Authority: 38 U.S.C. §1502(b)). (emphasis added to original).

Discussion

In the instant case, it would appear the Secretary finds tension in the request for an award of aid and attendance due solely for Appellant's major

depressive disorder condition (or circumstance) rated as 100% which is separate and distinct and doesn't involve different anatomical segments or bodily systems from any other conditions that might establish Appellant's entitlement under §1114 (l). While the Appellant freely admits he has a very severe service connected thoracolumbar condition with extreme pain, this is not the gravamen of his contention. However, as he was diagnosed by prior VA clinicians as being in need of aid and attendance for the disability, and Akles precedence holds no claim is required, it could be said to rightly be ripe for adjudication at the present time. §7103(c).

Appellant benefits from the sheer simplicity of his argument. VHA records clearly and unmistakably show he was accepted into the Program of Comprehensive Assistance for Family Caregivers (PCAFC) fully nine years ago which can be easily confirmed as being current and continued as of today's date. ***Bell*** *supra.*

As recently as May 2019, the Secretary conceded in the narrative portion of his RD that the Veteran *would* qualify for the entitlement of a&a but unfortunately lacked the requisite 100% rating for a single disability to qualify for §3.350(b)(3). Reasonable minds can only concur this was in reference to his 70% rating due solely to a major depressive disorder.

Simply referencing the history of the claim summarized above, the Trier of Fact may not note the import of §3.351(c)(3) throughout the claim stream and subsequent appeal in this adjudication. §3.351(c)(3) employs the modal verb "will" which is synonymous with "shall"- hence the regulation is mandatory. The Secretary's DBQs have, over the years, reviewed the Veterans psychological symptomatology *only* (as opposed to neurological or musculoskeletal deficits) and often make note of in-person observations for VA ratings purposes which indicated a need for aid and attendance of another due solely to those noted psychiatric symptoms. As clinicians, they are forbidden to make rating decisions unilaterally. ***Sizemore, Colayong*** *supra*. Sizemore and its progeny incorporate a long line of Court Of Veterans Appeals (COVA) precedence beginning with ***Colvin v. Derwinski***, 1 Vet.App. 171, 175 (1991). Nevertheless, the clinicians'

endorsement of these symptoms constitute a *de facto* medical diagnosis of the need for aid and attendance under §3.351(c)(3). Moreover, the diagnoses of the Veteran's inabilities to accomplish activities of daily living (ADLs) are well documented by VHA clinicians. ***Sickels*** *supra*.

The conundrum arises as to why, with this extensive, documented history of a need for aid and attendance, how the VA has arrived at this point in a nonadversarial, Veteran friendly *ex parte* venue. The Board need not, nor does the Appellant for a moment suggest, they venture forth on an unguided safari à la Brokowski in search of clear and unmistakable evidence everywhere *but* the Veteran's efolder. The entire history of the claim is well-documented- even if not reviewed. The VHA's extensive records of the Veteran's need for a&a due to the inability to accomplish activities of daily living (ADLs) resides in VistA programs. Converting it into CAPRI and associating it with the Veteran's efolder records would seem to have been, and still be, the obvious repair order for the last nine years.

On all the Secretary's DBQs for PTSD, depending on the era, the below-itemized list (for VA rating purposes) summarizes symptoms which VA examiners use to rate symptoms under §4.130 as well as to identify the need for SMC. For the purposes of aid and attendance, the last ten symptoms listed are considered medical and/or psychological "hallmarks" of the need for this entitlement. While the list is non-exhaustive, reasonable clinicians can all agree that the following list constitutes unequivocal, documented evidence of that need:

- Suicidal Ideation (or documented previous attempts)
- Obsessional routines which interfere with routine activities
- Impaired impulse control, such as unprovoked irritability with periods of violence
- Spatial disorientation
- Persistent delusions or hallucinations.
- Grossly inappropriate behavior
- Persistent danger of hurting self or others
- Neglect of personal appearance and hygiene

- Intermittent inability to perform activities of daily living, including maintenance of minimal personal hygiene.
- Disorientation to time and place

While VA examiners are required to weigh the credibility and competency of the entire history of the various reports under §§4.2; 4.6, they are forbidden to ignore probative medical diagnoses by their very own VA clinicians. ***Sickels*** *supra*. This bedrock Presumption of Regularity underpins the strictures of ***Colvin*** *supra*. But what happens when the VA examiners ignore these telltale medical findings of fact and abrogate this stricture? This is the *de novo* instant paradox before the Board. The Appellant has finally chosen to seek his one decision on appeal before a higher tribunal in search of justice. §7104(a).

Akles *supra,* and by extension, ***Bradley v. Peake***, 22 Vet. App. 280, 294 (2008), teach us that entitlement to aid and attendance, or <u>*any level*</u> of Special Monthly Compensation (SMC) rate for that matter, with the exception of SMC at the "S" rate, does not hinge on a 100 percent rating prerequisite to queue up in line for consideration. That provenance was reserved by Congress in §1114(l). See "<u>*or with such significant disabilities*</u> as to be in need of regular aid and attendance.) (emphasis added to the original). With the advent of ***Loper Bright Enterprises v. Raimondo***, 144 S. Ct. 2244 (2024), this decision lies squarely within the authority of the Trier of Fact.

By the same token, Akles precedence held entitlement to SMC <u>*at any rate*</u> requires no claim and is due and owing at such time as the medical evidence supports such entitlement. In reality, Veterans are more often than not forced to file for the higher levels of this entitlement themselves due to confusion nationally on what is required to qualify due to numerous Veterans Service Organizations which aver there is no such entitlement. Recent decisions at the Agency of Original Jurisdiction (AOJs) level have revealed the Secretary's SMC Ratings Calculator is not programmed to recognize more than one rating at the L or M level- let alone N, O,P or the R1/R2/T tiers. In every instance, the VA personnel are forced to override the Calculator and enter the data manually by consulting §3.350 for the correct application or rate.

Evidence of Record

With that noted, Appellant wishes to draw attention to the whole record- that which is required by §§4.2; 4.6; 4.10- including that which may have been overlooked in VHA's VistA.

As early as November 8, 2016, the Secretary was put on constructive notice that a Psychiatric Disability Benefits Questionnaire (DBQ) completed by Sara Spar-Alexander, Psy.D. diagnosed the Veteran with a 70% rating disability for his PTSD with major depressive disorder (MDD) *and* endorsed his inability to keep himself ordinarily clean and presentable (neglect of personal appearance and hygiene). ***Turco, Troph,*** *both supra*.

Again, twenty one months later, on July 24, 2018, the Veteran's treating physician (PCP), VAMC clinician Hayley Malloy, M.D. opined on a VAF 21-2680 endorsing a diagnosis of the need for aid and attendance due solely to his SC thoracolumbar condition which frequently becomes painfully unbearable. 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).

On March 12, 2019, the Appellant caused to be submitted his DD 215 (revised DD 214) with a new claim showing the award of the Combat Action Ribbon (CAR). This, by rights, constitutes a §3.156(c)(1) record as a) it is a service department record that has never been associated into the claims file prior to the index original claim submitted in June 2004; b) it was readily available prior to 2018; and c) it constitutes new and material evidence. §3.156(c) is

mandatory-not permissive. Further, the Veteran should be accorded the benefit of §1154(b) in aid of his credibility to testify to that which occurred in combat under the combat presumption. To date, this adjudication eludes him.

Of tremendous import to any *de novo* consideration is the RD of May 2, 2019. On page 2 of 6 pages, on Item #5., the Secretary denied entitlement to aid and attendance. In the narrative portion of the RD, on page 5 of 6 pages, the Secretary baldly avers, *in haec verba*:

"Although we acknowledge your need for aid and attendance, you do not have a single 100 percent evaluation, nor do you have a combined rating of 100 percent for disabilities resulting from a common etiology. Therefore, entitlement to aid and attendance is denied."

Appellant is utterly mystified as to this statute or regulation. Nowhere in the four corners of 38 USC or 38 CFR can this unicorn regulation be coaxed forth semantically; nor does the Examiner deign to enlighten the claimant as required under §3.104(f)(4)(5). Worst of all, it smacks of equitable estoppel as the Veteran was induced into believing he lacked standing. The RD further neglects to identify or even rebut the favorable findings of the need for a&a identified by Dr. M . In point of fact, the VA Examiner was unable (or unwilling) to identify any favorable findings whatsoever. This frustrates judicial review.

Disturbingly, different VA personnel have contributed their unsolicited medical opinions on the subject of "supportive" evidence of a need for a&a in the left margins of the Veteran's VBMS Documents file. Witness the entry of Ms. Xxxxxx xxxxxxx, VSR, in the VBMS Notes section on June 5, 2019. A CAPRI record of seven pages with only a concurrence of a VA staff psychiatrist's notes- none of which discuss a need for a&a- stands for the proposition that Dr. H <u>*did not*</u> endorse a need for a&a.

In ***Mariano v. Principi,*** 17 Vet. App. 305, 312 (2003), the Court held a Decision Review Officer is limited by law to review an appeal based on the facts found. Undoubtedly, further medical inquiry can be undertaken with a view

towards further developing the claim. However, in this regard, the Court has cautioned VA against seeking an additional medical opinion where favorable evidence in the record is unrefuted, and indicated that it would not be permissible to undertake further development if the sole purpose was to obtain evidence against an appellant's claim. See also ***Kahana v. Shinseki,*** 24 Vet. App. 428 (2011). §3.304(c). But that is not the end of the matter.

"Although "[t]here is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file" to render an adequate opinion, a medical examination report or opinion must "sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." ***Monzingo v. Shinseki,*** 26 Vet.App. 97, 105 (2012). In other words, the examiner must provide "not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." ***Nieves-Rodriguez v. Peake***, 22 Vet.App. 295, 301 (2008)." "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." ***Id*** at. 295.

Once again, on December 9, 2019, the VA conducted a new c&p Psychiatric DBQ review by psychologist Wende J. Anderson, Psy.D. Dr. Anderson opined on the aforementioned **psychiatric** symptomatology only and diagnosed total occupational and social impairment (100% schedular). In addition, she also identified the symptoms of suicidal ideation with two attempts documented in the Veteran's VistA records. Most importantly, she endorsed the following:

- obsessional routines which interfere with routine activities
- impaired impulse control, such as unprovoked irritability with periods of violence
- spatial disorientation
- persistent delusions or hallucinations
- grossly inappropriate behavior
- persistent danger of hurting self or others

- neglect of personal appearance and hygiene
- Intermittent inability to perform activities of daily living, including maintenance of minimal personal hygiene.

Notwithstanding this probative medical evidence, on December 12, 2019, the Secretary denied, *inter alia*, entitlement to aid and attendance in spite of the earlier demand that he have a 100% schedular rating six months earlier in May 2019. This time, he attributed any need for a&a solely to the Veteran's alleged TBI. Unfortunately, the records show the Veteran has never been diagnosed with a TBI. He concedes he filed a claim for it due to severe headaches after hitting his head in service as noted in the TBI exam in April 2001 but the claim was denied on April 8, 2019. Ergo, absent a diagnosis of TBI- either SC or NSC- the denial of a&a based on an undiagnosed NSC condition can only be seen as *void ab initio*. Moreover, as Dr. Anderson is a psychologist, she is not qualified by training to diagnose neurological disabilities. A close review of the DBQ clearly and unmistakably shows she studiously abstained from such in her psychological review.

A careful, longitudinal review of the claims file reveals the Veteran had a bicycle accident, fell and hit his head. His mother contends he never lost consciousness. After numerous correspondences between his treating physician, he was finally accepted for service in the U.S. Marine Corps. The presumption of soundness attaches unless rebutted by clear and unmistakable evidence. To date, the Secretary has failed to show the Appellant has, or had, a diagnosed TBI that pre-existed service. In ***Wagner v. Principi***, 370 F.3d 1089, 1096 (Fed. Cir. 2004), the Court held to satisfy its burden of showing no aggravation, VA must also establish by clear, unmistakable, and affirmative evidence that the preexisting condition did not increase in disability during service or that any increase in disability was because of the natural progression of the condition.

In the "Subject" column of the Veteran's VBMS documents, adjacent to the left of the VAF 21-2680 submitted on December 9, 2019, Mr. Reginald Hoskins, the Chicago Assistant Veterans Service Center Manager (AVSCM), opined *in haec verba* that "a&a not shown due to SC issues; see VAMC Miami

Capri notes for PCP(does not show add'l ADL care)." Two things come to Appellant's mind. First, Mr. Hoskins has made a decision medical in nature but offers no bona fides for his medical expertise. Secondly, is, of course ***Wilson v. Derwinski,*** 2 Vet. App. 16, 19 (1991), wherein the Court held that "Symptoms, not treatment, are the essence of any evidence of continuity of symptomatology."

The Secretary is required to show why his position is justified. In ***Doty v. United States,*** 53 F.3d 1244, 1251 (Fed. Cir. 1995), the Court held 'Courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.' (quoting ***Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.,*** 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))); ***Evans v. Shinseki,*** 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal).

On November 8, 2024, the Appellant submitted yet another VAF 21-2680 in support of his SC disability with the added request for SC for TBI. As the Veteran is not schooled in the elaborate intricacies of the AMA, this claim is not properly developed yet nor is it properly before the Board.

Lastly, with respect to the March 19, 2025, RD, now on appeal before the Board, the Secretary avers the Veteran failed to present himself for an examination. Ergo, " we found other medical evidence more persuasive because it is supported by an accurate account of the medical history and/or it is the most detailed and reliable depiction of your medical condition".

Sadly, the above RD fails to reveal that which has been lacking now for the last nine years. What secret handshake or password is the trick to qualifying for aid and attendance? In ***Conley v. Gibson***, 355 U.S. 41, 48 (1957), (citing ***Foman v. Davis,*** 371 U.S. 178, 181-82 (1962)), the Court held "The Federal Rules

reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . .").

The claimant is a combat Veteran as evidenced unequivocally by his award of the CAR. In addition, he has numerous other medals attesting to his years of faithful service to America. Counsel for Appellant wishes to enunciate he, too traveled this very same road for 28 years before proving his service in Vietnam. In ***Jaquay v Principi***, 304 F.3d at 1280 (2002), the Court held "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."

Conclusion

Appellant is on fours praying for that certain relief that only a higher tribunal seems capable of awarding. The worst he can aspire to is a Bryant notice to belatedly inform him (and this representative) of that which the Secretary has so clearly enunciated he lacks. Nevertheless, Appellant points to the plethora of evidence and §3.304(c) for the proposition that evidence is more than ample with which to adjudicate the decisions. His attempts via pro se and VSO representation below have been unavailing. Absent a visit to the Oracle at Delphi, he fears he will remain denied below. As the May 2, 2019, denial for a&a was based on the lack of a full 100% schedular rating under some heretofore unheard of regulation, Appellant submits he has already met his burden of proving his entitlement. Indeed, the Secretary freely concedes but for the lack of the requisite ratings criteria on May 2, 2019, he would now be entitled to the entitlement of a&a. The Secretary aspires to have his SMC L cake and eat it too. ***Mitchell*** *supra*.

In ***Russell v. Derwinski***, 3 Vet. App. 310, 313-14 (1992) (*en banc*), Judge Holdaway stated for posterity, " an error either undebatably exists, or there was

no error within the meaning of §3.105(a)". *Id*. at 317. Appellant avers this decision can never rise to the level of a clear and unmistakable error. SMC entitlement, much like §3.156(c), is an exception to finality. ***Akles*** *supra.* As entitlements to SMC require no claim and is due and owing the moment the Medical Evidence proves entitlement arises, there can simply be no delimiting suspense date. Medical evidence of a qualifying entitlement under 3.350(b) then becomes the date of claim by operation of law. ***Akles*** *supra*.

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), where the Court held "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 seeks that which was promised to him should he be injured when he raised his right hand and swore to defend America. He seeks no more- but certainly no less. Unfortunately, that promised entitlement has eluded him. VA has essentially created a last-ditch "Thursday Rule- i.e. "Were you born on a Thursday?" If answering in the affirmative, the next query is invariably "AM or PM?" Appellant avers this VA Three-card Monte scheme has become an endless series of post hoc rationalizations to deny him under any scenario. ***Evans, Troph****, both supra.*

Respectfully submitted,

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The above legal brief is the sole work product of the Appellant's representative and is devoid of any Artificial Intelligence in its construction.