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:** VBAHOU362
C-File or SSN: [redacted]	
Street Address:	
City, State, Zip:	

Date: 2/28/2025 **ATTN:** Litigation and Support Division

From: Gordon A. Graham

Title: Nonattorney Practitioner VA #39029 POA Code E1P

Address 14910 125th Street KP North

City, State Gig Harbor, WA 98329

Tel: (253)-313- 5377 **Fax (253) 590-0265**

Email: gagraham51@gmail.com **Gordon.Graham@va.gov**

Type of Document Submitted:

- ☐ Request for Board Hearing at VA Central Office in D.C.(Rule 703)
- ☐ Request for Advancement of the Docket (Rule 902)
- ☐ 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)
- ☐ Motion for Reconsideration (Rule1002)
- ☒ Other Appellant's Legal Brief of ten (10) pages

Number of Pages Submitted (NOT including this cover sheet): Eleven (11) 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

1. VETERAN'S NAME *(First, middle initial, last)*	2. VETERAN'S FILE NUMBER	3. VETERAN'S DATE OF BIRTH
[redacted]		

4. IF I AM NOT THE VETERAN, MY NAME IS *(First, middle initial, last)*	5. MY DATE OF BIRTH *(If I am not the Veteran)*

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

[redacted]

☐ I AM EXPERIENCING HOMELESSNESS

7. MY PREFERRED TELEPHONE NUMBER *(Include Area Code)*	8. MY PREFERRED E-MAIL ADDRESS	9. MY REPRESENTATIVE'S NAME
(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.)*

☐ 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 38 USC §1114(l); §§3.350(b)(3);3.352(a) due solely to residuals of Prostate cancer.	7/23/2024

C. Additional Issue(s)

☒ Check here if you attached additional sheets. Include the Veteran's last name and the file number. Ten (10) 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	2/28/2025

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.

Gordon A. Graham #39029
14910 125th St. NW
Gig Harbor, WA 98329
(253) 313-5377

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

February 28, 2025

Veteran: [redacted]
Subject: Notice of Disagreement with the 7/23/2024 Rating Decision
Substituted by surviving spouse [redacted]

Before the Department of Veterans Affairs

Appellant's Legal Brief

As a preliminary matter, the Veteran's surviving spouse recognizes the Court's recent holding in ***Williams v. McDonough*** ___ Vet App. No. 21-7363 dated June 21, 2024. Mrs. Hill explicitly waives her right to change dockets and requests a decision from the Board without delay.

Appellant's duly substituted surviving spouse, through counsel, now files her AMA VA Form 10182 Notice of Disagreement in the direct review submission lane contesting the denial of service connection for, and entitlement to, Special Monthly Compensation (SMC) at the L rate under the authority of 38 USC §1114(l); §§3.350(b)(3); 3.351(c)(3); 3.352(a), solely for the deceased Veteran's

prostate cancer with continuous use of a catheter to rebut the Rating Decision (RD) promulgated on July 23, 2024.

Because appellant is proceeding pro se, 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). 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." ***Cook v. Brown***, 68 F.3d 447, 451 (Fed.Cir.1995). Appellant's VA Agent is the equivalent of a Veterans Service Officer and has no legal training.

In order to better comprehend the history of the claim, Appellant proffers a chronological timeline to assist the Trier of Fact. All dates cited are the "Receipt Date" in VBMS.

History of the Claim

4/22/2024-- Veteran files VAF 21-526 for service connection (SC) for, *inter alia*, entitlement to aid and attendance of another due solely to prostate cancer.

7/23/2024-- Rating Decision (RD), *inter alia*, denies entitlement to aid and attendance of another due solely to residuals of prostate cancer with use of catheter.

This appeal ensues.

The Legal Landscape

In ***Akles v. Derwinski,*** 1 Vet.App. 118, 121 (1991) the Court held that the RO "should have inferred from the veteran's request for an increase in benefits ... a request for [SMC] whether or not it was placed in issue by the veteran." This gave birth to the "Akles rule" stating the ancillary entitlement of SMC should automatically be inferred at such time as the claimant's rating puts him or her in contention for the entitlement. Failure to develop the possibility of an award of SMC is remandable error.

In ***AB v. Brown***, 6 Vet.App. 35, 38 (1993), the Court held that 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 ***Tatum v. Shinseki,*** 23 Vet.App. 152, 157 (2009). This duty is rooted in 38 C.F.R. §3.103(a), which requires VA to "render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."

The "fair process doctrine" is 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).

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." ***Jaquay v Principi***, 304 F.3d at 1280 (2002).

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 ***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. See also ***Lang v. Wilkie*** 971 F.3d 1348 (Fed. Cir. 2020) where the Court held a Veteran's own medical records generated by VA itself, are always reasonably related to a Veteran's claim.

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").

In ***Breniser v. Shinseki,*** 25 Vet.App. 64, 79 (2011), the Court held "Accordingly, the Court holds 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".

In ***Buie v. Shinseki***, 24 Vet.App. 242, 250 (2010), the Court held that whenever a veteran has a total disability rating, schedular or extraschedular, based on multiple disabilities and the veteran is subsequently awarded service connection for any additional disability or disabilities, 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

[redacted]

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 ***Ephraim v. Brown***, 82 F. 3d 399 (Fed. Cir. 1996), the Court held that distinguishing claims based upon distinct medical diagnoses is more accurate and reliable than distinguishing claims according to subjective symptomatology. The consideration of symptoms is only appropriate in determining compensation to which a veteran is entitled.

Discussion

As an initial matter, the Veteran wishes to point out he received all his medical care at VA's medical centers, so it was virtually impossible for the Secretary to be ignorant of the long-standing diagnosis and incontinence associated with his malignant Prostate cancer. ***Bell, Lang*** *both supra*. To enunciate this more clearly, Appellant was awarded a 100% rating under §4.115b DC 7528 in July 2015 and was routinely reexamined to determine if his condition had improved or gone into remission. At that time (July 2015), no determination was made as to entitlement to SMC at any rate as required by ***Akle****s supra*.

In the years following the total schedular award, medical evidence was explicit as to increasing incontinence and the inability to accomplish activities of daily living. By 2022, Appellant was virtually bedridden and unequivocally in need of aid and attendance of another both due to the Prostate cancer residuals and the soon to be connected monomelic amyotrophy (ALS).

Appellant benefits from the utter simplicity of her argument. Of note, in the July 23, 2024, RD, on page 4 of 6 pages discussing the denial of aid and attendance, the Secretary stated, in the Favorable Findings identified in this decision, *in haec verba*:

"You require aid and attendance. A disability benefits questionnaire dated May 24, 2024, indicates you have disabilities which lead to a need for regular assistance from others with activities of daily living."

A May 24, 2024, medical opinion authored by Misty Rios, NP-C, attributed a majority of the Veteran's musculoskeletal disabilities to his variant of Amyotrophic Lateral Sclerosis (ALS) rather than peripheral neuropathy due to his well-controlled Diabetes Mellitus Type 2.

Based on this admission, the Secretary cannot have his SMC denial cake and eat it too. An error in the July 2024 RD either undebatably exists or there is no error whatsoever. Based on the favorable finding of fact, Appellant's spouse relies on the clear and unmistakable language ensconced in §3.104(c) for the proposition that Appellant's entitlement to aid and attendance for prostate cancer existed at some point subsequent to his award of 100% schedular in July 2015. As for the date entitlement arose, that, too, is a matter that remains in contention and would be a downstream issue once entitlement to aid and attendance has been adjudicated.

Notwithstanding the award of aid and attendance granted in the BVA Decision of January 30, 2025 (Docket No. 240805-503649), separately awarding aid and attendance solely under §3.350(b)(3) for the Appellant's ALS residuals, reasonable minds can only concur that the July 2024 denial of aid an attendance due solely to prostate cancer remained justiciable and viable for appeal. It was not appealed at the time of the July 26, 2024, submission of the VAF 10182 NOD seeking service connection and aid and attendance for his ALS residuals.

At the time of the denial of an award for aid an attendance in the July 23, 2024, RD, Appellant had specifically requested aid and attendance solely for residuals of his prostate cancer alone. The Board decision of January 30, 2025, clearly and unmistakably addressed only the entitlement to aid and

attendance for the residuals of Appellant's ALS in spite of the ambiguity of the decision language.

In point of fact, it would appear the Board member, in referencing the remand of the PCAFC VHA claim in the July 2024 decision (BVA Docket No. 240317-426232) confused aid and assistance by a caregiver (PCAFC) as synonymous with aid and attendance of another under §3.350(b)(3). At the time of that decision, the Veteran was not service connected for his ALS nor had the Board ruled on any possible entitlement to aid and attendance due to prostate cancer. Reasonable minds can only concur the favorable finding of fact for the need for aid and attendance mentioned in the July 2024 RD was referring to the Veteran's Prostate cancer. The reasoning is simple. The Veteran was not service connected for the ALS until the January 2025 BVA decision- hence there could be no award for aid and attendance for the ALS prior to that time. The PCAFC records also reported the Veteran was receiving VA medical home care several times a week due to being bedridden with use of a catheter.

The evidence shows the Veteran was forced to employ a condom-style catheter to collect his urine due to complete and total incontinence. CAPRI records show he had VA-hired clinicians come in several times a week to visit and change the catheter as necessary and monitor the Veteran for urinary tract infections. His spouse was trained by the VA medical personnel on how to "install" the catheter in their absence and was regularly supervised by them and in regular contact. §3.352(b).

Conclusion

Reasonable minds can only concur that the VAF 21-526 submitted on Aprill 22, 2024, clearly and unmistakably requested aid and attendance due solely for residuals of the service connected Prostate cancer only. That entitlement was denied in the July 23, 2024, RD. This current VAF 10182 NOD requests *de novo* review of that specific denial only. See ***Medrano v. Nicholson***,

21 Vet. App. 165, 170 (2007) (The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board).

A second VAF 21-526 submitted on July 26, 2024, clearly and unmistakably sought service connection and requested aid and attendance of another due solely for the residuals of Appellant's ALS. The January 2025 BVA decision can only be read to have awarded aid and attendance for the sole disability of ALS. Nowhere in the four corners of the January 2025 BVA decision can there be semantically discerned an award granting aid and attendance solely for both disabilities. Moreover, the July 26, 2024, VAF 10182 made no mention of the denial for aid and attendance due to Prostate cancer residuals nor any request to review the AMA denial for same. As such, an AMA appeal regarding that matter was not before the Trier of Fact.

In any event, the precedence established in ***Buie*** *supra* permits rearranging the disabilities under §3.103(a) in such away as to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. Further, the bright line rule of ***Breniser*** *supra* permits multiple awards of SMC under §3.350(b) via 3.350(e)(1)(ii) involving separate and distinctly different anatomical segments or bodily systems. Reasonable minds can only concur that the "condition" (or circumstance) of ALS is separate and distinct and involves different bodily systems from that of the "condition" (or circumstance of metastatic prostate cancer.

Wherefor, Appellant's spouse prays for relief and a separate award of aid and attendance under §§3.350(b)(3); 3.352(a); 3.351(c)(3) solely for her deceased husband's residuals of metastatic prostate cancer.

In the event the additional entitlement is granted, appellant's spouse further requests entitlement to SMC at the maximum rate and advancement to SMC R 1 or R 2 due to the much higher level of care during the last year of her husband's life under authority of §3.350(h). ***Breniser*** *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) ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.").

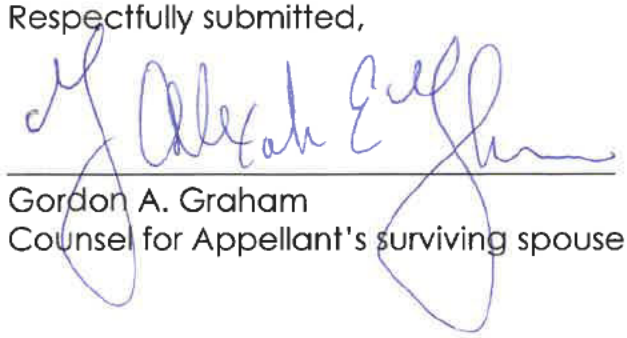
The pro-Veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit. See, e.g., ***King v. St. Vincent's Hosp.***, 502 U.S. 215, 220 (1991).

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's surviving spouse seeks no more than her due but certainly no less. Her husband served bravely in combat in the Vietnam War and received a Purple Heart Medal for his service due to his shrapnel injuries. He has now passed away due to severe injuries incurred during his service to our country. What his surviving spouse seeks is no more than a small down payment for his contributions keeping America free.

Respectfully submitted,



Gordon A. Graham
Counsel for Appellant's surviving spouse

The above legal brief is the sole work product of Appellant's representative and contains no AI-generated information or legal cites.

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