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:**	VBANEW309
C-File or S			
Street Add			
City, State,			

Date:	1/28/2026	**ATTN:**	Litigation and Support Intake

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 (§20.902(c))
- ☒ Waiver of Time to Select a Different Board Review Option
- ☐ 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 Ten (10) Pages

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

OMB Approved No. 2900-0674
Respondent Burden: 30 Minutes
Expiration Date: 04/30/2028

VA

DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)

PART I - PERSONAL INFORMATION

[redacted] OF BIRTH

H *(If I am not* DD/YYYY)

MELESSNESS

7. MY PREFERRED TELEPHONE NUMBER *(Include Area Code) (999-999-9999)*	8. MY PREFERRED E-MAIL ADDRESS	9. MY REPRESENTATIVE'S NAME
[redacted]	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 *(MM/DD/YYYY)*
Entitlement to SMC at the Intermediate rate between L and M under §3.350(f)(3) from June 5, 2025 for DC 7816 Psoriasis	10/24/2025
Entitlement to SMC at the M rate under §3.350(f((3) from June 5, 2025, for DC 6602	10/24/2025
Entitlement to SMC at the Intermediate rate between M and N under §3.350(f)(3) from June 5, 2025 for DC 5009	10/24/2025
Entitlement to SMC at the N rate under §3.350(f((3) from June 5, 2025, for DC 5237 (40%) plus DC 5009 (10%)	10/24/2025
Entitlement to SMC at the Intermediate rate between N and O under §3.350(f)(3) from une 5, 2025 for DC 8520 (40%) and DC 5009-5206 (10%) plus SMC K	10/24/2025

C. Additional Issue(s) SMC at the O rate; SMC at the R1 rate under §3.350(h)(1)(2)

[X] 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 *(MM/DD/YYYY)*
Gordon A. Graham OGC#39029 POA E1P	1/28/2026

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 FAL

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Dept. Of Veterans Affairs
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January 28, 2025

Veteran: [redacted]
Subject: Notice of Disagreement with the October 24, 2025 Rating Decision

Before the Department of Veterans Appeals
Appellant's Legal Brief

Appellant, through his appointed representative, now files his Notice of Disagreement (NOD) with the October 24, 2025, Rating Decision (RD) for the following reasons. The Secretary has neglected to complete the RD incorporating the latest precedence from the Barry Decision. In ***Barry v. McDonough***,101 F.4th 1348 (Fed. Cir. 2024), the Court held "§3.350(f)(3) does not limit how many SMC increases can be provided; instead, it is a mandatory entitlement that can apply multiple times, subject to a statutory cap".

In addition, Appellant also disagrees with the Secretary's multiple, implicit denials of the entitlement to SMC at the L rate under §3.350b)(3) filed in the VAF 20-0995 supplemental claim application of September 15, 2025, due solely to Asthma to include Chronic Obstructive Pulmonary Disease (COPD) as well as SMC at the L rate under §3.350b)(3) due solely to Psoriatic Arthritis with residuals.

Because appellant is proceeding *pro se* with a VA representative rather than a VA-accredited attorney, he asks for 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). In ***Andrews v. Nicholson***, 421 F.3d (2005) at 1283, the Cout held "Although we have held that the duty to construe a veteran's filings sympathetically does not necessarily apply when a veteran is represented by an attorney, the assistance provided by the DAV aide is not the equivalent of legal representation."

In addition, due to two different theories of possible entitlement to SMC, Appellant provides a brief history of the claim stream to enlighten the Board member and their staff attorneys. All dates cited refer to VBMS Receipt date.

History of the Instant Claim

6/05/2025-- Veteran files his VAF 21-526 for aid and attendance under several (3) different theories.

6/09/2025-- RD confirms and continues current level of SMC at the S rate plus K.

9/15/2025-- RD denies entitlement to aid and attendance solely based on a major anxiety disorder with TBI rated at 100% schedular.

10/20/2025-- Vet files 995 Supplemental claim (again) for a&a due solely to Anxiety Disorder with TBI, a&a due solely to Asthma and a&a due solely to Psoriatic arthritis with residuals accompanied by two VAF 21-2680s.

10/24/2025—RD grants entitlement to a&a but does not identify which disease or injury of the three filed for is the requisite need.

12/01/2025-- RD declares a clear and unmistakable error and revises the effective date of a&a to 6/04/2025.

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 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."

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."

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 ***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.

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". Id. at 83.

In ***Fugere v. Derwinski***, 1 Vet. App. 103, 105 (1990), aff'd 972 F.2d 331 (Fed. Cir. 1992), the Court held advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation.

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)-(s). The rate of SMC "varies according to the nature of the veteran's service-connected disabilities."

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.'"

Discussion

As noted above in his prologue, Appellant argues that he has requested entitlement to aid and attendance (a&a) for several different diseases, first in his VAF 21-526 of June 4, 2025, but yet again in his supplemental claim (VAF 20-0995) of October 20, 2025. While he is appreciative of the partial grant of aid and attendance awarded on October 24, 2025, Appellant is still entitled to a rating decision that complies with §3.103(a) and provides him one decision, on appeal under §7104(a). ***AB, Robinson*** *supra*.

The concept of implicit denial was dissected in ***Cogburn v. Shinseki***, 24 Vet. App. 205, 213 (2010). Here, in the instant case, Cogburn's fourth factor forbids implicit denial under the umbrella of ***Jaquay*** *supra*. Appellant's representative has no legal training, is not a member of a state bar and thus is the equivalent of no more than an above-average Veterans Service Officer knowledge-wise. In addition, reasonable minds might also conclude that the failure to address all the claims for aid and attendance runs afoul of §3.103(f)(1)(5)(6). This adjudicatory practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation. ***Fugere*** *supra*.

In the alternative, as a second option, Appellant relies on the recent precedence of ***Barry*** *supra* which would, by virtue of Appellant's service-connected disabilities, administratively result in a similar outcome under the authority of §§3.350(f)(3);3.351(c)(3); 3.352(a); 3.350(h)(1). For simplicity's sake, as well as clarity, Appellant will summarize his arguments into two parts to avoid confusion.

Aid and Attendance based on §3.350(b)(3)

Breniser *supra* permits two awards of SMC at the L through N rates, no condition (or circumstance) counted twice. This incorporates other regulations such as §3.350(e)(1)(ii)(3) which require the disability or disabilities to be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under §1114 L through N or the intermediate rate provisions involving different anatomical segments or bodily systems.

While the VA's M 21 1MR *generally* requires a 100% schedular evaluation for a single disability as a precursor to entitlement to aid and attendance under §3.350(b)(3), nowhere in the four corners of Part III subsection §3.350 can there be found this phantom requirement other than §3.350(i)(1)-i.e., a 100% schedular or TDIU plus an additional service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability or TDIU and involving different anatomical segments or bodily systems.

In order for the Trier of fact to make a *de novo* decision via this legal pathway based on §3.350(b)(3), the two VAF 21-2680s submitted with the latest VAF 20-0995 Supplemental claim represent the probative evidence for granting entitlement. The Secretary clearly and convincingly concedes the probative value of the independent clinicians who made these medical conclusions elsewise he would have sought additional corroboration by conducting a c&p exam himself.

In addition, by granting one theory of entitlement (the need for aid and attendance for an anxiety disorder with TBI), reasonable minds can only conclude the VA examiner(s) must have read both the 2680 reports on the need for aid and attendance to glean the necessary information to support the grant. ***Sickels*** *supra*.

Analyzing the first 2680 authored by VA clinician [redacted], CRNP, on page 2 of 4 pages, in Box 18, the instructions are to list what disability(ies) are considered permanent and totally disabling. Notably, the instructions for Box 18 do not state "List all the disabilities, which, **in concert,** cause the need for a&a." Any of the diseases qualify as a stand alone entitlement. Using ***Breniser, Akles*** *supra*, §3.103(a), it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.

Nurse [redacted]s 2680 lists four disabilities in box 18 that she considered to be permanent and totally disabling. Psoriatic Arthritis is a secondary of Psoriasis-thus both of these conditions are part of the same etiology-i.e., the skin and musculoskeletal issues. §§3.310(a); 4.14. Appellant's anxiety disorder with TBI, which he is currently receiving a&a, is accounted for. Asthma is a condition of the respiratory system and, as such, is separate and distinct and involves a different anatomical function or organ than a mental disorder. Appellant's chronic kidney disease (CKD) is also separate and distinct and involves the digestive system. Thus, of the four disabilities listed as permanent and totally disabling, none of them involve the same organs or medical etiology other than the psoriasis with psoriatic arthritis. ***Breniser*** *supra*.

The second 2680, authored by [redacted], PA-C, in Box 18. Disabilities Considered Permanent and Disabling on page two, also lists Psoriatic Arthritis, Anxiety disorder with TBI, Asthma and Chronic Kidney Disease. Both 2680s provide common ground for a finding of the need for a&a. Should the Board member find that Appellant legally and medically qualified for the need for a&a based on a separate and distinct need for a&a other than involving his anxiety disorder disability with TBI, this would satisfy the requirements of §§3.350(e)(1)(ii);

3.350(h)(2). Nurse [redacted] noted on page 3 of 4 pages, Box 29, that in the absence of a caregiver, the Appellant would require Nursing Home Care as he would be unable to self-inject his Cosentyx or Wegovy pens or open medication bottles due to his service connected psoriatic arthritis. In addition, Physician's Assistant [redacted] noted Appellant suffers balance issues due to his service-connected lower extremity psoriatic arthritis and requires ambulatory aids to safely navigate even flat terrain.

Unfortunately, the VA examiner failed to employ §3.103(a) and render a decision that adjudicated an additional entitlement to a second grant of a&a under one of the two other separate and distinct service-connected conditions. Or, if they did not consider it, perhaps their Adjudications Manual forbid them to award same. Either way, scarce judicial resources were implicitly squandered with no benefit accruing to the Veteran. §3.103. ***Moreira, Akles*** *supra*.

Aid and Attendance based on §§3.350(f)(3); 3.350(h)(1)

Using Appellant's Ratings Code Sheet issued at the same time as the grant of entitlement to a&a from VBMS dated October 24, 2025, the Board member will note the index disease of DC 8045-9411, rated 100% schedular, was awarded SMC at the L rate under §3.350(b)(3). But that is not the end of the matter.

Under authority of ***Barry*** *supra* and §3.350(f)(3), the Board will see additional ancillary entitlements via Appellant's other ratings which permit advancement under Breniser's architecture- to wit:

Appellant is entitled to advancement to the intermediate rate between SMC L and M based on additional entitlement to DC 7816 Psoriasis at 60%.

Appellant is entitled to advancement to the full rate of M based on additional entitlement to DC 6602 Asthma at 60%.

Appellant is entitled to advancement to the intermediate rate between SMC M and N based on additional entitlement to DC 5009 Psoriatic Arthritis, Left Foot Associated with Psoriasis at 60%.

Appellant is entitled to advancement to the full rate of N based on additional entitlement to DC 5237 Degenerative Joint Disease of the Lumbar Spine 40% plus DC 5009 Psoriatic Arthritis, Right Hand Associated with Psoriasis 10%.

Appellant is entitled to advancement to the intermediate rate between SMC N and O based on additional entitlement to DC 8520 Radiculopathy, Right Lower Extremity (Sciatic Nerve) Associated with Degenerative Joint Disease of the Lumbar Spine at 40% plus DC 5009-5206 Psoriatic Arthritis, Left Elbow (limitation of Flexion) Associated with Psoriasis at 10% plus SMC K.

Under the authority of §3.350(h)(1), Appellant submits he is entitled to SMC at the R 1 rate. Further, based on Nurse [redacted] diagnosis that the Appellant would require institutionalization in a nursing home in the absence of a caregiver, Appellant submits he very well may be entitled to §3.350(h)(2) and a higher level of care.

Prayer for Relief

Appellant is on all fours, virtually and all but literally, before the Board. He has been forced, as only he knows how as a *pro se* litigant, to present his case using legal precedence, as well as to assemble probative medical evidence, to support his contentions. He points to the more recent holding in ***Lynch v. McDonough***, 21F.4th 776 (2021) wherein the Court held that the evidence need only be in approximate balance which means nearly equal. See also ***Ortiz v. Principi*** 274 F.3d 1361,1364 (Fed. Cir. 2001) ("nearly equal = approximate which includes equipoise). He also feels ***Jaquay*** *supra* should be considered.

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."

Respectfully submitted,

Gordon A. Graham
Representing Appellant [redacted]

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

[redacted]

WAIVER OF TIME TO SELECT A DIFFERENT BOARD REVIEW OPTION

If you are waiving any remaining time to select a different Board review option, please check the option below.

X
_____ I ***waive*** my right to select a different Board review option. ***Please review my appeal as soon as possible.***

Signature
Gordon A. Graham #39029 ELP
Counsel for [redacted]

1/28/2026
Date

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