BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
[redacted]
Represented by
Gordon A. Graham, Agent

C XX XXX 653
Docket No. 250215-517271
Advanced on the Docket

DATE: May 2, 2025

ORDER

Entitlement to a higher level of special monthly compensation (SMC), to include SMC based on loss of use of both feet under the provisions of 38 U.S.C. § 1114(l), is denied.

FINDINGS OF FACT

1. The revision of the basis for the award of SMC from loss of use of both feet to a need for regular aid and attendance under the provisions of 38 U.S.C. § 1114(l) based on a difference of opinion pursuant to the procedures outlined in 38 C.F.R. §§ 3.2601(j) and 3.105(b) did not require a finding of clear and unmistakable error (CUE) and was not improper.

2. The effective function remaining in the Veteran's feet is more than that which would be equally well served by an amputation with use of a suitable prosthetic appliance.

CONCLUSION OF LAW

The criteria for entitlement to a higher level of SMC, to include SMC based on loss of use of both feet, have not been met. 38 U.S.C. §§ 1114, 5107; 38 C.F.R. §§ 3.102, 3.105(b), 3.350, 3.2601(j), 4.63.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran, who is the appellant in this case, had active service in the U.S. Army from May 1968 to May 1970 and is a Purple Heart recipient. The Board is thankful for his meritorious service.

This matter comes before the Board of Veterans' Appeals (BVA or Board) from a November 2024 rating decision by a Department of Veterans Affairs (VA) Regional Office (RO); the modernized review system, also known as the Appeals Modernization Act (AMA), applies.

In the February 2025 VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), the Veteran elected the Direct Review docket. Therefore, the Board may only consider the evidence of record at the time of the November 2024 agency of original jurisdiction (AOJ) decision on appeal. 38 C.F.R. § 20.301. Any evidence submitted after the AOJ decision on appeal cannot be considered by the Board. 38 C.F.R. §§ 20.300, 20.301, 20.801.

If the Veteran would like VA to consider any evidence that was submitted that the Board could not consider, the Veteran may file a Supplemental Claim (VA Form 20-0995) and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim[s], considering the new evidence in addition to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

1. Entitlement to a higher level of special monthly compensation (SMC), to include SMC based on loss of use of both feet under the provisions of 38 U.S.C. § 1114(l), is denied.

A discussion of the procedural history of this case is necessary prior to analysis of the appeal on the merits. A January 2019 rating decision granted SMC-L based on loss of use of both feet, secondary to service-connected Parkinson's disease (PD), under the provisions of 38 U.S.C. § 1114(l), effective from October 11, 2018.

From a separate claim/appeal, a December 2023 rating decision implemented a December 2023 decision of the Board that granted an initial 100 percent disability rating for myocardial infarction and coronary artery disease (CAD) from February 5, 2019, to July 17, 2020. The implementing rating decision, however, did not address the downstream issue of entitlement to a higher level of SMC based on that award.

In December 2023, the Veteran filed a VA Form 20-0996, Decision Review Request: Higher-Level Review, seeking higher level review of the December 2023 rating decision; specifically, he asserted entitlement to higher levels of SMC.

A June 2024 rating decision indicated that the issue of entitlement to a higher level of SMC was being returned due to the need to obtain additional evidence to substantiate the Veteran's claim, and that the AOJ would request an additional examination due to conflicting medical evidence.

An October 2024 Report of General Information (ROGI) as well as several VA e-mail correspondences from September and October 2024 indicate that the issue of entitlement to a higher level of SMC had been returned due to a difference of opinion. Specifically, there was conflicting medical evidence at the time of the January 2019 grant of SMC-L based on loss of use of both feet. The award had been based on a November 27, 2018, VA PD examination report, in which the examiner had stated that the Veteran was "currently unable to walk without assistance, and is a fall risk." However, on higher-level review, the Decision Review Officer (DRO) stated there was no indication that the Veteran had loss of use of his feet or that an amputation/prosthesis would be more suitable. Rather, it appeared that the Veteran had unsteady gait for which he had been granted service connection for right and left lower extremity tremors, balance impairment, and muscle rigidity with peripheral neuropathy secondary to PD, each evaluated as 40 percent disabling since October 11, 2018. The claim was returned for an examination to obtain additional information regarding the Veteran's disabilities.

After completion of VA examinations in October 2024, the November 2024 rating decision on appeal granted SMC-L based on the need for regular aid and attendance under the provisions of 38 U.S.C. § 1114(l), effective from October 11,

2018. The rating decision noted that the initial grant of SMC-L in the January 2019 rating decision indicated that the benefit was granted based on loss of use of both feet. However, the basis for the award of SMC-L had been corrected since the evidence demonstrated that the initial grant of SMC-L should have been based on a need for aid and attendance due to PD and its complications. The rating decision specifically noted that, "[t]his change has no impact on your VA benefits, payments, or consideration of special monthly compensation." The November 2024 Rating Codesheet further explained that, in finding that the initial award of SMC-L based on loss of use of both feet, it was observed that service connection for loss of use of both feet under Diagnostic Code (DC) 5110 had not been simultaneously awarded, and that the evidence did not show loss of use of both feet, but rather the need for aid and attendance due to PD, which, as of that date, had residuals which combined to 100 percent overall. The Codesheet further stated that no clear and unmistakable error (CUE) was called. Rather, the award of SMC-L was adjusted to reflect the need for aid and attendance rather than loss of use of both feet.

In addition to the revision to the basis for the SMC-L award in effect from October 11, 2018, the November 2024 rating decision granted a higher level of SMC under the provisions of 38 U.S.C. § 1114(p) and 38 C.F.R. § 3.350(f)(3) at the rate intermediate between subsection (l) and subsection (m) (SMC-P1), effective from October 11, 2018, on account of entitlement to the rate equal to subsection (l) with additional disabilities – tinnitus, prostate cancer, and diabetes mellitus with erectile dysfunction and chronic renal disease – independently ratable at 50 percent or more from October 11, 2018.

Finally, the November 2024 rating decision granted a higher level of SMC under the provisions of 38 U.S.C. § 1114(p) and 38 C.F.R. § 3.350(f)(4) at the rate equal to subsection (m) (SMC-P2), effective from February 5, 2019, on account of entitlement to the rate equal to subsection (l) with additional disability – myocardial infarction and CAD – independently ratable at 100 percent from February 5, 2019. The November 2024 Rating Codesheet observed that the January 2019 rating decision had failed to infer SMC-P1, the December 2023 rating decision had failed to infer SMC-P2, and that, therefore, these levels of SMC had been inferred and granted in the current rating decision.

The Veteran appealed the November 2024 rating decision to the Board, contending that the November 2024 rating decision wrongfully rescinded SMC-L based on loss of use of both feet without finding CUE, which, the Veteran's representative argued, was impermissible under the provisions of 38 C.F.R. § 3.105(a), which requires a demonstration of CUE in order to a revise a final decision. Therefore, the Veteran requests reinstatement of SMC-L based on loss of use of both feet. Moreover, he has argued that the award of SMC-L based on the need for aid and attendance that was granted in the November 2024 rating decision should remain in place, as he argues that the need for aid and attendance is based on service-connected disabilities (residuals of PD) distinct from those that caused loss of use of both feet (diabetes, peripheral neuropathy, and peripheral vascular disease). *See Breniser v. Shinseki*, 25 Vet. App. 64 (2011). Further, based on receipt of SMC-L based on both loss of use of both feet and a need for regular aid and attendance (i.e., two entitlements between the rates of (l) and (n) with no condition counted twice), the Veteran argues that he is entitled to SMC-O under the provisions of 38 C.F.R. § 3.350(e)(1)(ii). Finally, he argues he is entitled to SMC-R1 under the provisions of 38 C.F.R. § 3.350(h), as he is in receipt of SMC-O and is in need of regular aid and attendance.

Revision of Prior Decision Based on Difference of Opinion

The Board will first address whether the revision of the basis for the award of SMC-L from loss of use of both feet to a need for regular aid and attendance in the November 2024 rating decision was improper. For the reasons discussed below, the Board finds that it was not improper.

Under the AMA, a claimant who is dissatisfied with a decision by the AOJ may file a request for higher-level review in accordance with 38 C.F.R. § 3.2500, by submitting a complete request for review on a form prescribed by the Secretary. 38 C.F.R. § 3.2601(b). Higher-level review will be conducted by an experienced adjudicator who did not participate in the prior decision. 38 C.F.R. § 3.2601(e).

In this case, the Veteran sought higher-level review of the December 2023 rating decision and timely submitted the appropriate request. Thereafter, the revision made in the November 2024 rating decision was performed pursuant to the

provisions of 38 C.F.R. § 3.2601(j), which contemplates revision of prior decisions in the higher-level review process when there is a difference of opinion, and provides as follows:

> The higher-level adjudicator may grant a benefit sought in the claim under review based on a difference of opinion (*see* § 3.105(b)). However, any finding favorable to the claimant is binding except as provided in § 3.104(c) of this part. In addition, the higher-level adjudicator will not revise the outcome in a manner that is less advantageous to the claimant based solely on a difference of opinion. The higher-level adjudicator may reverse or revise (even if disadvantageous to the claimant) prior decisions by VA (including the decision being reviewed or any prior decision) on the grounds of clear and unmistakable error under § 3.105(a)(1) or (a)(2), as applicable, depending on whether the prior decision is finally adjudicated.

38 C.F.R. § 3.2601(j).

38 C.F.R. § 3.105(b), referenced in the above regulation, provides as follows:

> Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted on the basis of the evidentiary record and law that existed at the time of the decision, a difference of opinion being involved rather than a clear and unmistakable error, the proposed revision will be recommended to Central Office. However, a decision may be revised under § 3.2600 or § 3.2601 without being recommended to Central Office.

VA's Appeals and Reviews Manual, the M21-5, while not binding on the Board, provides additional guidance for when there is a difference of opinion. Chapter 5.1.i, Regulatory Authorities for Changing Decisions, provides that, "[d]ifference of opinion involves the de novo re-examination of a prior decision and its associated evidence. It allows re-weighing of that prior evidence, so the decision maker may make a new decision without regard to the earlier one. The reviewer

cannot use [difference of opinion] to revise the prior decision in a manner that would be less advantageous to the claimant."

The M21-5, Chapter 5.1.j, Difference of Opinion vs. Duty to Assist Error, further provides: "The exercise of a difference of opinion may lead to additional development, but that development does not necessarily mean that the prior decision failed to properly assist the claimant. The HLR reviewer has the authority to weigh the same evidence differently than the earlier adjudicator and may change the previous decision based on difference of opinion. If the difference of opinion results in the need for an examination or further development, then the reviewer must document this on the *VA Form 20-0999, Higher Level Review Return*. The reviewer must return the case for additional development resulting from a [difference of opinion] using that same *VA Form 20-0999*. However, this return does not constitute a DTA error as the previous decision was not necessarily incorrect. Rather, the amended decision mandates additional development to resolve, as is often the case, certain downstream issues."

VA's Adjudication Procedures Manual, the M21-1, while also not binding on the Board, provides additional clarity regarding the meaning and process for implementing a revision based on a difference of opinion. Part V.iv.1.E.2.a of the M21-1, Dissenting Opinion vs. Difference of Opinion, provides that "a difference of opinion scenario occurs when a decision maker is of the opinion that revision or amendment is needed (for reasons that do not qualify as clear and unmistakable error (CUE)) of a *promulgated* rating decision completed by another decision maker."

The M21-1, Part V.iv.1.E.3.c, Procedure for Correcting Rating Decisions, explains that "[w]hen a correction of an entitlement outcome is required for an issued decision that is binding, there must be CUE under the provisions of 38 C.F.R. § 3.105(a) and M21-1, Part X, Subpart ii, 5.A, *or* approval of difference of opinion under 38 C.F.R. § 3.105(b) and M21-1, Part X, Subpart v, 1.A.1 and 4."

A plain reading of 38 C.F.R. §§ 3.2601(j) and 3.105(b) along with the guidance provided in the M21-1 and M21-5 indicates that revision of a prior decision by a higher-level reviewer not resulting in a less advantageous outcome does not require

a finding of CUE, but rather, merely a difference of opinion requiring recommendation to the Central Office.

In this case, the revision undertaken by the AOJ in the November 2024 rating decision did not result in a less advantageous outcome as contemplated by 38 C.F.R. § 3.2601(j). The basis for the SMC-L award was merely changed from loss of use of both feet to a need for regular aid and attendance. The Veteran's award, SMC-L, was not reduced or terminated. The rating decision specifically stated that there would be no change in Veteran's benefits, payments, or consideration of special monthly compensation. Therefore, under the applicable regulations – 38 C.F.R. §§ 3.2601(j) and 3.105(b) – CUE was not required to make this revision, and, contrary to the assertions of the Veteran's representative, it was not error for the AOJ to revise the basis for the SMC-L award without a finding of CUE.

Higher Levels of SMC

Turning to the Veteran's request for higher levels of SMC, his assertion of entitlement to higher levels rests solely on reinstatement of a separate SMC-L award based on loss of use of both feet.

As noted above, the November 2024 rating decision granted SMC-P1 at the rate intermediate between subsection (l) and subsection (m) from October 11, 2018, and SMC-P2 at the rate equal to subsection (m) from February 5, 2019.

SMC is authorized in particular circumstances in addition to compensation for service-connected disabilities. 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350, 3.352. SMC at the "k" and "r" rates are paid in addition to any other special monthly compensation rates, with certain monetary limits.

SMC at the "k" rate is warranted for the anatomical loss or loss of use of the following extremities and organs: one foot, one hand, loss of use of both buttocks, one or more creative organs, blindness of one eye, deafness of both ears, complete organic aphonia (loss of voice), loss of 25 percent or more of the tissue from a single breast or both breasts in combination (including loss by mastectomy or

partial mastectomy), or when breast tissue has been subjected to radiation treatment.

As relevant to the Veteran's claim, SMC at the "l" rate is payable when the Veteran, due to service-connected disability, has suffered the anatomical loss or loss of use of both feet or one hand and one foot, or is blind in both eyes, or is permanently bedridden or so helpless as to be in need of regular aid and attendance. 38 U.S.C. § 1114(l); 38 C.F.R. § 3.350(b).

A Veteran who is already in receipt of SMC at the "l" rate cannot establish entitlement to a second award of SMC at the "l" rate under 38 U.S.C. § 1114(l) based on the need for aid and attendance unless the Veteran's need for aid and attendance arises from a disability other than that for which the Veteran is already in receipt of SMC under 38 U.S.C. § 1114(l). *Breniser v. Shinseki*, 25 Vet. App. 64, 77-78 (2011).

SMC at the "m" rate is warranted if the Veteran, as a result of a service-connected disability, has suffered the anatomical loss or loss of use of both hands, or of both legs at a level, or with complications, preventing natural knee action with prosthesis in place, or of one arm and one leg at a level; or with complications, preventing natural elbow and knee action with prosthesis in place, or has suffered blindness in both eyes having only light perception; or has suffered blindness in both eyes, rendering such Veteran so helpless as to be in need of regular aid and attendance. 38 U.S.C. § 1114(m); 38 C.F.R. § 3.350(c).

SMC at the "n" rate is warranted if the Veteran, as the result of a service-connected disability, has the anatomical loss or loss of use of both arms with factors preventing natural elbow action with prostheses in place, has anatomical loss of both legs with factors that prevent the use of prosthetic appliances, or has the anatomical loss of both eyes, or has suffered blindness without light perception in both eyes. 38 U.S.C. § 1114(n).

SMC at the "o" rate is warranted, if the Veteran as the result of a service-connected disability, has suffered disability under conditions which would entitle him to two or more of the rates provided in one or more subsections (l) through (n) of this

section, no condition being considered twice in the determination, or if the Veteran has bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 60 percent or more disabling and the Veteran also has service-connected total blindness with 20/200 visual acuity or less, or if the Veteran has service-connected total deafness in one ear or bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 40 percent or more disabling and the Veteran also has service-connected blindness having only light perception or less, or if the Veteran has the anatomical loss of both arms with factors that prevent the use of prosthetic.

The provisions of 38 U.S.C. § 1114(p) provide for "intermediate" SMC rates between the different subsections based on anatomical loss or loss of use of the extremities or blindness in connection with deafness and/or loss or loss of use of a hand or foot. 38 U.S.C. § 1114(p); 38 C.F.R. § 3.350(f). In addition to the statutory rates payable under 38 U.S.C. § 1114 (l) through (n) and the intermediate or next higher rate provisions outlined above, additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. § 1114, but not above the (o) rate. In the application of this subparagraph the disability or disabilities independently ratable at 50 percent or more must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. § 1114(l) through (n) or the intermediate rate provisions outlined above. 38 C.F.R. § 3.350(f)(3).

Further, in addition to the statutory rates payable under 38 U.S.C. § 1114(l) through (n) and the intermediate or next-higher rate provisions set forth under 38 U.S.C. § 1114(p), an additional single permanent disability independently ratable at 100 percent apart from any consideration of individual unemployability will afford entitlement to the next-higher statutory rate under 38 U.S.C. § 1114 or if already entitled to an intermediate rate to the next higher intermediate rate, but in no event higher than the (o) rate. The single permanent disability independently ratable at 100 percent must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under

38 U.S.C. § 1114(l) through (n) or the intermediate rate provisions outlined above. 38 C.F.R. § 3.350(f)(4).

To be awarded SMC under 38 U.S.C. § 1114(r)(1), the Veteran must be entitled to SMC at the rate authorized under subsection (o), the maximum rate authorized under subsection (p), or at the intermediate rate authorized between the rates authorized under subsections (n) and (o) and at the rate authorized under subsection (k). The Veteran must also be in need of regular aid and attendance. *See* 38 U.S.C. § 1114(r); 38 C.F.R. § 3.350(h), 3.352.

SMC at the "(r)(2)" rate is subject to the same criteria, plus there must be evidence that the Veteran is in need of a "higher level of care."

Need for a higher level of care shall be considered to be need for personal health-care services provided on a daily basis in the Veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional. Personal health-care services include (but are not limited to) such services as physical therapy, administration of injections, placement of indwelling catheters, and the changing of sterile dressings, or like functions which require professional health-care training or the regular supervision of a trained health-care professional to perform. A licensed health-care professional includes (but is not limited to) a doctor of medicine or osteopathy, a registered nurse, a licensed practical nurse, or a physical therapist licensed to practice by a State or political subdivision thereof. 38 C.F.R. § 3.352(b)(2).

As discussed above, the November 2024 rating decision revising the basis for the SMC-L award from loss of use of both feet to a need for regular aid and attendance did not require a finding of CUE and was not in error, so reinstatement of SMC-L on the basis of loss of use of both feet is not warranted on those grounds. Moreover, the Board finds that the evidence does not demonstrate loss of use of both feet as contemplated under 38 U.S.C. § 1114(l).

The term "loss of use" of a hand or foot is defined by 38 C.F.R. § 3.350(a)(2) as that condition where no effective function remains other than that which would be equally well-served by an amputation stump at the site of election below elbow or

knee with use of a suitable prosthetic appliance. The determination will be made of the basis of the actual remaining function, whether the acts of grasping, manipulation, etc. in the case of the hand, or balance, propulsion, etc., in the case of a foot, could be accomplished equally well by an amputation stump with prosthesis. The determination will be made on the basis of the actual remaining function, whether the acts of grasping, manipulation, etc. in the case of the hand, or balance, propulsion, etc., in the cause of a foot, could be accomplished equally well by an amputation stump with prosthesis. 38 C.F.R. § 4.63.

The relevant inquiry concerning an SMC award is not whether amputation is warranted but whether the veteran has no effective function remaining other than that which would be equally well served by an amputation with use of a suitable prosthetic appliance, and the responsibility for determining loss of use lies with the adjudicator and not an examining physician. *Tucker v. West*, 11 Vet. App. 369, 373 (1998) (*citing* 38 C.F.R. §§ 3.350(a)(2), 4.63).

In this case, a November 2018 VA PD examination report indicates severe balance impairment, severe bradykinesia or slowed motion (difficulty initiating movement, "freezing," short shuffling steps), and severe tremors of the right and left lower extremities. The Veteran was also noted to have severe muscle rigidity and stiffness in the right and left lower extremities. With regard to functional impact, the examiner concluded that the Veteran had moderate to severe disability due to PD, was currently unable to walk without assistance, and was a fall risk which precluded most if not all forms of employment.

An October 2024 VA PD examination report indicates moderate balance impairment, moderate bradykinesia or slowed motion, and moderate tremors of the right and left lower extremities. The Veteran also had moderate muscle rigidity and stiffness in the lower extremities. Current symptoms were tremors of the bilateral upper and lower extremities and the body, weakness of the upper and lower extremities, and shuffling movements.

An October 2024 VA peripheral nerves conditions examination report indicates a diagnosis of bilateral lower extremity peripheral neuropathy involving the sciatic and anterior crural nerves. The report noted that the Veteran used a walker

constantly for his gait abnormality secondary to PD. The examiner opined that, due to the peripheral nerve conditions, there was no functional impairment of the lower extremities such that no effective function remained other than that which would be equally well served by an amputation with prosthesis. The examiner diagnosed bilateral lower extremity tremors and muscle rigidity with peripheral neuropathy.

The same VA examiner completed a VA PD examination in October 2024, noting severe balance impairment, moderate bradykinesia or slowed motion, mild tremors in the lower extremities, and mild muscle rigidity and stiffness in the lower extremities. She noted that the Veteran was unable to walk without a walker and was a fall risk.

Based on the lay and medical evidence of record, the Board finds that the weight of the evidence is against a separate award of SMC-L based on loss of use of both feet. Certainly, the Veteran experiences balance impairment and gait alteration due to his PD requiring the assistance of a walker for ambulation, and this is reflected in his 40 percent ratings for right and left lower extremity tremors, balance impairment, and muscle rigidity with peripheral neuropathy, as well as his award of SMC-L based on a need for regular aid and attendance. However, the evidence does not demonstrate that no effective function remaining in the lower extremities other than that which would be equally well served by an amputation with use of a suitable prosthetic appliance as required under VA regulations for an award of SMC-L based on loss of use of both feet. The October 2024 VA examiner, who conducted both a PD and peripheral neuropathy examination, specifically stated that this was not the case. Therefore, a separate SMC-L award based on loss of use of both feet is not warranted. *See* 38 U.S.C. § 1114(l); 38 C.F.R. § 3.350(a)(2).

Because a separate award of SMC-L based on loss of use of both feet is not warranted, higher levels of SMC are also not warranted. As noted above, the November 2024 rating decision retroactively addressed the inferred SMC claims and awarded higher levels of SMC as outlined above. The highest SMC level has already been awarded in this case, and, other than the above, the Veteran has not contended nor does the evidence demonstrate that even higher levels of SMC are warranted in this case.

Accordingly, the claim for a higher level of SMC is denied. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine. However, as there is not an approximate balance of positive and negative evidence, that doctrine is not applicable. *See* 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.102, 4.3, 4.7; *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1990).

L.M. YASUI
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board T. Sherrard, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.