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:** VBAPHI310
C-File or SSN: CSS[redacted]	
Street Address: [redacted]	
City, State, Zip: [redacted]	

Date: 7/02 / 2025	**ATTN:** Litigation and Support Intake

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 (§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)
☐	Motion for Reconsideration (Rule1002)
☒	Other Appellant's Legal Brief of Sixteen (16) Pages

Number of Pages Submitted (NOT including this cover sheet): Eighteen (18) 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 higher level of Special Monthly Compensation under §§3.103(a); 3.350(j) 1114(t).	6/02/2025

C. Additional Issue(s)

☒ Check here if you attached additional sheets. Include the Veteran's last name and the file number. Sixteen (16) 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	7/02/2025

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.

RE: [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/E1P
Counsel for [redacted]

7/02/2025
Date

Mail or fax this form to:

Board of Veterans'
Appeals P.O. Box 27063
Washington, DC 20038

Fax: 1-844-678-8979

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

July 4, 2025

Veteran: [redacted]
Subject: Notice of Disagreement with the June 2, 2025, RD

Before the Department of Veterans Appeals
Appellant's Legal Brief

Appellant, through counsel, now appeals his Rating Decision of June 6, 2025, limiting his entitlement to SMC at the L rate for his comorbidities of PTSD with Traumatic Brain Injury (TBI) in the Rating Decision (RD) of June 2, 2025.

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). Appellant's representative is merely a VA Agent , thus pro se status attaches to the claimant/Appellant.

In addition, Appellant wishes to provide a brief history of the claim stream to enlighten the Board member and their staff attorney(s). All dates cited refer to VBMS Receipt date.

History of the Instant Claim

12/10/2022-- Servicemember attends VA pre-discharge Psychiatric exam for PTSD with previously diagnosed in-service comorbidity of TBI by Rachel G. Foster, Psy.D.; diagnoses symptoms of obsessional rituals which interfere with routine activities and Impaired impulse control, such as unprovoked irritability with periods of violence. States she is unable to differentiate symptoms of PTSD from TBI.

12/10/2022-- Servicemember attends VA pre-discharge neuropsychiatric exam for previously diagnosed TBI with Colin P. McCaul, MD (Physiatrist); on page 4 of 7 pages diagnoses TBI with current symptoms of migraine headache, memory issues, mild mood issues and loss of sense of smell due to a 1992 head injury pre-existing service.

5/05/2023-- VA-ordered TBI c&p exam by Lyndon B. Chumbley. M.D., Neurologist, diagnoses Veteran with mild memory loss, moderately impaired judgement, occasionally inappropriate social interaction, occasionally disoriented to person, time, place, situation, mild spatial disorientation; states on page 7 of 7 pages " In summary, it is my professional opinion that the majority of the service member's symptoms are secondary to functional neurological dysfunction which is as likely a result of his TBI as not."

8/04/2023—Servicemember files Intent to File (ITF) with VA.

10/24/2023-- Veteran separates from US Navy on Medical Evaluation Board findings.

11/11/2023-- RD narrative grants, *inter alia*, SC for PTSD with TBI residuals of migraine headaches, anosmia and intention tremor with effective date of October 25, 2023.

11/11/2023-- RD Code Sheet records DC 8045-9411 indicating predominant disability is TBI.

3/18/2024-- VA-contracted Psychologist Rachel G. Foster, Psy.D, completes second Psychiatric DBQ and endorses, *inter alia*, total occupational and social impairment and, on page 7 of 10 pages, diagnoses symptoms of obsessional rituals, impaired impulse control, grossly inappropriate behavior, intermittent inability to perform activities of daily living, including maintenance of personal hygiene; states on page 3 of 10 pages, she is unable to differentiate symptoms of PTSD from TBI.

6/10/2024-- RD grants 100% Permanent and Total rating with Chapter 35 DEA benefits and SMC at the S rate only. Code sheet suddenly utilizes DC 9411 only for dual comorbidities of PTSD and TBI. RD grants incorrect effective date of 3/17/2024 (original claim of 8/04/2023)

7/01/2024-- RD grants increase for headaches from 0% to 50% but uses wrong effective date of January 18, 2024 (original claim of 8/04/2023).

8/30/2024-- Veteran files VAF 21-526 for entitlement to SMC at the L level under §3.350(b)(3) based on his comorbidities of PTSD with insomnia disorder, intention tremor with anosmia and TBI.

11/23/2024-- VA-contracted clinician Neil K. Gupta, M.D. completes VAF 21-2680 and endorses the need for a&a due to help with dressing, bathing and grooming, preparing meals and help with executive thought functioning.

2/14/2025-- Addendum to VAF 21-2680 by Dr. Gupta states Appellant is incompetent to manage his own financial affairs.

2/20/2025-- RD denies a&a and proposes incompetency.

2/26/2025-- Veteran files VAF 20-0996 for HLR with IC.

5/02/2025-- RD declares Veteran is incompetent to handle disbursement of funds.

6/02/2025-- RD grants entitlement to a&a of another stating it is based on the need due solely to PTSD to the exclusion of TBI. RD makes no mention of Insomnia disorder or intentional tremors. Code Sheet again omits comorbidity rating of DC 8045-9411.

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."

"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 ***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 ***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 ***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 ***Butts v. Brown***, 5 Vet. App. 532, 538 (1993) the Court held the assignment of a particular diagnostic code is "completely dependent on the facts of a particular case." One Diagnostic Code may be more appropriate than another based on such factors as an individual's relevant medical history, diagnosis, and demonstrated symptomatology. Any change in diagnostic code by a VA adjudicator must be specifically explained. See also ***Pernorio v. Derwinski***, 2 Vet. App. 625, 629 (1992). These potentially applicable diagnostic codes provide for alternative rating criteria if more favorable, not separate rating.

In ***Grottveit v. Brown***, 5 Vet.App. 91, 93 (1993)), the Court held that when the issue involves medical diagnosis or etiology, competent medical evidence is required. See also ***Lathan v. Brown***, 7 Vet.App. 359, 365 (1995). See also ***Bielby v. Brown***, 7 Vet.App. 260, 268-69 (1994) (same)(contrasting the roles of medical examiners and VA adjudicators).

In ***Barry v. McDonough,*** (WL _____ CAFC 2022-1747, decided June 13, 2024) F.3d, 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 ***Ephraim v. Brown***, 82 F. 3d 399 (Fed. Cir. 1996), the Court held 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

From the RD of June 2, 2025, (Notification letter of June 6, 2025), it can be ascertained there is tension as to which disease entity is the predominant cause of the need for a&a of the Appellant. In addition, based on the Akles rule (***Akles*** *supra*), inferred entitlement to additional ratings under the precedence established recently in ***Barry*** *supra* has not been incorporated into the decision as the Agency of Original Jurisdiction's (AOJ) Ratings Code Sheet shows only one award of SMC at the P rate under §3.350(f)(3). §7103(c).

Be that as it may, from a review of the entire claims file, it is obvious this was, and still is, a continuously pursued, original claim begun with the filing of the August 4, 2023, ITF, commencing on the day following separation when entitlement arose-i.e., October 25, 2023. The claim has been continuously

pursued without surcease. Each request for increase granted -e.g. 100% for DC 8045-9411 or Headaches- occurred within six months of the original grant of service connection. ***AB*** *supra*. §§5110(a); 3.400.

The employment of a VAF 21-526 to assert entitlement to SMC at the L rate under §3.350(b)(3) can be excused due to the Secretary's AMA requirement that claimants must use the proper form to request entitlement to <u>any</u> claim, HLR, NOD or appeal to a higher tribunal. As entitlement to SMC arises at such time as the evidence supports the entitlement, and the entitlement is inferred, there is no such form that meets the Secretary's specifications. Failure to utilize <u>any</u> form when requesting entitlement to SMC results in no End Product Code (EP) being generated, and hence- no claim established. See also ***DePerez, Calma***, both *supra*. § 3.151(a).

Initially, Appellant vociferously disagrees with the narrative of the June 2, 2025, RD. The gravamen of his argument is the well-documented, longitudinal history of his comorbidities of PTSD and TBI which are amply illustrated. Reasonable minds can only concur that the Appellant freely conceded he had a head trauma in 1992 when he was 4 years old. The records clearly and unmistakably support the 1992 injury was acute and resolved without any reported sequelae.

The Appellant subsequently enlisted in the U.S. Navy twenty years later on October 24, 2012. At the time of entry, he freely offered the information of the 1992 injury. A thorough entrance examination accepted him as free of defect and the presumption of soundness attached. In 2016, and again in 2021, Appellant was involved in motor vehicle accidents (MVA) which were not his fault. Service Treatment Records (STRs) clearly and unmistakably attribute the Appellant's neurological residuals and subsequent loss of executive functions to the service-connected MVAs. He was diagnosed in service with both PTSD and TBI. That ship has sailed.

A Psychiatric DBQ completed on December 9, 2022, prior to Appellant's Release from Active Duty (RAD), by Rachel G. Foster, Psy.D, on page 3 of 12 pages, notes Appellant's prior diagnosis of service-incurred TBI. In addition, on page 9 of 12 pages, Dr. Foster clearly and unmistakably diagnosed symptoms indicative of Appellant's need for aid and attendance of another- to wit: obsessional rituals which interfere with routine activities as well as impaired impulse control, such as unprovoked irritability with periods of violence. Lastly, on page 11 of 12 pages, Dr. Foster stated unequivocally she was unable to differentiate between which signs of symptoms were part of PTSD and which were part of the TBI without resorting to speculation. §§3.351(c)(3); 3.352(a).

Also on December 9, 2022, the servicemember attended a pre-discharge neuropsychiatric exam for previously diagnosed TBI with VA -contracted Physiatrist Dr. Colin P. McCaul. On page 4 of 7 pages, Dr. McCaul revised the Navy's established diagnosis of TBI with current symptoms of migraine headache, memory issues, mild mood issues and loss of sense of smell due to a 2016 MVA and avers that quite possibly the 1992 head injury, which pre-existed service, is the genesis of any possible TBI. ***Ephraim, Mitchell*** both *supra*.

In §20.1403(d), the regulation provides examples of situations which are <u>not</u> clear and unmistakable error. Among them, subsection (d) notes a changed diagnosis is not grounds for changing a prior decision. Here, in the instant case, the Secretary attempts to foist a post hoc rationalization on the Board that even though the two comorbidities are combined, one of four clinicians contends there is no concrete proof of the condition (TBI) and therefore the need for a&a arises due solely to the psychological condition. Essentially, this amounts to a medical opinion devoid of data and conclusions with no supportive rationale.

Appellant asks the Trier of Fact to consider Dr. McCaul's medical opinion fails to consider the entire evidence of record and lacks any probative value. His "new" diagnosis is unsupported by any intercurrent records between 1992 and 2022 showing chronic residuals of TBI prior to entry. Additionally, the in-service diagnosis of TBI was declared in the line of duty (LOD) and, as such, is a favorable finding of fact and protected under §3.104 in the absence of clear

and unmistakable error. ***Bielby*** *supra*. §§4.1; 4.2; 4.6; 4.10. See also ***Nieves-Rodriguez v. Peake,*** 22 Vet.App. 295, 301 (2008) where the Court held that the examiner must provide "not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."

Less than six months later, on May 5, 2023, the Veteran attended a second VA-ordered TBI c&p exam conducted by Lyndon B. Chumbley, M.D., Neurologist. Dr. Chumbley arrived at a vastly different conclusion. The neurologist diagnosed the Veteran with TBI residuals consisting of mild memory loss, moderately impaired judgement, occasionally inappropriate social interaction, occasionally disoriented to person, time, place, situation and mild spatial disorientation. The clinician stated on page 7 of 7 pages " In summary, it is my professional opinion that the majority of the service member's symptoms are secondary to functional neurological dysfunction which is as likely a result of his TBI as not." ***Sickels*** *infra*. Dr. Chumbley's medical opinion was not considered in the promulgation of the appellant's RD. Dr. McCaul's, however, was....

Several months later, fully cognizant he was going to be medically discharged due to his neuropsychiatric conditions, the Veteran filed an ITF on August 4, 2023. Appellant has continuously pursued this claim following the original decision promulgated on November 11, 2023, post- separation. The November 2023 Code sheet accurately states the effective date of claim as October 25, 2023. Appellant would also ask the Trier of Fact to note the VA examiner correctly used the Diagnostic Code of 8045-9411.

As most in this business know, VA Examiners, when combining comorbidities, always express the predominant disability first and the lesser condition secondly. Based on this, the placement of DC 8045 for Appellant's TBI can only be construed to be correct based on the presumption of regularity. See ***Sickels v. Shinseki***, 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011). In ***Sickels***, 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.'"

The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties. ***Butler v. Principi***, 244 F.3d 1337, 1339 (Fed.Cir. 2001).

On January 18, 2024, the Veteran's VBMS efolder shows the submission of a VAF 20-0995 supplemental claim requested review of the assigned evaluations for, *inter alia*, PTSD with the comorbidity of TBI and migraines. Again, Appellant would point out to the Board that his 995 supplemental claim was submitted well within a year of the November 2023 RD and is still considered part and parcel of the original claim stream. ***AB*** *supra*. §§5110; 3.103(a); 3.155(d)(1)(ii). See also ***McClain v. Nicholson,*** 21 Vet. App. 319, 323 (2007) (holding that the requirement of a current disability is met when a claimant has a disability at the time a claim for VA compensation is filed or during the pendency of that claim).

Following submission of his supplemental claim expressing disagreement with his original decision, VA scheduled a c&p to review the level of disability of Appellant's PTSD condition with TBI. Dr. Foster (Psy.D) completed a second Psychiatric DBQ and endorsed, *inter alia*, total occupational and social impairment and, in addition on page 7 of 10 pages, diagnosed symptoms of a need for aid and attendance due to obsessional rituals, impaired impulse control, grossly inappropriate behavior, intermittent inability to perform activities of daily living, including maintenance of personal hygiene; on page 3 of 10 pages, she once again reiterated she was unable to differentiate symptoms of PTSD from TBI. §§3.351(c)(3); 3.352(a); 3.102.

On June 10, 2024, subsequent to the above -mentioned c&p exam, the Secretary awarded entitlement to a 100% Permanent and Total rating for the Veteran's PTSD with TBI, Chapter 35 DEA benefits. and SMC at the S rate only

were also granted. Disturbingly, the Code sheet suddenly omitted mention of DC 8045 in spite of the dual comorbidities of PTSD with insomnia disorder and TBI. Of even more concern, the RD granted an incorrect effective date of March 17, 2024, ignoring the fact that this was an original claim with no intercurrent examinations showing a staged rating was for application. See ***Fenderson v. West***, 12 Vet. App. 119, 126 (1999) (where the Court held when evidence indicates that the degree of disability increased or decreased during appeal period following the assignment of the initial rating, "staged" ratings may be assigned for separate periods of time based on facts found).

Hot on the heels of the above RD, several weeks later on July 1, 2024, the Secretary granted an increased evaluation for, *inter alia*, headaches and awarded a total schedular 50% for same. Once again, the Secretary baldly assigned an incorrect effective date of January 18, 2024, in spite of the original claim having been continuously prosecuted following separation and the 995 supplemental claim requesting a higher, initial rating having been filed well within the suspense period of one year.

Once again, and still well within the original one year suspense date which would end on November 10, 2024, on August 30, 2024, lacking any proper form to submit a request for entitlement based on the unequivocal evidence in support of the need for a&a, the Veteran submitted a VAF 21-526. VA accepted the document but misconstrued it as an *initial* claim for a&a under §3.350(b)(3) rather than a continuation of the original August 2022 ITF claim.

Granted, the Board does not recognize the Secretary's M 21 Manual for adjudicative purposes. However, the Secretary himself freely concedes he will accept a VAF 21-2680 as a request for a&a. Nevertheless, the M 21 states a 2680, in and of itself, is not a strict prerequisite for establishing a claim for entitlement to any level of SMC. "While Form 21-2680 may be accepted as a prescribed form adequate to claim entitlement to SMC, this form is not required to develop a claim for, or grant, entitlement to SMC. Additional development for VA Form 21-2680 should not be routinely undertaken when the form is not received with a claim." M-21 VIII.iv.4.A.1.i.

On November 23, 2024, Appellant attended a contracted c&p exam for a&a and a VAF 21-2680 was utilized to record any inabilities to accomplish activities of daily living. Clinician Neil K. Gupta, M.D. (VES) opined that due to the Veteran's vertigo and loss of balance, that he was unable to protect himself from the hazards and dangers of his daily environment. Additionally, Dr. Gupta diagnosed the Appellant's loss of memory provoked disorientation and caused him to lose his bearings when he walks around. Most importantly, Dr. Gupta opined, on page 2 of 5 pages, that the Appellant requires help with dressing, undressing, bathing and grooming suffers difficulties with executive functioning; on page 4 of 5 pages the clinician further noted the Appellant was unable to ambulate unassisted due to risk of injury and falls. ***Turco*** *supra*.

Notably, the VES form used to determine a&a asks no questions as to whether the claimant, in the absence of a caregiver or spouse, would be able to accomplish ADLs independently or need to be institutionalized in the absence of same. However, Dr. Gupta noted *in haec verba* on page 5 of 5 pages: "Veteran has cognitive issues and was not able to provide an adequate history and also noted to have lack of judgement and impulsivity. His wife had to answer questions during the examination."

On February 14, 2025, VA requested a clarification as whether the Veteran was able to handle his own financial affairs. Dr. Gupta replied in the negative that he was <u>*not*</u> capable of doing so.

On February 20, 2025, the Secretary denied entitlement to SMC at the L rate for a&a under §3.350(b)(3) but proposed a finding of incompetency. Consequently, on February 26, 2025, Appellant filed his VAF 20-996 request for an HLR to contest the denial of a&a and consented to the proposal for incompetency.

On June 2, 2025, following the HLR, a RD was promulgated awarding a&a solely for PTSD to the complete exclusion of residuals of TBI or insomnia disorder.

Once again, The Secretary perpetuated the effective date error and awarded March 17, 2024, as the effective date of entitlement.

On page 3 of 3 pages, the Secretary baldly avers

" Although the posttraumatic stress disorder and traumatic brain injury are evaluated together as 100 percent disabling, the evidence of record clearly indicates that the predominant symptoms which established the evaluation is [sic] based on the symptoms of post traumatic stress disorder. Since the traumatic brain injury is not the predominant reason for the aid and attendance [sic] a higher level of special monthly compensation would not be warranted at this time."

In rebuttal, the Appellant avers the diametric opposite. Only one clinician, Dr. McCaul, in his December 2022 DBQ, insisted there was no TBI diagnosed whatsoever, and therefore the sum of the symptoms diagnosed could only be attributed to the mental disorder. Inasmuch as Dr. McCaul attempts to play both judge and jury, he pointedly overlooks the U.S. Navy's favorable findings of fact that the Appellant's MVA accidents were LOD and thus presumed to be the etiology of the TBI residuals. ***Grottveit*** *supra.* Moreover, Doctors Foster, Chumbley and Gupta have all averred that not only are they unable to segregate the two comorbidities from one another, they are universally of the opinion that the sum of <u>*both*</u> the conditions unarguably shows a need for aid and attendance and the need for institutionalization in the absence of a caregiver to protect the Appellant from the dangers to himself, others and his environment.

In further support of this proposition, the Secretary himself made the decision to combine the two comorbidities into one rating on November 11, 2023 based on the evidence of record. The Secretary simply cannot have his 'PTSD equals a&a' cake and eat it too. He has further compounded the error of his decision by declaring the Appellant is incompetent to handle his finances.

Conclusion

Reasonable minds can only concur, that once the Appellant was able to show the need for a&a and a higher level of SMC at the T rate in the informal HLR conference, as demonstrated by the evidence of record, that entitlement arose on the day following separation from active duty. §3.400.

Further, the May 5, 2024, TBI examination by Dr. Crumbley is unequivocally supported by others in its conclusions. Dr. Foster's psychological observations are supported by the Appellant's medical records and probative in every respect. Dr. Gupta's observations were done via an in-person examination as were Dr. Crumbley's and Dr. Fowler's. While Dr. McCaul's c&p was also in-person as well, Dr. McCaul relied on absence of evidence for his suppositions. Perhaps even more egregious was his attempt to subvert the Presumption of Soundness and attribute the claimant's diagnosis of TBI to a childhood accident over 30 years in the past... or to ascribe it to no "diagnosis" of TBI whatsoever. Either supposition is unavailing. §3.104

Again, reasonable minds can only mutually concur that the Appellant has a diagnosed comorbid condition of both PTSD and residuals of TBI- to include headaches rated under a neurological diagnostic code of DC 8100. He also suffers intention tremors, anosmia and loss of executive function (apraxia) such that he is unable to vocalize his residuals without his wife's help explaining them. The Secretary appears to belatedly concur only insofar as he has determined the Appellant is incompetent and appointed a fiduciary.

The Trier of Fact need not go on an unguided safari à la Brokowski in search of supportive evidence when the Secretary has inadvertently supplied the same throughout the period on appeal. With the exception of the speculative c&p exam conducted by Dr. McCaul, nowhere in the four corners of the claims file can there be found any medical opinion segregating the two comorbidities of PTSD and TBI and explaining the symptomatology of each with no overlap. ***Ephraim*** *supra*.

Appellant benefits from the utter simplicity of his argument. With the sure knowledge that the Secretary has chosen to combine the two conditions based on overlap-ostensibly due to avoiding pyramiding- the benefit of the doubt must, by operation of law, accrue to the Veteran as to which of the two inextricably intertwined comorbidities are the etiology for the need for a&a. Given that proposition, entitlement to SMC at the T rate should be for consideration under authority of §§3.350(j); 1114(t).

Prayer for Relief

In ***Wise v. Shinseki***, 26 Vet. App. 517,531(2014), the Court held that the benefit of the doubt rule is a unique standard of proof, and "the nation, in recognition of our debt to our Veterans" has taken upon itself the risk of error in awarding such benefits."

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.

In ***Barrett v. Principi***, 363 F.3d 1316, 1320 (Fed. Cir. 2004), the Court held ("[T]he veterans benefit system is designed to award entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign."

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 asks for no more but certainly no less. When he raised his right hand and swore to defend his country, he was promised certain things- among them that were he to be injured in that service, his country would provide for him. America jeopardizes its ability to induce others to serve when we callously renege on those promised benefits.

Respectfully submitted,

Gordon A. Graham
Counsel for Appellant [redacted]

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