BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

Docket No. 241003-481044

Represented by
Gordon A. Graham, Agent

DATE: September 15, 2025

ORDER

Entitlement to special monthly compensation (SMC) under 38 U.S.C. § 1114 (p) at a rate higher than SMC (l) and less than SMC (o) is denied.

Entitlement to SMC under 38 U.S.C. § 1114 (t) is denied.

FINDINGS OF FACT

1. The Veteran's service-connected disabilities do not warrant a rate higher than SMC (l) and less than SMC (o) under 38 U.S.C. § 1114 (p).

2. The Veteran is not entitled to SMC at the (o) rate or to the intermediate rate between (n) and (o) under 38 U.S.C. § 1114 (p).

CONCLUSIONS OF LAW

1. The criteria for SMC under 38 U.S.C. § 1114 (p) at the rate higher than SMC (l) and less than SMC (o) have not been met. 38 U.S.C. §§ 1114, 5107; 38 C.F.R. § 3.350.

2. The criteria for SMC under 38 U.S.C. § 1114 (t) have not been met. 38 U.S.C. §§ 1114, 5107; 38 C.F.R. §§ 3.350, 3.352.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from June 2003 to December 2006 and from August 2009 to September 2010.

In the October 2024 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 September 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, considering the new evidence in addition to the evidence previously considered. *Id.*

It is valuable to note that the Veteran has already been found to be 100 percent disabled by VA. The Veteran has been in receipt of a schedular 100 percent combined disability rating since September 17, 2014. The Veteran has also been in receipt of SMC under 38 U.S.C. § 1114 subsection (l) and 38 C.F.R. § 3.350 (b) on account of being so helpless as to be in need of regular aid and attendance from April 28, 2021. He has also been found to be incompetent from April 26, 2019.

1. Entitlement to SMC under 38 U.S.C. § 1114 (p) at a rate higher than SMC (l) and less than SMC (o).

The Veteran claims that his musculoskeletal disabilities are separate and distinct from any neurological or mental disorders that combine to create entitlement to SMC (p) at the intermediate rate between (l) and (m) with an effective date of January 26, 2023. *See* June 2024 VA Form 10182 Legal Brief.

The Veteran is in receipt of SMC (l) on account of his need for aid and attendance. *See* 38 U.S.C. § 1114 (l). According to the July 2022 rating decision in which

SMC was granted, it was based upon the Veteran's service-connected posttraumatic stress disorder (PTSD) with traumatic brain injury (TBI), migraine headaches with PTSD and TBI, and a scar associated with PTSD and TBI.

Under 38 U.S.C. § 1114 (p), a recipient may be entitled to the next higher rate or an intermediate rate if the service-connected disabilities exceed the requirements for any of the SMC rates described under 38 U.S.C. § 1114.

Under 38 C.F.R. § 3.350 (f)(3), 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. In applying this provision, 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).

In addition to PTSD, TBI, vertigo, and migraines, the Veteran is service connected for bilateral lower knee disabilities and scars. While the Veteran's service-connected vertigo was awarded after his initial grant of SMC (l), it is secondary to the service-connected PTSD with TBI and is not separate and distinct because it shares the same etiology and vestibular function as the TBI. Moreover, the Veteran contends that his musculoskeletal disabilities of the bilateral knees combine to create entitlement to SMC (p) at the intermediate rate between (l) and (m). Specifically, the Veteran referenced the following disabilities:

- Residuals of status post repair of anterior cruciate ligament and subtotal resection of the right knee, rated as 10 percent disabling under Diagnostic Codes 5003-5260;
- Chronic mild left knee strain with osteoarthritis, rated as 10 percent disabling under Diagnostic Codes 5003-5260;
- Right knee instability, rated as 10 percent disabling under Diagnostic Codes 5003-5257;
- Scar, left side, top of head associated with PTSD with TBI, rated as 10 percent disabling under Diagnostic Code 7800; and

- Painful scar, left side, top of head associated with PTSD with TBI, rated as 10 percent disabling under Diagnostic Code 7804.

While the scars are considered secondary to the Veteran's PTSD with TBI, they are physical disabilities involving the skin. Nevertheless, the ratings assigned to the listed disabilities do not combine to 50 percent or higher. While the AOJ applied a bilateral factor of 1.9 percent for diagnostic codes 5260 and 5257, the actual bilateral factor amounts to 2.7 percent for the bilateral group consisting of two 10 percent ratings for the right leg and another 10 percent rating for the left leg. Yet, even after applying a higher bilateral factor, the combined rating rounds down to 40 percent.

Therefore, the Veteran's skin and musculoskeletal disabilities are not independently ratable at 50 percent or more from the conditions establishing entitlement under 38 U.S.C. § 1114 (l). Accordingly, the Veteran does not meet the conditions that would warrant a rate higher than SMC (l) and less than SMC (o) under 38 U.S.C. § 1114 (p).

2. Entitlement to SMC under 38 U.S.C. § 1114 (t).

The Veteran also claims entitlement to SMC (t) with an effective date of April 26, 2019, the date of the finding of incompetency based on the need for regular aid and attendance, on account of being service connected for residuals of TBI. *Id.*

Under 38 U.S.C. § 1114 (t), if any veteran, as the result of service-connected disability, is in need of regular aid and attendance for the residuals of TBI, is not eligible for compensation under § 1114 (r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care, the veteran shall be paid a monthly aid and attendance allowance equal to the rate described in 38 U.S.C. § 1114 (r)(2). 38 U.S.C. § 1114 (t); 38 C.F.R. § 3.350 (j).

A veteran is entitled to the higher level aid and attendance allowance authorized by 38 C.F.R. § 3.350 (j) in lieu of the regular aid and attendance allowance when all of the following conditions are met: (i) As a result of service-connected residuals of TBI, the veteran meets the requirements for entitlement to the regular

aid and attendance allowance in 38 C.F.R. § 3.352 (a); and (ii) As a result of service-connected residuals of TBI, the veteran needs a "higher level of care" (as defined in 38 C.F.R. § 3.352 (b)(3)) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care the veteran would require hospitalization, nursing home care, or other residential institutional care. 38 C.F.R. § 3.352 (b)(2).

The requirements for regular aid and attendance are outlined in 38 C.F.R. § 3.352 (a). They include inability of claimant to dress or undress him/herself, or to keep him/herself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); inability of claimant to feed him/herself through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment. It is only necessary that the evidence establishes that the veteran is so helpless as to need regular aid and attendance, not that there is a constant need.

The determination of the need for a higher level of care under 38 U.S.C. § 1114 (r)(2) is subject to the criteria of 38 C.F.R. § 3.352. Pursuant to that section, the need for a higher level of care means that the veteran requires personal healthcare services provided daily in their home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed healthcare professional. 38 C.F.R. § 3.352 (b)(2).

Personal health-care services include (but are not limited to) such services as physical therapy, administration of injections, placement of in-dwelling 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. 38 C.F.R. § 3.352 (b)(3)-(4).

The regulations also provide that the term "under the regular supervision of a licensed health-care professional" means that an unlicensed person performing

personal health-care services is following a regimen of personal health-care services prescribed by a health-care professional, and that the health-care professional consults with the unlicensed person providing the health-care services at least once each month to monitor the prescribed regimen. 38 C.F.R. § 3.352 (b)(4). The consultation need not be in person; a telephone call will suffice. *Id.* A person performing personal health-care services who is a relative or other member of the veteran's household is not exempted from the requirement that he or she be a licensed health-care professional or be providing such care under the regular supervision of a licensed health-care professional. 38 C.F.R. § 3.352 (b)(5).

Importantly, the provisions of 38 C.F.R. § 3.352 (b) are to be strictly construed. 38 C.F.R. § 3.352 (b)(6). The higher-level aid and attendance allowance are to be granted only when the veteran's need is clearly established, and the number of daily services required by the veteran is substantial. *Id.*

The Veteran is currently in receipt of SMC under 38 U.S.C. § 1114, subsection (l) and 38 C.F.R. § 3.350 (b) on account of being so helpless as to be in need of regular aid and attendance.

Entitlement to SMC under 38 U.S.C. § 1114 (t) requires, as a threshold matter, that the Veteran be entitled to the maximum rate under § 1114 (o), or to the maximum rate under § 1114 (p) at the intermediate rate between (n) and (o). 38 C.F.R. § 3.350 (j). As discussed in the previous section, entitlement to SMC (p) has been denied, and the Veteran is not otherwise entitled to SMC at the (o) rate. Because the threshold requirement for SMC (t) is not met, the claim must be denied as a matter of law.

Even if the threshold requirement were met, and if the Board resolved reasonable doubt in the Veteran's favor that his need for aid and attendance is solely due to residuals of TBI, the record does not establish that the Veteran would require hospitalization, nursing home care, or other residential institutional care.

The higher level of aid and attendance under 38 U.S.C. § 1114 (r)(2) requires a need for daily skilled services provided by, or under the regular supervision of, a licensed health care professional. *See* 38 C.F.R. § 3.352 (b)(3). While the Veteran requires daily assistance from a caregiver (i.e., his wife), the evidence shows that

the care consists of supervision, medication reminders, and help with activities of daily living, rating than skilled medical services as defined by the regulation. Therefore, the criteria for (r)(2) are not met.

The Board notes the Veteran submitted a private medical opinion in support of his claim for a higher level of aid and attendance. In this opinion, a psychiatrist stated the Veteran's impaired impulse control with irritability and periods of violence, inability to perform activities of daily living, and noticeable memory deficits, the Veteran would be unable to survive outside of an institutionalized setting without a full-time caregiver. *See* February 2024 Private Medical Opinion. Even if the Veteran were unable to survive outside of an institutionalized setting without a full-time caregiver, there is no evidence that his caregiver or wife is providing daily skilled medical care.

Accordingly, entitlement to a higher level of SMC is denied.

John J. Crowley
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board Cochran, Laura

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.