BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

Docket No. [redacted]

Represented by
Gordon A. Graham, Agent

DATE: October 26, 2026

ORDER

Entitlement to special monthly compensation (SMC) under 38 U.S.C. § 1114(t) is granted.

FINDING OF FACT

The most probative evidence of record shows that the Veteran's residuals of his service-connected traumatic brain injuries (TBI) causes a need for regular aid and attendance as defined by 38 C.F.R. § 3.352(a).

CONCLUSION OF LAW

The criteria for SMC under 38 U.S.C. § 1114(t) have been met. 38 U.S.C. §§ 1114, 5107; 38 C.F.R. §§ 3.102, 3.350, 3.352.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty with the United States Army from June 2003 to December 2006 and from August 2009 to September 2010 with service in Southwest Asia during the Persian Gulf War the award of the Combat Infantry Badge. The Veteran also had intervening service with a Reserve Component.

This appeal comes to the Board of Veterans' Appeal (Board) under the Appeals Modernization Act (AMA) review system. *See* 38 C.F.R. §§ 3.2400 to 3.2601, 20.200 to 20.205.

Specifically, the appeal comes to the Board from a September 2024 rating decision. In October 2024, the Veteran filed with the RO a VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), in which he 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.

In a September 2025 decision the Board denied the claims for SMC under 38 U.S.C. § 1114(p) at a rate higher than SMC (l) and less than SMC (o) and SMC under 38 U.S.C. § 1114(t). The Veteran appealed the Board decision to the United States Court of Appeals for Veterans Claims (Court).

In a June 2026 order, which incorporated the parties Joint Motion for Partial Remand (JMPR), the Court vacated and remanded the September 2025 Board decision to the extent that it denied SMC under 38 U.S.C. § 1114(t).

Finally, the Board notes that evidence was added to the claims file during a period of time when new evidence was not allowed. As the Board is deciding the claim it may not consider this evidence in its decision. *See* 38 C.F.R. § 20.300. The Veteran may file a Supplemental Claim and submit or identify this evidence. *See* 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.* Specific instructions for filing a Supplemental Claim are included with this decision.

Beyond the above, it is valuable to note that 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.

I. The JMPR's Concerns

The June 2026 JMPR vacated and remanded the September 2025 Board decision to the extent that it denied SMC under 38 U.S.C. § 1114(t) because the decision did not adequately address the below claim by the Veteran:

> … VA received Appellant's VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), on October 11, 2024 … Appellant attached several pages to his VA Form 10182, noting that he 'timely files his AMA Notice of Disagreement with accompanying legal brief of the May 31, 2024, Rating Decision (RD) denying entitlement to Special Monthly Compensation (SMC) at the (t) rate under 38 U.S.C. § 1114(t) and 38 C.F.R. § 3.350(j) … [M]ost relevantly, Appellant referenced the application of the Court's holding in *Laska v. McDonough*, 37 Vet. App. 460 (2024) …
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> Specifically, Appellant stated his belief that the Regional Office (RO) erred in April and August 2023 and May and September 2024 rating decisions 'as both held that the Veteran did not qualify for SMC at the T rate based on the ultra vires stricture imposed under §3.352(b)(2)(iii),(3).'… As such, he argued that '[a]s the regulation is now held to be ultra vires, it is void *ab initio* under *Barry supra*... entitlement to SMC T arose on April 26, 2019–the date of the finding of incompetency…'

In this regard, the Board notes that the below decision will consider and discuss all theories of entitlement for SMC under 38 U.S.C. § 1114(t) to include the above *Laska, supra*, theory identified by the JMPR.

Context in this case is important: The parties cited to, once again, a Court case that did not exist when the RO addressed the case.

Given the above, the Board finds that neither a Remand for additional development nor further discussion of the above concern is needed at this time. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (remands which would only result in

unnecessarily imposing additional burdens on VA with no benefit flowing to the veteran are to be avoided).

II. The Claim for SMC under 38 U.S.C. § 1114(t)

As outlined in the JMPR, the Veteran and his representative assert that the appellant's residuals of his service connected TBI entitles him to SMC under 38 U.S.C. § 1114(t) due to the Court's holding in *Laska, supra.*

SMC under 38 U.S.C. § 1114(t) is payable to a veteran who, as the result of service-connected disability, is in need of regular aid and attendance for the residuals of a TBI, is not eligible for compensation under 38 U.S.C. § 1114(r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care. 38 U.S.C. § 1114(t). Determination of this need is subject to the criteria of 38 C.F.R. § 3.352. 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 § 3.350(j) when 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 needs a "higher level of care" (as defined in paragraph 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 need for a "higher level of care" shall be considered to be a 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)(3).

The term "under the regular supervision of a licensed health-care professional," as used in paragraph (b)(3), 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. The consultation need not be in person; a telephone call will suffice. 38 C.F.R. § 3.352(b)(4). 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).

Tellingly, the Court in *Laska, supra,* invalidated the implementing regulation, 38 C.F.R. §, 3.352(b)(2)(ii), because it is beyond the requirements of the statutory language in 38 U.S.C. § 1114(t). The Court emphasized that the level of care specified in subsection (t) - the need for "regular aid and attendance" - explicitly matches the language in subsection (l), not the higher-level care required in subsection (r)(2). The Court considered that the plain language of the statute and the legislative history of subsection 1114(t) shows that Congress intended to compensate the cognitive and psychological manifestations of TBI at the same level as the anatomic loss, blindness, and deafness contemplated by SMC(r)(2).

Therefore, post-Laska, supra, the provisions of 38 C.F.R. § 3.352(b)(2)(ii) will not be considered in determining eligibility for SMC(t), rather eligibility will be considered only under the language of the statute.

Accordingly, when adjudicating claims for SMC pursuant to 38 C.F.R. § 1114(t) since *Laska, supra*, the criteria VA must apply is the same criteria when determining the need for regular aid and attendance under 38 C.F.R. § 3.352(a) and they are as follows: inability of veteran to dress or undress himself, or to keep himself 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; inability of veteran to feed himself 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 daily environment. It is not required that all of the disabling conditions enumerated in this paragraph be found to exist, nor is it necessary that there be a constant need for aid and attendance. *Id.*

Additionally, an individual who is bedridden meets the criteria for aid and attendance. The regulation provides that being "bedridden" means that the condition which, through its essential character, actually requires that the claimant remain in bed. Determinations that the veteran is so helpless as to be in need of regular aid and attendance will not be based solely upon an opinion that the claimant's condition is such as would require him to be in bed. They must be based on the actual requirement of personal assistance from others. 38 C.F.R. § 3.352(a).

In evaluating the evidence, the Board has been charged with the duty to assess the credibility and weight given to evidence. *Davidson v. Shinseki*, 581 F. 3d 1313 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F. 3d 1372 (Fed. Cir. 2007). Indeed, the Court has declared that in adjudicating a claim, the Board has the responsibility to do so. *Bryan v. West*, 13 Vet. App. 482, 488-89 (2000). In doing so, the Board is free to favor one medical opinion over another, provided it offers an adequate basis for doing so. *Owens v. Brown*, 7 Vet. App. 429, 433 (1995).

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under the laws administered by VA. VA shall consider all information and medical and lay evidence of record. Where there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, VA shall give the benefit of the doubt to the claimant. 38 U.S.C. § 5107; 38 C.F.R. § 3.102; *see also Lynch v. McDonough,* 21 F.4th 776 (Fed. Cir. 2021) (*en banc*).

With the above criteria in mind, the Board finds it significant that the April 2022 VA housebound aid and attendance examiner opined, among other things, that the Veteran can not prepare his own meals because he would leave stove/oven

unattended due to short term memory loss as well as needs assistance bathing, grooming, and keeping himself ordinarily clean and presentable.

The Board also finds it significant that the Veteran submitted a February 2024 private medical opinion in support of his claim. Tellingly, in this opinion that psychiatrist opined that the Veteran would be unable to survive outside of an institutionalized setting without a full-time caregiver given his impaired impulse control with irritability and periods of violence, inability to perform activities of daily living, and noticeable memory deficits.

Lastly, the Board cannot overlook the fact that the record shows that the RO in a July 2022 rating decision granted the Veteran SMC under 38 U.S.C. § 1114, subsection (l) and 38 C.F.R. § 3.350(b) on account of his being so helpless as to be in need of regular aid and attendance and this Favorable Finding is binding on the Board. *See* 38 U.S.C. § 5104A; 38 C.F.R. § 3.104(c).

Given the above, the findings by the April 2022 VA housebound aid and attendance examiner when taken together with the February 2024 opinion by the private psychiatrist and the binding finding by the RO that the Veteran met the criteria for 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 show that the claimant meets the 38 C.F.R. § 3.352(a) criteria for regular aid and attendance. *See Owens, supra.*

Tellingly, and as noted above, the Court in *Laska, supra,* held that when adjudicating claims for SMC under 38 U.S.C. § 1114(t) VA must apply the 38 C.F.R. § 3.352(a) criteria for regular aid and attendance because it struck down the provisions of 38 C.F.R. § 3.352(b)(2)(ii).

Accordingly, because the most probative evidence of record shows that the Veteran met the 38 C.F.R. § 3.352(a) criteria for regular aid and attendance and because the Court in *Laska, supra,* held that when adjudicating claims for SMC under 38 U.S.C. § 1114(t) VA must apply the 38 C.F.R. § 3.352(a) criteria, the Board finds that the record shows that the appellant met the criteria for SMC under 38 U.S.C. § 1114(t) due to his residuals of his TBI. *See Owens, supra.*

Therefore, the Board finds that the criteria for SMC under 38 U.S.C. § 1114(t) have been met and the appeal is granted. *See* 38 U.S.C. § 1114; 38 C.F.R. §§ 3.350(j), 3.352.

In granting above claim for SMC under 38 U.S.C. § 1114(t), the Board makes no finding as to its' effective date because this issue is not before it. Instead, this is an issue the RO will address when implementing the Board's decision.

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

Attorney for the Board Werner, Neil T.

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.