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:** VBAOAK343
C-File or SS	
Street Addr	
City, State,	

Date: 11/01/2025	**ATTN:** Litigation and Support Intake

From:	**Gordon A. Graham**
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Type of Document Submitted:

☐	Request for Board Hearing at VA Central Office in D.C.(Rule 703)
☐	Request for Advancement of the Docket (§20.902(c))
☒	Waiver of Time to Select a Different Board Review Option
☐	Submission of New and Relevant Evidence associated with the Instant Appeal
☒	VAF 10182 NOTICE OF DISAGREEMENT (BVA Review)
☐	Motion for Reconsideration (Rule1002)
☒	Other Appellant's Legal Brief of seventeen (17ki) Pages

Number of Pages Submitted (NOT including this cover sheet): Nineteen (19) Pages

VA Directive 6609, NOVEMBER 9, 2007: NOTICE! Access to Veterans records is limited to Authorized Personnel Only. Information may not be disclosed unless permitted pursuant to 38 CFR 1.500-1.599. The Privacy Act contains provisions for criminal penalties for knowingly and willingly disclosing information from the file unless properly author

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

[redacted]

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 a&a under §3.350(b)(3) and entitlement to SMC at the T rate under §1114(t) §3.350(j).	10/20/2025

C. Additional Issue(s)

☒ Check here if you attached additional sheets. Include the Veteran's last name and the file number. 17 pages 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	11/01/2025

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.

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Dept. Of Veterans Affairs
Board of Veterans Appeals
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November 1, 2025

Veteran: [redacted]
Subject: Rating Decision of October 20, 2025

Before the Department of Veterans Appeals
Appellant's Legal Brief

Appellant, through counsel, now files his Notice of Disagreement (NOD) with the October 20, 2025, rating decision (RD) denying entitlement to aid and attendance of another under the authority of §3.350(b)(3) as well as the ancillary entitlement to SMC at the T rate. Appellant appeals in the direct venue lane and requests a *de novo* adjudication under §7104(a) taking the *whole* of the history of the claim into account.

Because Appellant is proceeding pro se, represented by a VA Agent, 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).

In order to aid the Trier of Fact and their staff attorneys in adjudicating the appeal, Appellant submits a brief history of the claim for aid and attendance to date. All dates cited, unless otherwise denoted, refer to entries in the VBMS Receipt Date.

History of the Claim

5/01/2015-- Veteran submitted copies of his service treatment records and a VAF 21-4138 sworn testimony under §1154(b) as to his combat experiences in Iraq and subsequent medivac by air to treat his TBI.

2/28/2024-- BVA Decision No. 20-25 107A grants, *inter alia*, entitlement to 100% for §4.130 DC 9411-8045 with effective date of 1/10/2010 noting Veteran requires a caregiver due to the level of his TBI disabilities.

3/18/2024-- RD grants 100% for PTSD with TBI with effective date of 1/26/2010 due to diagnosed need for a caregiver due to persistent delusions.

4/03/2024-- Veteran submits STRs dated 5/27/2008 endorsing ringing in ears, sensitivity to bright light, irritability, headaches and sleep problems in post-deployment medical reports following head injury.

4/03/2024-- Veteran submits VAF 21-2680 authored by VA clinician Honghung D. Nguyen, M.D., diagnosing need for a&a for inability to accomplish the activities of daily living to include intermittent dizziness, poor memory, balance, and prompting to perform self care due to PTSD, Neck pain and headaches.

5/30/2024-- RD grants, *inter alia*, entitlement to SMC at the S rate under §3.350(i)(1) but implicitly denies entitlement to a&a under §3.350(b)(3).

6/03/2024-- Veteran's spouse submits VAF 21-10210 Witness statement out of time dated 4/09/2024 attesting to her role as caregiver under the VHA's PCAFC program since Veteran's separation from service in 2008.

6/27/2024-- VA clinician Dr. Honghung Nguyen submits medical opinion that Veteran requires a&a and would have to be institutionalized in the absence of his wife as caregiver due solely to the residuals of his TBI.

10/11/2024-- RD denies entitlement to SMC at the L rate under §3.350(b)(3).

10/15/2024—Veteran timely files his VAF 20-0996 HLR request disagreeing with the 10/15/2024 denial of entitlement to SMC at the L and T rate.

1/17/2025-- PTSD Psych Review DBQ conducted by Joyce Anis, Ph.D. via videoconference. Clinician fails to diagnose 17- year continuing persistent delusions.

2/08/2025-- Veteran's spouse timely submits statement in support of claim for a&a to include recent appearance of psychogenic non-epileptic seizures (PNES).

2/12/2025-- RD for HLR announces a difference of opinion and favorable findings of fact identify the Veteran requires a&a and assistance with bathing/showering, eating or self-feeding,, medication management and assistance with being protected from environmental hazards.

2/15/2025-- Veteran timely submits VAF 21-2680 authored by VA clinician Dr. Honghung Nguyen dated 10/30/2024 endorsing need for a&a and need for nursing home care in absence of spouse/caregiver.

5/14/2025-- RD denies entitlement to a&a of another "because the criteria regarding aid and attendance have not been met."

9/17/2025-- Veteran timely files VAF 20-0995 Supplemental claim with private Independent Medical Opinion (IMO) by Maria V. Rivero, M.D. in support of need for a&a (Exhibit A.).

10/17/2025-- A&a c&p exam by Scott Nelson, PA-C, concedes diagnoses of PTSD, TBI, headaches, spinal conditions, knee conditions, upper and lower extremity neurologic conditions and tinnitus- but notes Veteran has no disabilities which are totally disabling.

10/20/2025-- RD denies entitlement to aid and attendance and by implicit extension, to ancillary entitlement of SMC at the T rated under §3.352(j).

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 knows 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 ***Clemons v. Shinseki,*** 23 Vet. App. 1, 5 (2009), the Court held that a claimant "[does] not file a claim to receive benefits only for a particular diagnosis, but for the affliction his . . . condition, whatever that is, causes him." Consequently, VA "should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim," taking into consideration "the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." VA commits error "when it fail[s] to weigh and assess the nature of the current condition the appellant suffer[s] when determining the breadth of the claim before it." Id. at 6.

38 USC §1154(b) states:

In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, air, or space organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may

be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

38 CFR §4.2 Interpretation of examination reports states:

Different examiners, at different times, will not describe the same disability in the same language. Features of the disability which must have persisted unchanged may be overlooked or a change for the better or worse may not be accurately appreciated or described. It is the responsibility of the rating specialist to interpret reports of examination in the light of the **whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present.** Each disability must be considered from the point of view of the veteran working or seeking work. If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes. (emphasis added to original). (emphasis added to original)

§4.6 Evaluation of evidence states:

"The element of the weight to be accorded the character of the veteran's service is but one factor entering into the considerations of the rating boards in arriving at determinations of the evaluation of disability. Every element in any way affecting the probative value to be assigned to the evidence in each individual claim must be thoroughly and conscientiously studied by each member of the rating board in the light of the established policies of the Department of Veterans Affairs to the end that decisions will be equitable and just as contemplated by the requirements of the law. (emphasis added to original)."

§ 4.126(a) Evaluation of disability from mental disorders states:

"When evaluating a mental disorder, the rating agency shall consider the frequency, severity, and duration of psychiatric symptoms, the length of remissions, and the veteran's capacity for adjustment during periods of remission. **The rating agency shall assign an evaluation based on all the**

evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination. (emphasis added to original).

In ***Akles v. Derwinski***, 1 Vet.App. 118, 121 (1991), The Court held, and the Secretary further conceded that, to the extent that SMC may be considered part of a claim for increased compensation, the VA should have inferred from the veteran's request for an increase in benefits . . . a request for [SMC] whether or not it was placed in issue by the veteran.

In ***Bailey v. O'Rourke***, 30 Vet.App. 54, 60 (2018) The Court held that a medical opinion is inadequate where its rationale is based solely on medical literature and not facts specific to the individual veteran).

In ***Guerrieri v. Brown***, 4 Vet. App. 467, 470-71(1993) the Court held "The credibility and weight to be attached to medical opinions is within the providence of the Board as adjudicators. Greater weight may be placed on one physician's opinion over another depending on factors such as reasoning employed by the physicians and the extent to which they reviewed prior clinical records and other evidence."

In ***Nieves-Rodriguez v. Peake***, 22 Vet. App. 304 (2008), the Court held a VA medical examination report is entitled to no weight if it contains only data and conclusions. "It should now be obvious that a review of the claims file cannot compensate for lack of the reasoned analysis required in a medical opinion. It is the factually accurate, fully articulated, sound reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion." ***Id.*** at 306.

In ***Miller v. West***, 11 Vet. App. 345,348(1998), the Court held that "a bare conclusion, even one reached by a health care professional, is not probative without a factual predicate in the record".

Most recently, in ***Martinez-Bodon v. Wilkie,*** 32 Vet.App. 393, 397 (2020), the Court held establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. See also ***Romanowsky v. Shinseki*** ,26 Vet.App.289, 293 (2013).

In ***AB v. Brown***, 6 Vet. App. 35, 38 (1993), the Court held 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 §3.103(a).

In ***Bradley v. Peake***, 22 Vet. App. 280 (2008), the Court held "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 **Buie v. Shinseki, 24 Vet.App. 242, 250 (2010)**, the Court held that [w]henever a veteran has a total disability rating, schedular or extraschedular, based on multiple disabilities and the veteran is subsequently awarded service connection for any additional disability or disabilities, VA's duty to maximize benefits requires VA to assess all of the claimant's disabilities without regard to the order in which they were service connected to determine whether any combination of the disabilities establishes entitlement to [SMC] under section 1114. This duty to maximize encompasses all SMCs and requires VA render a decision which grants every benefit that can be 'supported in law while protecting the interests of the Government.'

In ***Barry v. McDonough***, WL _____ CAFC 2022-1747, decided May 16, 2024, Fed. Cir. (2024), the Court held that there is no restriction on the number of times §3.350(f)(3) can be applied as long as each and every disability is separate and

distinct from the index disease and involving different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. §1114 (l) through (n).

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." ***Moreira v. Principi,*** 3 Vet.App. 522, 524 (1992).

§4.130 General Rating Formula for Mental Disorders states:

"Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; **persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene);** disorientation to time or place; memory loss for names of close relatives, own occupation, or own name." (emphasis added to original).

In ***Sickels v. Shinseki***, 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011), the Court held that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without "demonstrating why the medical examiners' reports were competent and sufficiently informed"). See also ***Ashley v. Derwinski,*** 2 Vet.App. 307, 308 (1992) (quoting ***United States v. Chem. Found., Inc.***, 272 U.S. 1 (1926)) "[t]here is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties.'" 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). See also ***Miley v. Principi***, 366 F.3d 1343, 1347 (Fed. Cir. 2004) quoting Butler. Further, in ***Rizzo v. Shinseki***, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009), it was held: "what appears regular is regular and what appears irregular is irregular- the burden of proof of irregularity falling on the appellant to rebut."

Discussion

Initially, Appellant wishes to strenuously point out he is a combat Veteran with award of two (2) Army Commendation Medals- one for each of his deployments into combat areas in Southwest Asia. In addition, he was also awarded the Army's Meritorious Service Medal in lieu of a Bronze Star Medal. Thus, the presumptions accorded Veterans under §1154(b) are for application. He deployed to Iraq and Afghanistan one time each as shown by the Bronze Service Star on his National Defense Service Medal. But for his severe injury to his head from motor vehicle misadventures in the combat zone, and resultant severe Traumatic Brain Injury (TBI) in 2008 in the line of duty, he had looked forward to making the Army a career. Regrettably, even though annotated in his service medical records, the Agency failed to service connect him for his TBI initially. In point of fact, even though it was clearly annotated in his STRs, no one saw fit to point out the obvious connection between his Bel's Palsy to service. See ***Bell v. Derwinski***, 2 Vet. App. 611, 613 (1992), where the Court held records generated by VA facilities that may have an impact on the adjudication of a claim are considered constructively in the possession of VA adjudicators during the consideration of a claim, regardless of whether those records are physically on file.

Reasonable minds can only concur that the Secretary has had ample time (seventeen years) to rebut the Appellant's §1154(b) entitlement to the combat presumption by presenting clear and convincing evidence to rebut the presumption. This he has declined to do. See ***McWhorter v. Derwinski***, 2 Vet.App. 133, 136 (1991), where the Court held "Yet,[w]here [an] appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by [the] appellant, and ignored by [VA], to be conceded."

With his §1154(b) bona fides confirmed and established per his DD 214, Appellant wishes to continue to the *gravamen* of his contentions. As an initial matter, Appellant wishes to illustrate that the February 28, 2024, BVA Legacy Decision No. 20-25 107A granted an earlier effective date of January 26, 2010.

As such, this new current claim stream represents an uninterrupted, continuously pursued claim now commencing in January 2010. Certainly, a Fenderson staged rating is appropriate for consideration in light of the changed effective-date circumstances and a more complete picture of the evidence as it was known in 2008. See ***Fenderson v. West***, 12 Vet. App. 119, 126 (1999), where the Court held where 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). In the instant case at bar the Secretary has vehemently declined to entertain the legal invitation. This is error.

Established precedence concerning staged ratings has in no way *ever* been constricted or precluded such as to *not* comprehend the application of "staged" ratings as they apply to SMC. ***Moreira*** *supra*. In fact, that is the very essence of the Fenderson and Moreira decisions. It embodies the procedural due process consideration accorded Veterans in ***AB*** *supra* that the Agency of Jurisdiction is tasked with the authority to "render a decision which grants *every* benefit that can be supported in law while protecting the interests of the Government". §3.103(a). ***Akles*** *supra*. Appellant submits that the Secretary has fallen woefully short of his duty to assist under §3.103(a)(f) but also to render the benefit of the doubt under §3.102. See also ***Buie*** *supra*.

Moreover, the Secretary baldly attempts to announce favorable findings of fact under §3.103(f)(4) that the Appellant has indeed been diagnosed as being in need of aid and attendance of another while in the next breath denying entitlement to same. This need was so great it was even recognized by the VHA whereupon they granted Personal Caregiver entitlement (PCAFC) to the Veteran's spouse in the intercurrent period. How this incontrovertible evidence of entitlement to a&a escaped the notice of the Secretary may never be known. ***Nieves-Rodriguez*** supra.

What is certainly *not* in contention is the level of disability of the Appellant. The record is replete with descriptions of the Veteran's condition when airlifted (Medivac'd) out of the combat area and admitted to a hospital for treatment

for TBI for a month. See also April 3, 2024, submission of Service Treatment Records never before associated with the claims file in VBMS attest to the fact that Appellant was suffering from ringing in ears, sensitivity to bright light, irritability, headaches and sleep problems in post-deployment medical reports following his diagnosed head injury in the line of duty. ***Clemons*** *supra*.

The Appellant, not solely because he is covered by the presumption of credibility associated with §1154(b), but also because he is capable of reporting that which comes to him via his five senses, is considered to be credible and competent to report the subjective symptoms of his injuries. See ***Layno v. Brown***, 6 Vet. App. 465, 470 (1994), where the Court held a Veteran is competent to report on that of which he or she has personal knowledge). See also ***Jandreau v. Nicholson***, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (noting general competence of laypersons to testify as to symptoms but not medical diagnoses).

As mentioned *supra*, the Secretary has had ample opportunities to clearly and convincingly rebut Appellant's testimony as to the statutory canon of construction under §1154(b). However, the Statute states, inter alia, that the Secretary "shall resolve every reasonable doubt in favor of the veteran." Appellant is unable to discern this legal distinction has yet been adjudicated below in the October 20, 2025, RD.

Nevertheless, Appellant freely waives review below in the first instance for any perceived duty to assist or other due process error and asks the Trier of Fact to make a *de novo* decision based wholly on the entirety of the evidence of record. §7104(a).

Because the claim stream inherently encompasses entitlement to SMC at any level of entitlement, to include the higher level of SMC at the T rate, Appellant submits the Trier of Fact has the authority under §7103(c) to decide the matter, including any ancillary determinations as to multiple entitlements to §3.350(f)(3). ***Akles, Barry*** both *supra*.

By operation of law, entitlement to SMC hinges not so much on the principles of ***Martinez-Bodon*** *supra* and its progeny descended from Shedden and Hickson, but on the determination as to the level of disability often measured in the degree of disability due to quality-of-life issues. ***Moreira*** *supra*. The Secretary considers anything less than a total schedular rating of 100% to be insufficient as to qualify for potential consideration for SMC L and higher. This is demonstrable error. In fact, the only regulation demanding a 100% or TDIU rating for entitlement to SMC is §3.350(i). Fortunately, the Board is not bound by the tenets of the M21 Adjudications Manual. See ***Overton v. Wilkie***, 30 Vet. App. 257, 263 (2018).

Entitlement to SMC hinges on the earliest date it can be ascertained that the entitlement arose. ***Akles, Brandley*** both *supra*. Of note, as early as August 2012, the BVA decision of February 2024 cites to medical evidence showing the Veteran reported having delusions which were still present and chronic in 2014. The BVA decision goes on to confirm that "[i]n September 2016, August 2017, and March 2020, "his caregiver continued to support the Veteran with activities of daily living." In 2020, he continued to have delusions." See VBMS BVA decision entry of February 28, 2024, page 12 of 21 pages.

Essentially, the February 2024 Board decision confirmed by a preponderance of the evidence that the Veteran required aid and attendance of another under §3.350(b)3). No other reading of the evidence by reasonable minds can infer a lesser entitlement of SMC at the S rate for Housebound under 3.350(i). There is a vast chasm between the two entitlements-primarily the inability to accomplish activities of daily living.

Nevertheless, in the May 30, 2024, ignoring the medical evidence of record mentioned in the BVA decision, the Secretary awarded the lesser entitlement of SMC at the S rate based on a mechanical computation under §3.350(i)(1)-i.e., 100% schedular plus 60% or more separate and distinct disabilities from the index disease of PTSD. ***Bell, Ingram*** both *supra*.

In point of fact, the Secretary defines the state of total disability for compensation purposes under §4.130 DC 9411 as " Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; **persistent delusions** or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. (Emphasis added to original).

Reasonable minds can only concur that ***Turco v. Brown***, 9 Vet. App. 222, 224 (1996), stands for the proposition that the Court has held that eligibility for SMC 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. It would also be appropriate to point out that the Board member, in her February 2024 decision put the Secretary on notice that the evidence of record indicating entitlement to SMC at the L rate for a&a of another was undebatable.

Following the May 14, 2025, RD-again denying the Appellant a&a without even a mention of the earlier favorable finding of the need for a&a- he refiled a supplemental claim, submitting a new and relevant private, independent medical opinion (IMO) by a respected medical authority in her field. Dr. [redacted] reviewed the entire claims file of the appellant so it cannot be said that her medical opinion is devoid of probity for lack of review of *all* the pertinent records. Her observations are taken from the Appellant's records over the whole recorded history as required for a probative assessment by operation of the Secretary's regulations. §§4.2; 4.6; 4.10.

Of note, Dr. [redacted] provided ample support for her opinions with supportive rationale based on the evidence of record by other clinicians and also by citing to the answers to questions in the Katz Index of Activities of Daily Living. Additionally, Mr. Pansoy was asked to complete the Daily Activities Questionnaire (reproduced by the Divison of Geriatric Medicine, UCLA Healthcare. Previsit Questionnaire, Copyright 2013. The Regents of California).

Certainly of note, of course, is the Secretary's concession freely offered, in the February 12, 2025, HLR decision wherein he conceded, *in haec verba*, that the Appellant was in need of the aid and attendance of another. With this concession, Appellant is now completely confused as to what he needs to comply with the regulation. Appellant submits the Secretary simply cannot have his SMC denial cake and eat it too. In the alternative, short of a pilgrimage to the Oracle at Delphi seeking enlightenment as to that which Appellant lacks, he is mystified as to how to cut this impervious Gordian Knot.

Nevertheless, subsequent to the submission of the supplemental claim with supportive IMO on September 17, 2025, an in-person c&p exam for aid and attendance was entered into VBMS on October 17, 2025, authored by Veterans Evaluation Services (VES) clinician Scott Nelson, PA-C. Nurse Nelson averred he had reviewed *all* available records and findings prior to completing his medical opinion.

Nurse Nelson stated, *in haec verba*, that "Veteran has no disabilities that are totally disabling." As Judge Holdaway stated in Russell v. Derwinski, 3 Vet. App. 310, 314 : "an error either undebatably exists or there was no error within the meaning of § 3.105(a). Assuming, *arguendo*, that Nurse Nelson had indeed read all the available records, he could not help but notice that the Appellant had been recently rated at 100% permanent and total with an earlier effective date of January 2010. ***Nieves-Rodriguez v. Peake*** *supra*. Based on the Secretary's very own choice of phraseology of what constitutes a "total disability", Appellant contends he is indeed totally disabled.

As an aside, Appellant would point to his most recent code sheet issued at the same time as the RD. Front and center, the Trier of Fact will note the "build up" of the diagnostic code for his PTSD with TBI shows the DC 8045 listed first. Under §4.126(d), the Secretary requires the more dominant disabling aspect of the condition be cited first- hence a "built up" code of 8045-9411 would indicate the predominant disability to be TBI. ***Sickels*** *supra*.

From the clear and unmistakable evidence in the c&p exam, it appears that the examination is useless for rating purposes because the clinician fails to

even hew to the known facts. Ergo, it amounts to no more than data and conclusions with irrelevant conjecture. Appellant wishes to rebut the presumption of regularity as expressed in ***Rizzo*** *supra*. In Rizzo, the Court held "what appears regular is regular and what appears irregular is irregular- the burden of proof of irregularity falling on the appellant to rebut." Appellant need point no further than the recent BVA decision clearly stating his need for a&a and his 100% rating for the comorbidities of his PTSD and TBI to rebut Nurse Nelson's credibility- let alone the presumption that we are entitled to assume his competency as a VA examiner and the adequacy of his VA opinion without "demonstrating why his reports were competent and sufficiently informed. ***Sickels*** *supra*.

Conclusion

Appellant feels Doctor [redacted]s IMO is far more probative than Nurse Nelson's and submits the VES opinion has little or no probative value for rating purposes. In the same vein, Appellant feels Dr. Honghung, his treating physician, is far more aware of the clinical history and the evidence of a need for a&a. ***Guerrieri, Sickels*** both *supra*.

While the Court does not give undue deference to the treating physician rule, per se, they are allowed to take judicial note of this fact when making a decision on weighing the significance to attach to the evidence. See ***White v. Princip***i, 243 F.3d 1378 (Fed. Cir. 2001); ***Van Slack v. Brown***, 5 Vet. App. 499, 502 (1993); and ***Chisem v. Brown,*** 4 Vet. App. 169 (1993) (noting that there is no "treating physician rule" requiring the Board to give additional evidentiary weight to opinions of doctors who have evaluated or treated the Veteran over time, but it is permissible for the Board to bear this length of treatment in mind when considering just how familiar with the Veteran's condition the clinician may be).

Appellant was promised much when he raised his right hand and swore to defend his Country. Now, when he asks America to fulfill that promise, he is met with obfuscation and unjust denial with no ascertainable avenue or revelations

as to how to correct the injustice. The Secretary has repeatedly declined to illuminate that which he needs to attain an entitlement that even Veterans Law Judge Victoria Moshiashwili conceded was due and owing.

Notwithstanding the Secretary's reticence to share his secret handshake or password, Appellant waives remand for the obvious failure in the duty to assist and throws himself on the mercy of this higher tribunal. He asks for a *de novo* decision- his promised one decision on appeal under §7104(a)- which he prays will encompass recognition of his combat service and the truthfulness of his testimony and that of his wife and caregiver.

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.

See also ***Barrett v. Principi,*** 363 F.3d 1316, 1320 (Fed. Cir. 2004) ("[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."

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."

Wherefore, Appellant begs the Trier of Fact to perform a *de novo* adjudication of the claim and employ Congress' statute (§1114(t) as written based on recent Laska precedence. Appellant waives review below in the first instance for any duty to assist errors under §5104B and §3.103(f) as further delay would not result in any benefit accruing to the Veteran. See ***also Fugere v. Derwinski,*** 1 Vet. App. 103, 105 (1990), aff'd 972 F.2d 331 (Fed. Cir. 1992), wherein the Court held advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation.

Respectfully submitted,



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

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Gordon A. Graham #39029 E/P Counsel
for [redacted]

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