Continuation of VAF 21-0958

[redacted]

Movant, through counsel, now files her Notice of Disagreement (hereinafter NOD) and initiates her substantive appeal of the 7/27/2018 Motion to Revise the above enumerated decisions. All precedential legal cites, statutes and regulations in regard to the 1/09/2013 decision are applicable based on the date of promulgation. Likewise, all cites and regulations extant at the time of the 9/23/2014 decision are timely and none of the citations to precedence were decided subsequent to the motion for VA ratings revisions in question presented here.

While appellant has couched her claim as a Motion to Revise prior decisions, it should be noted that entitlement to Special Monthly Compensation (hereinafter SMC) is due and payable at the earliest point it can be ascertained medically that the Veteran has established legitimate entitlement. See §3.401(a)(1). Any prior error in this regard based on an error of interpretation of the regulations - 38 CFR §§3.350(a)(2)(i),(e)(1)(ii); 3.350(f)(3),(4); 3.809(b)(3),(c) and 38 USC §1114(l) that existed at the time the decision was made merely revises the rating to comport with the medical facts. As such, Special Monthly Compensation, as enacted by Congress in 38 USC §1114, is not a 'claim' in the truest sense of the word but an entitlement due and owing based on date of loss of use and the quality of life thereafter. Once medical evidence unequivocally shows entitlement, that date is the date of entitlement. Movant, by operation of law, is not required to show the error manifestly changed the outcome. Unlike a claim for Clear and Unmistakable Error (hereinafter CUE), SMC is a unique facet of law that requires no claim - and hence- no revision when it is ascertained a claimant clearly and unmistakably qualified earlier than the date the entitlement was awarded. See 38 CFR §3.401(a)(1).

The Secretary contends on page 3 of the 10/12/2018 decision that the appeal period for the 1/04/2013 decision has expired and the movant can only reopen this finally adjudicated claim by submitting new and material evidence. This is error and unsupported by statute and regulation (§3.401).

Nevertheless, for filing purposes, movant utilizes a Motion to Revise format and will comply with the relevant statute and regulation (38 U.S.C. §§ 5109A(a), 7111(a); see also 38 C.F.R. §§ 3.105(a), 20.1403(a). Appellant relies on the clear and unequivocal language in the 1/04/2013 findings of fact to show loss of use of the right lower extremity in 2012 as well as the Secretary's implicit concession of same.

Movant also will show a separate entitlement to SMC L under 38 CFR §3.350(b)(1), based on precedential law, arose on 9/23/2014. See Breniser v Shinseki, 25 Vet.App. 64, 79 (2011). This error of law manifestly changed the outcome which, unarguably would have resulted in an award of SMC O and revision upwards to SMC at a higher level of aid and attendance (R 1).

CUE, as described in Russell v. Derwinski, 3 Vet. App. 310, 313-14 (1992), is a rare error. The movant must show :

(1) that either the facts known at the time were not before the adjudicator or

(2 the statute or regulation then in effect was incorrectly applied

If either of the above components are legally met, a final test is performed:

(3) that, had the error not been made, the outcome would have been manifestly different. (38 CFR §3.105)

Moreover, a CUE claim must identify the alleged error(s) with '"some degree of specificity." (quoting Fugo v. Brown, 6 Vet.App. 40, 44 (1993) ("to reasonably raise CUE there must be some degree of specificity as to what the alleged error is and . . . persuasive reasons must be given as to why the result would have been manifestly different") (emphasis in original)); See also Bustos v. West, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999).

Movant will show the failure to award SMC K for loss of use of an extremity under 38 CFR §3.350(a)(2)(i) in the 2012 award. Movant will further show entitlement to SMC at the R 1 rate existed from 9/23/2014 onward based on entitlement to two entitlements to SMC between 'L' and 'N'- no condition being counted twice.

Facts

The evidence of record in the movant's e-file shows movant was discharged from military service and subsequently service connected on 7/09/2003 for, inter alia, multiple sclerosis in all four extremities (mild paralysis of the median and sciatic nerves), a voiding dysfunction, an adjustment disorder, irritable bowel syndrome and migraine headaches. ***There was no finding of any loss of use of an upper or lower extremity.*** In addition, no award for aid and attendance of another was determined to exist at the time of the 2003 adjudication..

On 11/25/2005 the ratings for movant's Multiple Sclerosis were increased in all extremities from mild to moderate paralysis of the median and sciatic nerves – i.e. from 10% to 20%. Of mention, movant's rating for right lower extremity was increased to 40% but no higher. In no instance was it held movant had lost the use of *any* extremities. Her migraine headaches were increased to a compensable level, her irritable bowel syndrome was increased to 30%, and, lastly, her voiding dysfunction was increased from 30% to 60% due to incontinence and retention. At this time, movant was diagnosed as being in need of catheterization multiple times a day. ***Notably, neither was movant awarded SMC for loss of use of any extremities nor was she found to be in need of the aid or attendance of another.***

On 1/04/2013, movant's rating for right lower extremity was increased from 40% to 80% - the highest schedular award for Diagnostic Code (DC) 8018-8520 available. Under 38 CFR §4.27, a hyphenated code identifies the etiology of a disease or injury- in this case- DC 8018 for Multiple Sclerosis- while the suffix, 8520, identifies the analogous diagnostic code assigned for ratings purposes**. In spite of an award for the highest schedular evaluation available (80%), loss of use of the right lower extremity was not diagnosed nor was an award of SMC K entitlement established.**

Entitlement ***was*** established at this time, however, on 1/04/2013 (effective 1/09/2012), for SMC at the L rate for aid and attendance of another. In addition, SMC P was awarded under 38 CFR §3.350(f)(3) based on additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more. The 1/04/2013 Confirmed Rating Decision sheet, however, states the reason for the aid and attendance award was for :

"P-1 Entitled to special monthly compensation under 38 USC 1114, subsection (p) and 38 CFR 3.350(f)(3) at the rate intermediate between subsection (l) and (m) on account of
-Left lower extremity parasthesias (claimed as tingling and pain in all extremities -and difficulty walking) rated at 20%
-left upper extremity parasthesias (claimed as tingling and pain in all extremities, -clumsiness and loss of dexterity in both hands) rated at 20%
-multiple sclerosis with neurogenic bladder (claimed as bladder incontinence and retention)
-parasthesias of the scalp
-right lower extremity weakness and decreased sensation (claimed as claimed as monophasic demyelinating episode, fatigue, weakness and parasthesias of the legs, tingling and pain in all extremities, and difficulty walking) rated at 80 %

-right upper extremity weakness (claimed as parasthesias of all extremities , tingling and pain in all extremities, clumsiness and loss of dexterity in both hands) rated at 30%

with additional disabilities,

-adjustment disorder with depressed mood (claimed as depression and emotional lability and cognitive problems to include impaired memory and impaired cognitive processing rated at 30%
-bruxism with temporomandibular joint dysfunction
-irritable bowel syndrome (claimed as bowel constipation and incontinence) rated at 30%
-migraine headaches rated at 10%

(See Exhibit A 1/04/2013 Page 3, Confirmed Ratings Decision)

Moreover, the 2013 ratings for disabilities associated with multiple sclerosis of the extremities did not reflect loss of use or entitlement to any award for same.

On 6/19/2015, entitlement to loss of use of one hand and one foot under DC 8018-5111 was established and SMC L was awarded-albeit with no increase to SMC O and consideration of §3.350(e)(1)(ii). In addition, service connection for several cervical nerves was established at a compensable level.

On 5/24/2017, a Decision Review Officer (DRO) decision granted SMC at the M rate based on loss of use of the lower extremity above the knee. However, in the same rating, the prior entitlement to the ½-step "bump" upward to the intermediate rate between L and M was not awarded. Instead of a rating at R 1 or, in the alternative, SMC at the intermediate rate between M and N under §3.350(f)(3), the Secretary awarded SMC only at the M rate. This was error that manifestly changed the outcome as well.

On 7/27/2018, movant filed a motion to revise the prior decisions to comport with established law and regulations pertaining to SMC- to wit- entitlement to SMC at the R 1 rate based on her enumerated conditions entitling to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. §§1114(l) through (n). Authority for the disabilities is claimed under 38 USC §§1114(l),(m), 38 CFR §§3.350((b)(1),(3); 3.350(e)(1)(ii).

Analysis

CUE in the 1/09/2013 decision.

Per Fugo *supra,* movant argues that she qualified for SMC at the K rate for her loss of use of the right lower extremity on 2/9/2012. The Secretary held, on page two of the ratings narrative dated 1/09/2013, the following to be findings of fact:

"Dr. [redacted] of VAMC [redacted] indicated you are not able to walk unaided. You require a right foot brace" [i.e. orthotic appliance].

"You need assistance in bathing and tending to other hygiene. You may require assistance getting in and out of the bathtub, and occasionally getting on and off the toilet. You need aid and attendance due to your persistent right sided weakness and **right sided foot drop**. VAMC [redacted] record dated February 9, 2012 shows you were using a scooter and/or wheelchair for prolonged ambulation." (emphasis added).

The above are positive findings of fact. As such, they may not be disturbed. See Medrano v. Nicholson,. 21 Vet.App. 165, 170 (2007). The VA examiner is limited by law to review a claim based on the facts found. Undoubtedly, further medical inquiry could have been undertaken with a view towards developing the evidence up or down. However, in this regard, the Court has cautioned the Secretary against seeking additional medical opinions where favorable evidence in the record is unrefuted, and indicated that it would not be permissible to undertake further development if the sole purpose was to obtain evidence against an appellant's claim. See Mariano v. Principi, 17 Vet. App. 305, 312 (2003). See also Kahana v. Shinseki, 24 Vet. App. 428 (2011).

To establish CUE, it must be clear from the face of the decision that a particular fact or law had not been considered in the adjudication of the case. See Crippen v. Brown, 9 Vet.App. 412, 421 (1996) (citing Eddy v. Brown, 9 Vet.App. 52, 58 (1996)).

In the instant case, the preponderance of evidence is medical rather than subjective and Dr. [redacted] 2/09/2012 diagnoses, ipso facto, provided the basis for entitlement to a higher level of SMC at the K level by operation of law. In point of fact, there simply was no evidence of record before the VA examiner that would support denial of loss of use of the lower extremity.

In the same vein, it is apparent the ratings board ignored or overlooked the evidence of record and made a decision medical in nature. See Colvin v. Derwinski, 1 Vet.App. 171, 175 (1991) (holding that the Board may only consider independent medical evidence and may not substitute its own medical

opinion). Here, in the instant case, the Examiner ignored Doctor [redacted] medical findings of fact regarding foot drop and the inability to perambulate unassisted. The failure to award SMC K for diagnosed loss of a lower extremity can only be seen as clear and unmistakable error. The absence of any discussion in the Reasons or Bases discussion regarding these medical findings of fact in 2013 was arbitrary and capricious and an abuse of discretion. Failure to award SMC for loss of use of right lower extremity was error.

Foot drop-The Legal Standard of Review

Loss of use of a foot or hand is defined in §3.350(a)(2)(i) and §3.809(a),(b)(3),(c). While §3.350(a)(2)(i) certainly offers several examples of what constitute loss of use of an extremity, the list is nonexhaustive. Loss of use has often been granted for fall danger and many other disabilities which preclude perambulation. The much-touted example of amputation with a suitable prosthesis is inapposite here. See Tucker v West, 11 Vet.App. 369, 374 (1998) ("The relevant inquiry concerning an SMC award is not whether amputation is warranted but whether the appellant has had effective function remaining other than that which would be equally well served by an amputation with use of a suitable prosthetic appliance. See 38 C.F.R. § 3.350(a)(2), § 4.63. The Board concluded that because his situation did "not warrant amputation," the appellant was not eligible for SMC.)"

The mere mention of "footdrop" constitutes loss of use regardless of which nerve is involved. The test is enumerated in §4.40 under functional loss. Indeed, §3.350(a)(2)(i) specifically states the qualifying medical "test" is when "no effective function remains". The Secretary freely acknowledged movant was unable to ambulate unassisted. Nowhere in the four corners of §3.350(a)(2)(i) is there to be found a requirement that diagnosed foot drop *due exclusively* to the peroneal nerve(as opposed to the sciatic here) is the prerequisite for a finding of fact that loss of use of a lower extremity exists. The mere fact that ambulation is precluded absent the assistance of another (or an assistive device) is evidence of loss of use of either one or both of the lower extremities. In

the instant case, the finding of fact is that the movant, as of 1/09/2014, exhibited and was diagnosed with, the inability to ambulate unassisted. Further, the [redacted] VAMC Doctor ([redacted]), clearly and unequivocally held on 2/09/2012 that the movant was *"using a scooter and/or wheelchair for prolonged ambulation."*

Applicability of §3.809

Under §3.809(b)(3), the regulation defines loss of use of a lower extremity.

"(3) The loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair." (§3.809(b)(3) (2012)

Moreover, the same regulation, in subsection (c), defines what precludes locomotion:

(c)*Preclude locomotion.* This term means the necessity for regular and constant use of a wheelchair, braces, crutches or canes as a normal mode of locomotion although occasional locomotion by other methods may be possible. §3.809(c) (2012)

As the tenets of §3.809 were available and applicable in 2012, it would be clear and unmistakable error to fail to adhere to the definitions of loss of use and what precludes locomotion. Additionally, with diagnosed foot drop so as to preclude locomotion, the failure to apply §3.350(a)(2)(i) and award SMC K for the loss of use of the right lower extremity can only be read as an incorrect application of the statutory or regulatory provisions extant at the time of the 1/09/2013 decision. Russell v. Derwinski, 3 Vet. App. 310, 313-14 (1992) stated: "The Secretary, in his brief, equates the adjectives "clear and unmistakable" to "obvious" as used in 38 U.S.C. § 7103(c)(formerly § 4003(c)). That statute, which authorizes the BVA to correct "an obvious error in the record," perforce means an "obvious" error, the existence of which, as noted above, is undebatable, or, about which reasonable minds cannot differ."

It cannot be said that the facts (foot drop/inability to perambulate unassisted) were not before the ratings board and the movant does not contend otherwise. Neither does movant contend that there is any dispute over how the facts were weighed. Doctor [redacted] findings speak for themselves. Indeed, movant benefits from the sheer simplicity of her argument. Reasonable minds can only concur that movant had a qualifying disability that entitled her to SMC K as early as 2012.

Presumption of Regularity

The Presumption of Regularity attaches to the [redacted] VAMC doctor's findings of fact that movant was(and is) unable to ambulate unassisted due to right sided foot drop. See Sickels v. Shinseki, 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011) (holding 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").

"[T]here is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties.'" Ashley v. Derwinski, 2 Vet.App. 307, 308 (1992) (quoting United States v. Chem. Found., Inc., 272 U.S. 1 (1926)).

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. See Butler v. Principi, 244 F.3d 1337, 1339 (Fed.Cir. 2001).

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." Here, the evidence is dispositive that a diagnosed foot drop with accompanying disability that precluded locomotion without the assistance of an assistive device was ignored. As the presumption of regularity has been rebutted, the validity of the 2013 ratings decision is clearly irregular.

In the instant motions for revision, the Secretary substantially conceded an award of SMC at the K rate for loss of use of the lower extremity was for application yet it was not awarded. Awarding the highest schedular rating for an extremity can only be read as synonymous with conceding loss of use.

As for whether the error manifestly changed the outcome, it is patently obvious a SMC award at the K rate for loss of use of a lower extremity would have remunerated the movant at a higher level of SMC. Or, in the alternative, if movant grants the presumption applies, it would confirm the award of aid and attendance was not predicated solely on the loss of use of her right lower extremity. Error attaches in either scenario.

CUE in the 9/23/2014 Decision

As an initial matter of CUE in the 2014 decision, movant wishes to point out the error of failing to continue rating her under §3.350(f)(3) in the 9/23/2014 rating decision. This was an illegal reduction without notice subject to §3.344(a). In the 2013 decision discussed earlier, the Secretary correctly identified entitlement under SMC P for a half-step "bump" upwards from SMC L to the intermediate rate between L and M. In the 9/23/2014 decision here, the entitlement was erroneously withdrawn. This is error. The pertitnent regulations, both §§3.350(f)(3) and (f)(4), are quoted here for illumination.

(3)Additional independent 50 percent disabilities. In addition to the statutory rates payable under 38 U.S.C. 1114 (l) through (n) and the intermediate or next higher rate provisions outlined above, **additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate** or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114, but not above the (o) rate. In the application of this subparagraph the disability or disabilities independently ratable at 50 percent or more must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114 (l) through (n) or the intermediate rate provisions outlined above. The graduated ratings for arrested tuberculosis will not be utilized in this connection, but the permanent residuals of tuberculosis may be utilized.

(4)*Additional independent 100 percent ratings.* In addition to the statutory rates payable under 38 U.S.C. 1114 (l) through (n) and the intermediate or next higher rate provisions outlined above **additional single permanent disability independently ratable at 100 percent apart from any consideration of individual unemployability will afford entitlement to the next higher statutory rate** under 38 U.S.C. 1114 or if already entitled to an intermediate rate to the next higher intermediate rate, but in no event higher than the rate for (o). In the application of this subparagraph the single permanent disability independently ratable at 100 percent must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114 (l) through (n) or the intermediate rate provisions outlined above. (emphasis added)

Additionally, §3.350(f)(4)(i) clarifies any misconceptions as to the applicability of the regulations:

(i) Where the multiple loss or loss of use entitlement to a statutory or intermediate rate between 38 U.S.C. 1114 (l) and (o) is caused by the same etiological disease or injury, that disease or injury may not serve as the basis for the independent 50 percent or 100 percent unless it is so rated **without regard to the loss or loss of use.**

Pursuant to the above, in 2013, the VA examiner awarded SMC at the intermediate rate between L and M via entitlement to §3.350(f)(3). Notably, this regulation, while still applicable in the 2014 decision, was ignored in 2017. Movant was clearly entitled to an SMC award at the intermediate rate between M and N. Reasonable minds can agree that the failure to award the increase (or bump) was error. But that is not the end of the matter by far.

Applicability of Breniser

In 2011, the Court of Appeals for Veterans Claims (hereinafter CAVC) decided Breniser v. Shinseki, 25 Vet.App. 64, 79 (2011). Throughout the course of this brief above, and especially in the Facts subsection, movant has emphasized she was never rated for loss of use of ***any*** extremities prior to the 2014 decision. Movant was awarded Aid and Attendance at the SMC L rate in 2013. The award of Aid

and attendance is devoid of any discussion of loss of use of any extremity. Thus, reasonable minds can only conclude the SMC award for helplessness was based solely for the enumerated conditions mentioned-i.e. movant's right sided "weakness", a psychiatric illness with cognitive deficits, extreme bowel and bladder incontinence and migraine headaches. See Sickels *supra*

Prior to 9/23/2014, there was no finding of fact that movant had diagnosed loss of use of one hand and one foot. This finding of fact entitled movant to a second award of SMC at the L rate. A further rating of SMC M was awarded in 2017 based on the determination that movant had loss of use above the knee.

Breniser is on point in this discussion because the fact pattern is virtually identical. **The only major difference is the *order* in which the disabilities were awarded.** The Court has held repeatedly that VA has a "well-established" duty to maximize a claimant's benefits. See Buie v. Shinseki, 24 Vet. App. 242, 250 (2011); AB v. Brown, 6 Vet. App. 35, 38 (1993); see also Bradley v. Peake, 22 Vet. App. 280 (2008). This duty to maximize benefits requires VA to assess *all* of a claimant's disabilities to determine whether any single disability, or combination of disabilities, establishes entitlement to special monthly compensation (SMC) under 38 U.S.C.A § 1114. See Bradley *supra* (finding that SMC "benefits are to be accorded when a Veteran becomes eligible without need for a separate claim"). Buie held that it makes no difference in which order the disabilities were awarded when assembling them to obtain the highest and best rating.

In the Breniser decision, Mr. Breniser was awarded SMC L for loss of use of his lower extremities. However, he appealed for a higher rating of SMC at an additional L rate for aid and attendance based solely on his loss of use of his lower extremities. Breniser was affirmed based on the tenets of both §3.350(e)(1)(ii) and §4.14 – i.e. no condition being counted twice.

The clear and unmistakable reading of §3.350(e)(1)(ii) forbids the counting of one condition twice:

(e)Ratings under 38 U.S.C. §1114 (o)

(e)*Ratings under 38 U.S.C. 1114 (o).*

(1) The special monthly compensation provided by 38 U.S.C. 1114(o) is payable for any of the following conditions:

(ii) Conditions entitling to two or more of the rates **(no condition being considered twice**) provided in 38 U.S.C. 1114(l) through (n); (emphasis added)

However, in the instant case, a different set of facts argue for the application in favor of the movant. First and foremost, movant was rated exclusively for aid and attendance of another in the first instance. The Court, in Breniser defines this as one "condition". From Breniser:

The Secretary argues that "[i]n the context of [section 1114(o)] and its history, the word 'conditions' clearly refers to a term such as 'circumstances,' and the latter use of the word 'condition,' in its singular form, refers to the underlying disability or disabilities, such as anatomical loss, loss of use, or blindness, that entitles a [v]eteran to a rate proscribed in paragraph (l) to (n) of 38 U.S.C. § 1114." **But see Moreira v. Principi, 3 Vet.App. 522, 524 (1992) (The rate of SMC "varies according to the nature of the veteran's service-connected disabilities.")** (emphasis added)

The Secretary is very explicit in his definitions of "condition" or "circumstance". In 38 C.F.R. § 3.350(e)(3) the definition of conditions or combinations thereof, is explicit in its requirements and strictures against pyramiding.

Combinations. **Determinations must be based upon separate and distinct disabilities.** This requires, for example, that where a veteran who had suffered the loss or loss of use of two extremities is being considered for the maximum rate on account of helplessness requiring regular aid and attendance, the latter must be based on need resulting from pathology other than that of the extremities. **If the loss or loss of use of two extremities or being permanently bedridden leaves the person helpless, increase is not in order on account of this helplessness.** Under no circumstances will the combination of "being permanently bedridden" and "being so helpless as to require regular aid and attendance" without separate and distinct anatomical loss, or loss of use, of two extremities, or blindness, be taken as entitling to the maximum benefit. **The fact, however, that two separate and distinct entitling disabilities, such as anatomical loss,**

or loss of use of both hands and both feet, result from a common etiological agent, for example, one injury or rheumatoid arthritis, will not preclude maximum entitlement. 38 C.F.R. § 3.350(e)(3)(2013). (emphasis added)

Movant differs from Breniser insofar as she was rated for aid and attendance based on a specific subset of disabilities *prior to* an award for loss of use of extremities. Unlike Breniser, movant was rated for aid attendance **first**. See Buie supra. The qualifying disabilities included, inter alia, a mental disability under DC 9434, neurogenic bladder with the need for frequent catheterizations and other compensable ratings for irritable bowel syndrome and migraine headaches. While it can be said her "conditions" also included moderate paralysis of her various extremities due to muscular sclerosis, nowhere can it be read to say the aid and attendance was predicated solely on the condition (or circumstances) of the multiple sclerosis. Moreover, nowhere in the four corners of the award for aid and attendance is there any mention of loss of use of *any* extremity or extremities whatsoever. In point of fact, the circumstances reveal quite the opposite; the Secretary studiously avoided reaching a finding of loss of use of movant's right lower extremity in the 2013 decision even with a total schedular evaluation of total paralysis of the sciatic nerve.

Taken in the context of Breniser, movant's loss of use of two extremities, which occurred subsequent to the award of aid and attendance, constitute a wholly separate and distinct qualifying "condition or circumstance" which is entirely divorced from the finding of a need for aid and attendance. Put another way, movant has suffered a loss of use which entitles her to another of the four enumerated qualifiers for SMC at the L rate.

Movant asks the Board to grant the Secretary Chevron deference in his interpretation of "no condition counted twice" as espoused in 38 CFR §3.350(e)(1)(ii). See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). "Chevron deference" is granted to the Secretary in the absence of any explicit Congressional directive in a statute or regulation. However, Chevron deference can only extend to what Congress has not

spoken to explicitly. See Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious. or manifestly contrary to the statute.")

Breniser further held:

"Congress expressly devised ***progressively increasing*** rates of SMC in subsections (l) through (o) based upon its determination of what conditions were more disabling. Against this backdrop, the Court cannot find the Secretary's interpretation, which prohibits SMC at the maximum(o) rate when the need for aid and attendance arises from the same pathology that otherwise entitles the veteran to an award of SMC at a rate provided in subsections (l) through (n), unreasonable. Breniser supra. (emphasis counsel's).

Conversely, it can be stated that any *subsequent award* of SMC at the L rate for loss of use of two extremities, and remote to an award at the L rate for aid and attendance, is not a "condition" being counted twice" if the condition was not a sole predicate for the prior award of Aid and Attendance.

38 CFR §3.350(b) authorizes four "conditions" severally-any one of which entitles a claimant to SMC at the L rate. They are not arranged in any order denoting a degree of disability. The four bases for entitlement, while not mutually exclusive, nevertheless cover four different etiologies (i.e. loss of use of extremities, loss of eyesight, need for aid and attendance of another and lastly, being bedridden.

Assuming, arguendo, that movant independently attained entitlement to aid and attendance at the L rate with no condition(s) of loss of use as the predicate for the aid and attendance, any subsequent award of SMC at the L rate for the condition of "loss of use of a hand and foot" can only be read as an additional circumstance (read condition) above and beyond the entitlement for the aid and attendance. To read otherwise would be to abrogate the controlling precedence established in Breniser.

38 CFR §3.352(a) enumerates examples of the requirements to attain aid and attendance. While it is not exhaustive of each and every possible combination, none of the listed examples explicitly encompass loss of use of any appendage.

"The following will be accorded consideration in determining the need for regular aid and attendance . . . : inability of claimant to dress or undress himself (herself), or to keep himself (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 himself (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 not required that all of the disabling conditions enumerated in this paragraph be found to exist before a favorable rating may be made. **The particular personal functions which the veteran is unable to perform should be considered in connection with his or her condition as a whole.** It is only necessary that the evidence establish that the veteran is so helpless as to need regular aid and attendance, not that there be a constant need. " 38 C.F.R. § 3.352(a) 2013. (emphasis added)

The absence of any mention of loss of use in an argument for aid and attendance forces the adjudicator to review the term 'helplessness'. 38 USC §1114(l) specifically states "as the result of service-connected disability" in its preamble. It also includes the phrase "with such significant disabilities" . But see Howell v. Nicholson, 19 Vet. App. 535, 538 (2006) (holding that the "[t]he plain and unambiguous language of section 1114(l) requires that a claimant be in need of regular aid and attendance 'as the result of service-connected disability'" (quoting 38 U.S.C. § 1114(l)).

Buie and Bradley's (*supra*) bright line rule have taught us that the order in which entitlements, especially SMC, are awarded, is inconsequential to the manner in which they are assembled. Veterans seek the highest and best rating and the appeal remains in contention until there is some semblance of finality. AB *supra*.

Application to Law to Facts

"Statutory interpretation begins with the language of the statute, the plain meaning of which we derive from its text and structure." Myore v. Nicholson, 489 F.3d 1207, 1211 (Fed. Cir. 2007) (quoting McEntee v. M.S.P.B., 404 F.3d 1320, 1328 (Fed. Cir. 2005).

The final ruling by the Breniser Court held the definition of condition and "no condition considered twice" thusly:

"Accordingly, the Court holds that a claimant who is in receipt of SMC cannot establish entitlement to a second rate of SMC under section 1114(l) based on the need for aid and attendance – and, hence, a higher rate of SMC under section 1114(o) – unless the claimant's need for aid and attendance arises from a disability other than that for which the claimant is already in receipt of SMC. " Breniser *supra*.

Based on Breniser precedence, movant submits she was in receipt of SMC at the L rate for Aid and Attendance before she was in receipt of SMC at the L rate for loss of use of two extremities. The entitlement to Aid and Attendance was for a "condition" or, in the alternative, better described as a compendium of "conditions" or "disabilities" (plural)-some of which related to her service connected Multiple Sclerosis. In addition, she was in receipt of entitlement to several other disabilities or "conditions" which were included in the award of aid and attendance - including, inter alia, irritable bowel syndrome, migraine headaches and a major mental disorder that makes her so helpless as to be in need of the aid and attendance of another.

As the original award of aid and attendance did not comprehend loss of use of ***any*** extremities whatsoever, any dramatic increase in disability that entitles a Veteran to an additional award of SMC at the L rate can only be seen as an

exceptional "disability or condition" separate and distinct from the original award for the Aid and Attendance. The Secretary's myopic focus on the disability by name (i.e. Multiple Sclerosis) isolates it from other equally disabling service connected "conditions " that also provided entitlement to Aid and Attendance several years before. Simply intoning the words Multiple Sclerosis *in haec verba* does not suffice to conjoin two severally discernable entitlements to SMC at the rate between L and N. Inasmuch as the Secretary did not grant loss of use to the movant in 2013 despite her diagnosed foot drop and the inability to ambulate without assistance, it would be error to grant the exact same entitlement at a later date based on the same evidence of record. See Martin v. Occupational Safety &Health Review Commission, 499 U.S. 144, 156 (1991) (explaining that "'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action").

Movant relies on Buie *supra* for the proposition that the 2013 entitlement to aid and attendance arose from an amalgam of conditions which may have partially included Multiple Sclerosis. However, to say the 2013 award of Aid and Attendance was due solely to, or in some way predicated entirely on, Multiple Sclerosis, to the mutual exclusion of all the rest of her mentioned disabilities cited as the reason for the 2013 award of Aid and Attendance, is simply not supported by the evidence of record. cf. Martin *supra*. Pointedly, the 9/23/2014 decision awarding SMC L for loss of use of hand and foot is devoid of any reasons or bases or findings of fact, let alone a conclusion of law giving rationale for the determination. Absent a finding of fact with appropriate discussion, the decision leaves reviewing courts with no basis to determine the legality of the conclusion of law and an appropriate date entitlement arose. Conflating loss of use of extremities at a later date as somehow part and parcel of an earlier award for aid and attendance has no support in law based on Breniser supra.

Summary

Movant has explicitly and specifically defined the errors of law and the attendant conclusions that the errors manifestly changed the outcome of the

ensuing decisions. Movant has further elucidated the correct reading of statute, regulation and precedence (Breniser supra) that supports the arguments for revision.

Movant, through counsel, seeks relief by an award of the highest and best SMC she is entitled to, and no more, that can be supported in law while protecting the interests of the Government. See 38 CFR §3.103(a). Case law supports the movant. If the VA Examiner is unsure of precedential law, please refer this to VA Regional Counsel of the Office of General Counsel (027) for advisement in the first instance.

In any case, movant seeks a VBMS flash for medical reasons as movant's numerous service connected circumstances continue to decline. Please issue a Statement of the Case (SOC) at the VA's earliest convenience in order that movant may file her substantive appeal and VA Form 9. Movant would further appreciate an expedited VA Form 8 Certification of Appeal at the VA's earliest convenience as she will be seeking advancement on the docket at the Board of Veterans Appeals under Rule 900 (38 CFR §20.900(c)) for these same medical reasons as well.

Your earliest attention to this matter would be greatly appreciated.

Respectfully submitted,

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