



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
DONALD [REDACTED]
Represented by
Gordon A. Graham, Agent

C 26 [REDACTED]
Docket No. 190228-4883
Advanced on the Docket

DATE: March 6, 2020

ORDER

Entitlement to higher level of aid and attendance allowance under 38 U.S.C. § 1114 (r)(2) and 38 C.F.R. §§ 3.350, 3.352 (b)(1) is granted.

FINDING OF FACT

Resolving all reasonable doubt in the Veteran's favor, the evidence of record demonstrates that he requires a higher level of care for aid and attendance as a result of his service-connected disabilities.

CONCLUSION OF LAW

The criteria for SMC based on the need for a higher level of care aid and attendance have been met. 38 U.S.C. §§ 1114 (r)(2), 5107(b); 38 C.F.R. §§ 3.350, 3.352 (b)(1).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from February 1967 to November 1970.

This matter is before the Board of Veterans' Appeals (Board) on appeal from a February 2019 rating decision by a Regional Office (RO) of the Department of Veterans Affairs (VA).

In a November 2019 Board hearing, the Veteran was present, and the Veteran's spouse testified before the undersigned Veterans Law Judge. A hearing transcript has been associated with the claims file.

On August 23, 2017, the Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55 (to be codified as amended in scattered sections of 38 U.S.C.), 131 Stat. 1105 (2017), also known as the Appeals Modernization Act (AMA), was signed into law. This law creates a new framework for veterans dissatisfied with VA's decision on their claim to seek review.

In February 2019, the Veteran through his representative submitted VA Form 10182 Decision Review Request: Board Appeal (Notice of Disagreement) and selected Hearing with a Veterans Law Judge Board review option, indicating he wanted a Board hearing and the opportunity to submit additional evidence in support of the appeal within 90 days of hearing.

The Board notes the record was left open for 90 days for the Veteran and his representative to submit additional evidence in support of his claim. The 90-day period has passed, and to date, the Veteran's representative has submitted additional evidence received in November 2019.

Evidence was added to the claims file during a period of time when new evidence was not allowed. Therefore, the Board may not consider this evidence. 38 C.F.R. § 20.300. The Veteran may file a Supplemental Claim and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

Special Monthly Compensation (SMC)

Special monthly compensation (SMC) under 38 U.S.C. § 1114 (r)(2) may be granted if a veteran, in addition to needing regular aid and attendance, requires a higher level of care without which he would require hospitalization, nursing home care, or other residential institutional care. A “higher of level of care” is a need for personal health-care services provided on a daily basis in the veteran’s home by a person licensed to perform such services or who performs such services under the regular supervision of a licensed health-care professional. The determination of the need for a higher level of care must be made by a physician. *See* 38 U.S.C. § 1114 (r)(2).

A veteran is entitled to the higher level aid and attendance allowance under 38 C.F.R. § 3.352 (b)(1) when: (1) the veteran is entitled to the compensation authorized under 38 U.S.C. § 1114 (o), or the maximum rate of compensation authorized under 38 U.S.C. § 1114 (p) and; (2) the veteran meets the requirements for entitlement to the regular aid and attendance allowance in paragraph (a) of this section; and (3) the veteran needs a “higher level of care” 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. *See* 38 C.F.R. § 3.352 (b)(1).

In determining whether the veteran meets the requirement of assistance under 38 C.F.R. § 3.352 (a), determination that the veteran is so helpless as to be in need of regular aid and assistance must be based on the actual requirement of personal assistance from others including consideration of: 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. *See* 38 C.F.R. § 3.352(a).

A veteran is entitled to the higher level aid and attendance allowance under 38 C.F.R. § 3.352 (b)(2) when: (1) As a result of service-connected residuals of traumatic brain injury, the veteran meets the requirements for entitlement to the regular aid and attendance allowance in paragraph (a) of this section, and (2) the veteran needs a “higher level of care” 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. *See* 38 C.F.R. § 3.352(b)(2).

“Higher level of care” is defined as the 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. *See* 38 C.F.R. § 3.352(b)(3).

The term “under the regular supervision of a licensed health-care professional” means that an unlicensed person performing personal health-care services is following a regimen of personal health-care services prescribed by a health-care professional, and that the health-care professional consults with the unlicensed person providing the health-care services at least once each month to monitor the prescribed regimen. The consultation need not be in person; a telephone call will suffice. 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. The performance of the necessary aid and attendance service by a relative of the

beneficiary or other member of his or her household will not prevent the granting of the additional allowance. 38 C.F.R. § 3.352 (b)(2-4), (c).

The requirements for establishing the need for a higher level of care are to be strictly construed. The higher-level aid and attendance allowance is to be granted only when the Veteran's need is clearly established and the amount of services required by the Veteran on a daily basis is substantial. 38 C.F.R. § 3.352 (b)(5).

Entitlement to aid and attendance based upon a higher level of care under 38 U.S.C. § 1114 (r)(2)

The Veteran, through his representative, is seeking additional compensation under 38 U.S.C. § 1114 (r)(2) and 38 C.F.R. §§ 3.352 (b)(1), 3.352 (b)(2) based on the need for higher level of care. *See* November 2019 Amended Brief.

By way of history, the Veteran is currently service connected for coronary artery disease with ventricular fibrillation, status post myocardial infarction and cardiac arrest evaluated as 100 percent disabling effective September 2011; dementia status post anoxic brain injury 100 percent disabling effective September 2011; loss of both lower extremities, residuals of Parkinson's disease evaluated as 100 percent disabling effective March 2016; urinary incontinence, residuals of Parkinson's disease evaluated as 20 percent disabling effective November 2016 and 40 percent disabling effective August 2017; bowel impairment, residuals of Parkinson's disease evaluated as 30 percent disabling effective March 2016; left upper extremity aparaxia, residuals of Parkinson's disease evaluated as 20 percent disabling effective March 2016; right upper extremity aparaxia, residuals of Parkinson's disease evaluated as 20 percent disabling effective March 2016; hypophonia evaluated as 10 percent disabling effective March 2016, swallowing impairment evaluated as 10 percent disabling effective March 2016, erectile dysfunction evaluated as 0 percent disabling effective September 2011, right side facial impairment evaluated as 0 percent disabling effective March 2016, and left side facial impairment evaluated as 0 percent disabling effective March 2016. The Veteran's combined evaluation for compensation was 100 percent since September 2011. *See* November 2017 Rating Codesheet.

The Board notes the Veteran is entitled to the special monthly compensation authorized under 38 U.S.C. § 1114 (o) and 38 C.F.R. § 3.350 (e) for on account of loss of use of both lower extremities, residuals of Parkinson's disease and coronary artery disease with ventricular fibrillation, status post myocardial infarction and cardiac arrest from March 2016, and special monthly compensation authorized under 38 U.S.C. § 1114 (p) and 38 C.F.R. § 3.350 (f)(4) for loss of use of both lower extremities, residuals of Parkinson's disease independently ratable at 100 percent from March 2016. *See* November 2017 Rating Codesheet.

From the outset, the Board finds the Veteran does not qualify for a higher level of aid and assistance under 38 C.F.R. § 3.352 (b)(2), as the Veteran has not been diagnosed and is not otherwise service connected for traumatic brain injury or residuals of a traumatic brain injury. Thus, the Board will consider whether the Veteran qualifies for a higher level of aid and assistance under 38 C.F.R. § 3.352 (b)(1).

Regarding the first requirement for a higher level of aid and assistance, the Board notes the Veteran is in receipt of SMC benefits under 38 U.S.C. § 1114 (o) on account of loss of use of both lower extremities, residuals of Parkinson's disease, and coronary artery disease with ventricular fibrillation, and status post myocardial infarction and cardiac arrest effective from March 23, 2016. *See* November 2017 Rating Decision. Accordingly, the Board finds the Veteran meets the first requirement of compensation authorized under 38 U.S.C. § 1114 (o), as required for entitlement to the higher-level aid and attendance allowance.

With respect to the second requirement, the Board finds the Veteran has demonstrated the need for regular aid and attendance as his disabilities demonstrate the veteran is so helpless, he requires aid and assistance which meet the requirements of 38 C.F.R. § 3.352 (a). An April 2016 examiner reported the Veteran is unable to care for himself and has a 24-hour caregiver. The April 2016 examiner also indicated the Veteran cannot work due to impaired memory and executive function. The April 2016 examiner remarked after suffering two heart attacks in August 2011, he developed Alzheimer's and Parkinson's disease as a result of anoxic encephalopathy. *See* April 2016 Parkinson's Disease Disability Benefits Questionnaire. In an October 2017 Parkinson's Disease Disability

Benefits Questionnaire, the examiner reported the Veteran was severely unable to walk in that he tends to fall forward, he cannot walk independently, has limited, slurred speech, fairly impaired cognition and is not aware of his surroundings most of the time, cannot clean or dress himself, cannot shower independently, and it is not possible for him to do household chores or drive. *See* October 2017 Parkinson's Disease Disability Benefits Questionnaire. Accordingly, the Board finds the Veteran meets the second requirement of need for regular aid and attendance pursuant to 38 C.F.R. § 3.352 (a) as required for entitlement to the higher-level aid and attendance allowance.

Thus, the question before the Board is whether the Veteran needs a higher level of care as defined by 38 C.F.R. § 3.352(b)(3).

In a November 2019 Board hearing, the Veteran's spouse testified that she has been providing healthcare services for eight years after some training from registered nurses and has been supervised continuously except for a short period of time in 2017. The Veteran's spouse reported she is consulted only a monthly basis at a bare minimum. The Veteran's spouse attends day care and is under the supervision of registered nurse from Monday to Friday where he is provided physical therapy and cognitive therapy. *See* November 2019 Board Hearing Transcript.

In a July 2019 Medical Opinion, the neurologist indicated the Veteran is regularly visited by a nurse as part of palliative care at least once per month. The July 2019 neurologist opined without the 24 hours a day, 7 days per week care he currently receives, the Veteran would be hospitalized because of the complexity of his care. The July 2019 neurologist also reported in the absence of provision of such higher level of care, the Veteran would require hospitalization, nursing home care, or other residential institutional care. *See* Exhibit A- July 2019 Medical Opinion.

In an October 2019 Letter, the nurse practitioner reported the Veteran was under her care in 2011 with anoxic brain injury. The October 2019 nurse practitioner wrote that the Veteran's spouse performed personal healthcare services on a daily basis that included physical and cognitive therapy after family training was completed with therapies. *See* Exhibit B- October 2019 Letter.

Based on the above, the evidence of record shows that the Veteran is receiving personal healthcare services daily from his spouse. The Veteran is receiving personal healthcare services including physical therapy, and cognitive therapy, which require professional healthcare training or regular supervision of a trained healthcare professional to perform. Here, the Veteran's spouse is not a licensed healthcare professional. The Veteran's spouse is under the supervision of a licensed healthcare professional because the Veteran is under the care of a nurse practitioner and the Veteran's spouse performed personal healthcare services including physical and cognitive therapy after training. *See Exhibit B- October 2019 Letter.* Thus, the Veteran's spouse was trained to provide these personal healthcare services including physical therapy by a licensed healthcare professional. Moreover, it is clear from the July 2019 neurologist statement that, if not for these services, the Veteran would require hospitalization, nursing home care, or other residential institutional care. *See Exhibit A- July 2019 Medical Opinion.*

As such, resolving all reasonable doubt in the Veteran's favor, the Board finds the Veteran needs a higher level of care in addition to regular aid and attendance due to his service-connected disabilities; therefore, entitlement to SMC based on the need for higher level of care in addition to regular aid and attendance is warranted. *See 38 U.S.C. § 1114 (r)(2); 38 C.F.R. § 3.352 (b)(1).*



MICHAEL LANE
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

L. Gerlt, Law Clerk

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.