



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

IN THE CASE OF

Appellant Represented by
Gordon A. Graham, Agent

XSS

Docket No. 200314-163451

DATE: July 9, 2021

ORDER

As of February 8, 2020, a separate rating of special monthly compensation (SMC) pursuant to 38 U.S.C. § 1114(l) is granted, subject to the laws and regulations governing the payment of monetary benefits.

As of February 8, 2020, a higher rating of SMC pursuant to 38 U.S.C. § 1114(o) is granted, subject to the laws and regulations governing the payment of monetary benefits.

As of February 8, 2020, a higher rating of SMC pursuant to 38 U.S.C. § 1114(r)(1) is granted, subject to the laws and regulations governing the payment of monetary benefits.

FINDINGS OF FACT

1. Resolving all doubt in the appellant's favor, the Veteran required the regular aid and attendance of another person as a result of his service-connected B-cell acute lymphoblastic leukemia (hereinafter, leukemia) as of February 8, 2020, the date of the award of service connection.
2. As of February 8, 2020, the Veteran was entitled to two rates of SMC under 38 U.S.C. § 1114(l).

3. As of February 8, 2020, the Veteran was entitled to SMC pursuant to 38 U.S.C. § 1114(o) and was in need of the regular aid and attendance of another person.

CONCLUSIONS OF LAW

1. As of February 8, 2020, the criteria for a separate rating of SMC pursuant to 38 U.S.C. § 1114(l) have been met. 38 U.S.C. §§ 1114, 5107; 38 C.F.R. §§ 3.102, 3.350, 3.352.

2. As of February 8, 2020, the criteria for a higher rating of SMC pursuant to 38 U.S.C. § 1114(o) have been met. 38 U.S.C. §§ 1114, 5107; 38 C.F.R. §§ 3.102, 3.350.

3. As of February 8, 2020, the criteria for a higher rating of SMC pursuant to 38 U.S.C. § 1114(r)(1) have been met. 38 U.S.C. §§ 1114, 5107; 38 C.F.R. §§ 3.102, 3.350.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from June 1964 to June 1968. He died in May 2020, and the appellant is his surviving spouse, who, in July 2020, was accepted as the substitute claimant for the purpose of processing this appeal to its completion. This matter comes before the Board of Veterans' Appeals (Board) from a rating decision issued on February 21, 2020 by a Department of Veterans Affairs (VA) Regional Office. In the April 2020 VA Form 10182, Decision Review Request: Board Appeal, the Veteran elected the Direct Review docket. In June 2020, following notice of the Veteran's death, the Board dismissed the case due to lack of jurisdiction. However, subsequent to the acceptance of the appellant as the substitute claimant, the appeal has been returned to the Board for further appellate consideration. Based on the Veteran's election of the Direct Review docket, the Board may only consider the evidence of record at the time of the agency of original jurisdiction (AOJ) decision on appeal. 38 C.F.R. § 20.301.

SMC is a special statutory award in addition to awards based on the schedular evaluations provided in VA's rating schedule. Claims for SMC, other than those pertaining to one-time awards and an annual clothing allowance, are governed by 38 U.S.C. §§ 1114 (k)-(s) and 38 C.F.R. §§ 3.350 and 3.352. In this regard, the rate amounts increase the later in the alphabet the letter appears (except for the (s) rate). SMC under subsections (k) through (r) are rates that are paid in addition to any other SMC rates, with certain monetary limits.

Pertinent to the instant case, subsection (o) is granted for loss of both arms, entitlement to two or more rates provided in Subsections (l)-(n), deafness of certain severities, paraplegia, and/or helplessness. SMC under subsection (l) is payable for anatomical loss or loss of use of both feet, one hand and one foot, blindness in both eyes with visual acuity of 5/200 or less or being permanently bedridden or so helpless as to be in need of regular aid and attendance. SMC under subsection (m) is payable for anatomical loss or loss of use of both hands; anatomical loss or loss of use of both legs at a level, or with complications, preventing natural knee action with prosthesis in place; anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place with anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place; blindness in both eyes having only light perception; or blindness in both eyes leaving the veteran so helpless as to be in need of regular aid and attendance. SMC under subsection (n) is for amputation or loss of use of certain body parts, to include blindness without light perception in both eyes. 38 U.S.C. § 1114.

The appeal period before the Board stems from receipt of the Veteran's service connection claim for Parkinson's disease and associated disorders on September 3, 2019. According to the February 2020 rating decision, the Veteran was in receipt of one rate of SMC under subsection (l) based on the need for regular aid and attendance and loss of use of a creative organ due *solely* to his service-connected Parkinson's disease complications as of the date of the award of service connection for such (emphasis added).

The appellant's representative contends the Veteran was entitled to two or more rates of SMC under subsection (l) and, as a result, SMC under subsection (o).

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Specifically, her representative argues the Veteran was in need of regular aid and attendance due to his Parkinson's disease, exclusive of his bilateral lower extremity muscle rigidity with bradykinesia (hereinafter, BLE disability), and therefore, an additional, separate rating of SMC under subsection (1) was warranted based on loss of use of both feet. Alternatively, the representative asserts the Veteran was in need of the regular aid and attendance of another person due to his leukemia, exclusive of his Parkinson's disease and associated disabilities.

Pertinent to the representative's first contention, the term "loss of use of a hand or foot" is defined 38 C.F.R. § 3.350(a)(2)(i) as existing when "no effective function remains other than that which would be equally well served by an amputation stump at the site of election below the elbow or knee with the use of a suitable prosthetic appliance." The determination will be made on the basis of the actual remaining function whether, in the case of the foot, the acts of balance, propulsion, etc., could be accomplished equally well by an amputation stump with prosthesis. 38 C.F.R. § 3.350(a)(2)(i). One example of loss of foot includes complete paralysis of the external popliteal nerve and consequent foot drop, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants confirmatory of complete paralysis of this nerve. 38 C.F.R. § 3.350(a)(2)(i)(b). A similar definition is provided at 38 C.F.R. § 4.63.

In *Jensen v. Shulkin*, 29 Vet. App. 66 (2017), the United States Court of Appeals for Veterans Claims (Court) defined loss of use of both lower extremities as when dysfunction was so severe as to preclude locomotion without the regular and constant use of assistive devices. Total loss of use was not required. Otherwise stated, the Court indicated that the concept of loss of use contemplated that the claimant was deprived of the use of his lower extremities to such a degree that his locomotion was precluded.

As of September 3, 2019, the Veteran was in receipt of 20 percent ratings for his BLE disability under 38 C.F.R. § 4.124A, Diagnostic Code 8520. Under Diagnostic Code 8520, a 20 percent rating is assigned for moderate incomplete paralysis of the sciatic nerve. Notably, higher ratings are provided for greater severity of disability, to include an 80 percent rating that contemplates complete paralysis of the sciatic nerve where the foot dangles and drops, no active

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movement possible of muscles below the knee, flexion of the knee weakened or lost.

An October 2019 VA treatment record shows the Veteran was instructed to use a walker all of the time as he was unable to walk very far and fell when using a cane on a daily basis. Although a November 2019 VA treatment record indicates the Veteran ambulated with a slow pace, used a cane, and had a history of a fall in August, the record shows the Veteran drove himself to the urgent care facility.

VA examination in November 2019 revealed moderate bradykinesia, muscle rigidity, and stiffness but no tremor in the right lower extremity or the left lower extremity. The examiner noted the Veteran walked slowly, with a shuffling gait and weakness in his legs. However, VA examination of the peripheral nerves that same month did not demonstrate a peripheral nerve condition or peripheral neuropathy. Muscle strength testing and sensation testing were normal, with no evidence of muscle atrophy, but deep tendon reflexes were hypoactive in the bilateral knees and ankles. The examiner concluded the Veteran did not have any peripheral nerve involvement associated with his Parkinson's disease as such was a central nervous system disease.

In this regard, VA examination of the central nervous system in November 2019 revealed no muscle weakness or muscle atrophy in the lower extremities. It was noted the Veteran's regular use of a wheelchair was due to poor balance secondary to dementia and Parkinson's disease, and the VA examiner specifically found there was not functional impairment of an extremity such that no effective function remained other than that which would be equally served by an amputation with prosthesis. Again, a November 2019 medical opinion reflects the finding that the Veteran was wheelchair bound due to frequent falls and poor balance without peripheral nerve involvement. Additionally, a VA treatment record dated in February 6, 2020, indicates the Veteran, despite ambulating with a 4-wheeled walker at all times, was independent with basic activities of daily living (ADLs), mobility, and transfers in connection with his Parkinson's disease.

Upon review, the Board finds that even if the Veteran required the regular aid and attendance of another person due to his Parkinson's disease complications,

exclusive of his BLE disability, the medical evidence does not show the latter resulted in the loss of use of both feet. In particular, the medical evidence shows the Veteran's use of assistive devices, to include a wheelchair, was mainly due to his balance impairment and dementia rather than any symptomatology associated with the lower extremities. Additionally, the medical evidence is consistent with the assigned ratings, which indicate the Veteran's BLE disability was of only moderate severity during the appeal period. Moreover, the Board affords significant probative value to the November 2019 VA examiner's opinion, which was based on physical examination of the Veteran and a review of the record. Therein, the VA examiner specifically found there was not functional impairment of an extremity such that no effective function remained other than that which would be equally served by an amputation with prosthesis.

With regard to the representative's second assertion, however, the Board has considered the basic criteria for regular aid and attendance are set forth in 38 C.F.R. § 3.352(a) in accordance with 38 C.F.R. § 3.351(c)(3). The following are accorded consideration: inability of claimant to dress or undress, or to keep himself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid); inability to feed himself through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his daily environment. Additionally, given the AOJ's determination, the Board's analysis herein will focus solely on the functional impairment resulting from the Veteran's service-connected disabilities exclusive of his Parkinson's disease complications.

A February 11, 2020, Oncology Outpatient Visit Note shows the Veteran had a very poor prognosis and that in his current setting, options included hospice and/or supportive care alone. The most common complications of leukemia were noted to be anemia, which could cause significant fatigue, neutropenia, which could result in life-threatening infections, and thrombocytopenia, which could cause life-

threatening bleeding events. The record indicates the Veteran's family was most interested in pursuing hospice combined with treatment for palliative purposes and symptom relief and a hospice referral was placed that day. A Homemaker Home Health Aide (HHHA) Consult Report dated on February 12, 2020, notes the Veteran had been on the HHHA Electronic Wait List (EWL) since August 2019; however, he was now hospice eligible and able to bypass EWL. In this regard, the record specifically identifies diagnoses of Parkinson's Disease and leukemia "not having achieved remission" and notes the Veteran needed help from another person in connection with dressing, grooming, bathing, eating, toileting, bed mobility, transfers, ambulation, and behavior. Additionally, the record shows he required assistance with housekeeping, laundry, meal preparation, transportation, managing finances, medication management, and shopping and indicates the appellant was his primary caregiver who would benefit from outpatient respite. According to the record, the intention of the HHHA program was to address ADL needs adjunct to independent activities of daily living.

Upon review, the Board finds the medical evidence dated as of February 8, 2020, indicates that the Veteran's service-connected leukemia, independent of his Parkinson's disease and associated disabilities, markedly restricted his ability to care for himself. In particular, the aforementioned treatment records show the Veteran became hospice eligible based on his new ADL needs. Therefore, the Board resolves all doubt in the appellant's favor and finds the Veteran's service-connected leukemia resulted in his need for the aid and attendance of another person. Consequently, the criteria for a separate rating of SMC under subsection (l) based on the need for the regular aid and attendance of another person were met as of February 8, 2020.

Given the above award, the Veteran was entitled to two rates of SMC under subsection (l) and, as a result, SMC under subsection (o) as of February 8, 2020. 38 U.S.C. § 1114. Finally, as noted above, the appellant's representative argued the Veteran should be awarded SMC under 38 U.S.C. § 1114(r)(1) for a higher rate of aid and attendance if the Board were to award SMC under 38 U.S.C. § 1114(o). *See Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991); *Bradley v. Peake*, 22 Vet. App. 280 (2008) (finding that SMC "benefits are to be accorded when a veteran

becomes eligible without need for a separate claim”). In this respect, subsection (r)(1) authorizes a special aid and attendance rate when the veteran is in receipt of the maximum rate under either Subsection (o) or (p) and is in need of regular aid and attendance or a higher level of care. As the Board herein awards entitlement to SMC under subsection (o) and has determined that the Veteran was in need of the regular aid and attendance of another person as of February 8, 2020, the criteria for SMC under subsection (r)(1) have been met as of February 8, 2020. 38 U.S.C. § 1114.



MARTIN B. PETERS
Acting Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

M. M. Celli, Counsel

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.