



**DEPARTMENT OF VETERANS AFFAIRS  
Veterans Benefits Administration  
Regional Office**

[REDACTED]

**VA File Number**

[REDACTED]

**Represented By:  
GORDON A GRAHAM  
Rating Decision  
08/27/2021**

**INTRODUCTION**

The records reflect that you are a Veteran of the Peacetime. You served in the Navy from August 28, 1978 to September 3, 1982. We received your supplemental claim on August 16, 2021. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

**DECISION**

1. A clear and unmistakable error was made in the level of special monthly compensation assigned from August 23, 2018 and is changed to reflect February 12, 2018.
2. A clear and unmistakable error is found in the effective date of major neurocognitive impairment (MCI) - (previously claimed as mild neurocognitive impairment , major depressive disorder, adjustment disorder with anxiety and unspecified neurocognitive disorder (also claimed as memory loss and sleep disturbance) and an evaluation of 100 percent is established from August 23, 2018.
3. Entitlement is warranted for special monthly compensation under 38 U.S.C. 1114, subsection



(p) and 38 CFR 3.350(f)(4) at the rate equal to subsection (m) on account of entitlement to the rate equal to subsection (l) with additional disability, independently ratable at 100 percent from August 23, 2018.

### EVIDENCE

- Standard 5103 Notice, received on August 19, 2021
- 5103 Notice Acknowledgement, received on August 18, 2021
- VA Form 20-0995 Supplemental Claim Application, received on August 16, 2021
- VAMC (Veterans Affairs Medical Center) treatment records, Central TX VAMC, for the period April 22, 2019 to April 30, 2019
- Service Treatment and Personnel Records, for the period August 28, 1978 to September 3, 1982
- Rating Decision - Narrative, and all the evidence contained therein, received on October 11, 2018
- Rating Decision - Narrative, and all the evidence contained therein, received on March 04, 2020

### REASONS FOR DECISION

#### **1. Whether the level of Special Monthly Compensation assigned was a clear and unmistakable error.**

Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been. (38 CFR 3.105)

38 CFR 3.401a notes: (1) Except as provided in §3.400(o)(2), the date of receipt of claim or date entitlement arose, whichever is later. However, when an award of pension or compensation based on an original or supplemental claim is effective for a period prior to the date of receipt of the claim, any additional pension or compensation payable by reason of need for aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established.

A clear and unmistakable error was made in the level of special monthly compensation assigned from August 23, 2018 and is changed to reflect February 12, 2018, the date entitlement arose. (38 CFR 4.1, 38 CFR 3.400)

Although a VA Form 21-2680 Examination for Housebound Status or Permanent Need for Regular Aid and Attendance was not received until May 2, 2018, it has been determined that



retroactive entitlement with an earlier effective date is warranted. The service connected disabilities of major neurocognitive impairment (MCI), diabetes mellitus type II, and the peripheral neuropathies effecting your lower extremities all contribute to your need for aid and attendance, and all have effective dates established as February 12, 2018. Based on this it has been determined that your need for aid and attendance shall also be awarded for the retroactive period for which entitlement to the additional benefit is established.

Please note that the Rating Decision dated April 26, 2018 granted special monthly compensation at the housebound rate for this time period. You cannot receive special monthly compensation at both the housebound rate and the aid and attendance rate simultaneously. As the greater benefit is aid and attendance, its implementation replaces your prior entitlement to housebound special monthly compensation.

**2. Whether the effective date assigned for major neurocognitive impairment (MCI) - (previously claimed as mild neurocognitive impairment , major depressive disorder, adjustment disorder with anxiety and unspecified neurocognitive disorder (also claimed as memory loss and sleep disturbance) was clearly and unmistakably erroneous.**

Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was a clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been. In this case, the disability effective date is corrected because the previous decision was a clear and unmistakable error. (38 CFR 3.105)

Rating decision 10/11/2018 granted increase in mental to 100% from 8/21/2018 intent to file. This was found to be incorrect, because that ITF would have only applied to 8/22/2018 claim and not the 8/23/2018 claim for mental increase. The effective date is changed to 8/23/2018, the date of claim for increase. This action does not change your overall disability percentage. (38 CFR 3.400)

We have assigned a 100 percent evaluation for your mild neurocognitive impairment (MCI) - (previously claimed as major depressive disorder, adjustment disorder with anxiety and unspecified neurocognitive disorder (also claimed as memory loss and sleep disturbance) based on:

- Memory loss for own occupation
- Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood
- Depressed mood
- Spatial disorientation
- Impaired judgment
- Mild memory loss



- Chronic sleep impairment
- Memory loss for own name
- Difficulty in understanding complex commands
- Impaired abstract thinking
- Difficulty in adapting to stressful circumstances
- Neglect of personal appearance and hygiene
- Difficulty in adapting to work
- Impairment of short- and long-term memory
- Intermittent inability to perform maintenance of minimal personal hygiene
- Difficulty in adapting to a worklike setting
- Anxiety
- Intermittent inability to perform activities of daily living
- Memory loss for names of close relatives

The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 100 percent disability evaluation.

This is the highest schedular evaluation allowed under the law for major or mild neurocognitive disorder due to another medical condition. (38 CFR 4.125, 38 CFR 4.126, 38 CFR 4.130)

### **3. Entitlement to a higher level of special monthly compensation.**

A claimant may file a supplemental claim by submitting or identifying new and relevant evidence. New evidence is evidence not previously part of the actual record before agency adjudicators. Relevant evidence means evidence that tends to prove or disprove a matter at issue in a claim. (38 CFR 3.2500 and 38 CFR 3.2501) In support of your claim, new and relevant evidence has been received and your claim is now reconsidered.

The BVA decision found that A/A was warranted on all service connected disabilities, and not necessarily just on the respiratory so there wouldn't be entitlement to separate and distinct 50% or more at that time. In reference to the 9/7/2018 PTSD exam, the 8/23/2018 increase to PTSD (which had the wrong effective date and is a clear and unmistakable error, CUE) would warrant A/A for mental all by itself and then the COPD/Asthma/sleep apnea is separate and distinct 100% disability so the full P-step to M would be warranted. Entitlement is warranted for special monthly compensation under 38 U.S.C. 1114, subsection (p) and 38 CFR 3.350(f)(4) at the rate equal to subsection (m) on account of entitlement to the rate equal to subsection (l) with additional disability, independently ratable at 100 percent from August 23, 2018, the date entitlement arose. (38 CFR 4.1, 38 CFR 3.400)

Please note: You are currently granted special monthly compensation based on being housebound. However, since both special monthly compensation cannot be simultaneously granted at the same time, your special monthly compensation for housebound will be discontinued, as aid and attendance offers you a greater benefit. Therefore, housebound has been discontinued, which is the day prior to your effective date that your aid and attendance is being granted. Although you meet the criteria for A&A at the SMC "L" rate, you do not meet the threshold of 38 U.S.C 114 (o) for a higher level SMC.



**REFERENCES:**

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all Veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, [www.va.gov](http://www.va.gov).

