BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
[redacted]
REPRESENTED BY
Gordon A. Graham, Attorney

[redacted]
Docket No. 18-40 194
Advanced on the Docket

DATE: September 28, 2018

ORDER

Service connection for loss of use of lower extremities is granted.

Special monthly compensation under 38 U.S.C. § 1114(l) based on loss of use of extremities, is granted.

REFERRED

The issues of (1) the propriety of the reduction in disability rating for a low back disability, and (2) entitlement to higher levels of special monthly compensation, were raised at the Board hearing. *Board Hr'g Tr. 7-9, 11.* Those issues are referred to the Agency of Original Jurisdiction (AOJ) for adjudication.

FINDINGS OF FACT

It is factually ascertainable that, as of June 2018, the Veteran had loss of use of both lower extremities due to his service-connected disabilities.

CONCLUSIONS OF LAW

1. The criteria for service connection for loss of use of both lower extremities have been met. 38 U.S.C. § 1114; 38 U.S.C. §§ 3.350, 3.809.

2. The criteria for special monthly compensation under 38 U.S.C. § 1114(l) based on loss of use of extremities have been met. 38 U.S.C. § 1114; 38 U.S.C. §§ 3.350, 3.809.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran had active service from May 1962 to May 1968.

This matter is on appeal from a July 2018 rating decision.

The Veteran testified before the undersigned Veterans Law Judge in a hearing at the RO in September 2018. It is acknowledged that the Veteran's attorney requested a copy of the hearing transcript; however, given the grant of the issues addressed and the referral of the other matters raised during the hearing, the Board finds that there is no prejudice to the Veteran by issuing a decision at this time.

Applicable Law

As applicable to both claims on appeal, special monthly compensation (SMC) under § 1114(l) is payable if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of both feet, or of one hand and one foot, or is blind in both eyes, with 5/200 visual acuity or less, or is permanently bedridden or with such significant disabilities as to be in need of regular aid and attendance. *See* 38 C.F.R. § 3.350(b). Loss of use of a hand or a foot will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow or knee with use of a suitable prosthetic appliance. The determination will be made on the basis of the actual remaining function, whether the acts of grasping, manipulation, etc., in the case of the hand, or of balance, propulsion, etc.,

in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis; for example: (a) Extremely unfavorable complete ankylosis of the knee, or complete ankylosis of two major joints of an extremity, or shortening of the lower extremity of 3 1/2 inches or more, will constitute loss of use of the hand or foot involved. (b) Complete paralysis of the external popliteal nerve (common peroneal) and consequent footdrop, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants confirmatory of complete paralysis of this nerve, will be taken as loss of use of the foot. 38 C.F.R. § 3.350(a)(2), (b)(1).

"Loss of use" means a deprivation of the ability to avail oneself of the anatomical region in question. A loss of use exists if a veteran has suffered a deprivation in his ability to use his lower extremity so severe that he is precluded from perambulating without one of the required assistive devices. Locomotion is precluded even if a veteran is capable on occasion of moving about unaided. *Jensen v. Shulkin*, 29 Vet. App. 66, 78 (2017). "Precluded locomotion" 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. 38 C.F.R. § 3.809(c).

Discussion

1. Service connection for loss of use of lower extremities

The Veteran maintains that he has loss of use of both lower extremities due to the effect of his service-connected disabilities.

After careful consideration, the Board finds that the evidence establishes loss of use of both feet due to his service-connected disabilities.

He is service-connected for multiple disabilities affecting the lower extremities, including degenerative arthritis of the lumbar spine with degenerative disc disease, status post laminectomy with secondary lumbar radiculopathy of the right and left lower extremities; and metastatic bone disease to the lumbar spine and bilateral hips associated with prostate cancer.

The medical evidence supports a finding of loss of use of both lower extremities due to these service-connected disabilities. Most specifically, a VA examiner in July 2018 found that the Veteran's prostate cancer, metastatic to the spine and pelvis, had caused radiculopathy with motor and sensory loss to the legs requiring use of a wheelchair and walker. This same examiner (in a different section of the report) explained that the Veteran was using a walker in the house due to thoracic and lumbar radiculopathy and using a wheelchair outside of the house due to the leg weakness from thoracic and lumbar radiculopathy and hip bone disease. The examiner concluded that the Veteran had loss of appreciation to foot placement resulting in a high fall risk.

Earlier, at a June 2018 physical examination, a different VA examiner observed that the Veteran used a cane continually and walker, but some days was not able to walk at all or dress himself due to chronic low back pain and leg pain and weakness. The examiner detailed radiculopathy causing the Veteran's legs to sometimes give out causing instability and/or falling, along with instability of station. The examiner noted that the Veteran had difficulty with prolonged walking greater than 20 feet, standing greater than 5 minutes, and sitting longer than 20-30 minutes without change of position due to pain to all joints.

This evidence demonstrates deprivation of the ability to avail himself of the lower extremities, including deprivation in his ability to use his lower extremity so severe that he was precluded from perambulating without one of the required assistive devices. Although the June 2018 VA examiner found that he could walk not greater than 20 feet, it does not appear he was capable of moving about unaided and, even with an assistive device, he remained a high fall risk. *See Jensen*, 29 Vet. App. at 78.

This level of impairment was not factually ascertainable prior to the June 2018 VA examination. Two months prior, at VA in March 2018, it was found that he had worsening leg weakness, but normal strength and deep tendon reflexes. Earlier, in November 2017, at his private urologist, he was found to have no clubbing, cyanosis, edema, or deformity noted with normal full range of motion of all joints. One month prior, in October 2017, at a private cancer clinic, he was found to be restricted in physically strenuous activity, but ambulatory and able to carry out

work of a light or sedentary nature, including with a normal gait and normal strength.

Thus, it is first factually ascertainable as of the June 2018 VA examination that he had loss of use of both lower extremities. The claim is therefore granted from that date. *See Swain v. McDonald*, 27 Vet. App. 219, 224 (2015); *accord Young v. McDonald*, 766 F.3d 1348 (Fed. Cir. 2014); *see also Tatum v. Shinseki*, 24 Vet. App. 139, 145 (2010) (discussing assignment of an effective date for a reduction in disability rating under DC 7528); VAOPGCPREC 12-98. The appeal is granted to this extent.

2. Special monthly compensation under 38 U.S.C. § 1114(l) based on loss of use of extremities

The Veteran next contends that SMC under § 1114(l) based on loss of use of both lower extremities is warranted.

Consistent with the Board's decision establishing legal entitlement to loss of use of both lower extremities due to his service-connected disabilities since June 2018, SMC under § 1114(l) based on loss of use of both lower extremities, is warranted. The appeal is therefore granted.

The Veteran's representative argued at the Board hearing (and in a September 2018 appellant brief) that higher levels of SMC are also assignable. At present, the Board must defer consideration of those issues as the evidence is not sufficiently developed to decide them in his favor. For instance, the Veteran's representative argued for a higher level of aid and attendance under § 1114(r)(1). That benefit is allowable in certain circumstances during periods a veteran is not hospitalized at United States Government expense. *See* 38 C.F.R. § 3.350(h). The Veteran's attorney averred that the Veteran is currently in hospice care, but it is not clear if this is at the government's expense. It may be so when considering that the hospice care is for a service-connected disability. However, the Board has no information either way as to this fact. As such, the Board has referred those matters to the RO to ensure that the Veteran is afforded full due process and a fair hearing as to those issues. *See, e.g., Bernard v. Brown*, 4 Vet. App. 384, 394 (1993).

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C. CRAWFORD
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

C. Bosely, Counsel