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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0309

LARRY LACK, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

DAVIS, *Chief Judge*: U.S. Air Force veteran Patricia Lack served honorably from July 1973 to March 1984. While stationed in the Philippines she contracted a gastrointestinal condition that ended her military career. A December 1984 rating decision awarded her service connection for "recurrent diarrhea, compatible with Crohn's disease,"[1] rated as 10% disabling and effective the day after her separation from service.[2] The same rating decision awarded special monthly compensation (SMC) under 38 U.S.C § 314(k), the predecessor to section 1114(k), for anatomical loss of a creative organ from an in-service hysterectomy.

Attempting to treat the veteran for fatigue and malaise associated with Crohn's disease, a VA physician prescribed Prozac.[3] The effects of this drug resulted in a June 1990 suicide attempt,[4]

[1] Record (R.) at 3674.

[2] A Sept. 1999 Supplemental Statement of the Case recharacterized the recurrent diarrhea as inflammatory bowel disease and raised the disability rating to 30%, effective August 7, 1996. R. at 2536.

[3] "Prozac" is the "trademark for preparations of fluoxetine hydrochloride." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1539 (32d ed. 2012).

[4] *See* R. at 2625-30 (testimony at rating office hearing describing severe nightmares and physical effects). The National Institutes of Health warns that "your mental health may change in unexpected ways when you take fluoxetine or other antidepressants even if you are an adult over 24 years of age. You may become suicidal, especially at the beginning of your treatment and any time that your dose is increased or decreased." https://medlineplus.gov/druginfo/meds (last visited June 17, 2019); *see also* PHYSICIAN'S DESK REFERENCE S-742

in which Mrs. Lack sustained a self-inflicted gunshot wound (GSW) to her chest. A 7½ month hospitalization followed. Among other injuries, the GSW severely damaged her lungs.

Over the years, through a series of additional claims and associated appeals, Mrs. Lack received several more service-connection awards and associated SMC compensation. An October 1999 rating decision awarded service connection for PTSD, rated as 100% disabling, effective August 7, 1996.[5] A February 2000 rating decision awarded compensation under 38 U.S.C. § 1151 for "residuals of [GSW] left of sternum" rated at 20%, splenectomy rated at 20%, and restrictive lung disease rated at 60%, all effective August 7, 1996.[6] This same rating decision granted SMC based on one disability evaluated at 100% and another evaluated at 60%.[7] An April 2001 Board decision revised the effective date for the section 1151 awards to June 3, 1992.[8] A May 2001 rating decision implementing the April 2001 Board decision further awarded TDIU, also effective June 3, 1992.[9] Finally, a May 2004 rating decision increased the disability rating for restrictive lung disease to 100%, effective March 2, 2004, based on VA treatment records that prescribed outpatient oxygen therapy. This rating decision also included an award of SMC for aid and attendance, which is discussed more fully below. A September 2004 rating decision awarded SMC "at the rate equal to [that in] subsection (m) [of section 1114, title 38, U.S. Code,] on account of restrictive lung disease with additional disability, post[-]traumatic stress disorder[,] independently ratable at 100[%] from 04/22/2004."[10]

Mrs. Lack died in September 2008; the cause of death was "pulmonary fibrosis."[11] Larry Lack, the veteran's surviving spouse, then filed a claim for dependency and indemnity compensation and accrued benefits. He now appeals a September 13, 2017, decision of the Board of Veterans' Appeals that denied an effective date before April 22, 2004, for an award of SMC under 38 U.S.C. § 1114(r)(2) for accrued benefits purposes. Because the Board failed to discuss

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(2017 ed.) (advising to monitor patients on fluoxetine for increased risk of "suicidality").

[5] R. at 2530.

[6] R. at 2499.

[7] *See* 38 U.S.C. § 1114(s).

[8] R. at 2354.

[9] R. at 2325.

[10] R. at 2036.

[11] R. at 1369 (death certificate).

issues reasonably raised by the record, rendering its statement of reasons or bases inadequate, the Court will set aside the September 2017 Board decision and remand the matter for further proceedings consistent with this opinion.

I. CONTROLLING LAW

SMC is a benefit paid in addition to basic rates of disability compensation and is available to veterans whose service-connected disabilities result in "additional hardships above and beyond those contemplated by VA's schedule for rating disabilities."[12] The multitiered rate schedule for SMC is set forth in 38 U.S.C. § 1114 and "varies according to the nature of the veteran's service-connected disabilities."[13] "[SMC] benefits are to be accorded when a veteran becomes eligible without need for a separate claim."[14] Further, the Secretary has a duty to maximize benefits.[15]

There are three provisions in section 1114 under which a veteran may receive SMC based on her need for aid and attendance of another person. The first level of aid and attendance is provided in subsection (l). Additional amounts for aid and attendance are available under subsection (r) if the veteran is entitled to certain levels of SMC under other provisions of the statute.

For all three levels of aid and attendance, a veteran must satisfy the requirements in 38 C.F.R. § 3.352(a) (2019).[16] This regulation lists six factors that can lead to a determination of need for aid and attendance, among which are: (1) inability to dress herself or keep herself ordinarily clean and presentable; (2) inability to feed herself; (3) inability to attend to the wants of nature; and (4) being bedridden. It is mandatory that VA consider the enumerated factors in § 3.352(a), and eligibility for aid and attendance requires the presence of at least one of the enumerated factors.[17]

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[12] *Breniser v. Shinseki*, 25 Vet.App. 64, 68 (2011).

[13] *Moreira v. Principi*, 3 Vet.App. 522, 524 (1992).

[14] *Bradley v. Peake*, 22 Vet.App. 280, 294 (2008) (citing *Akles v. Derwinski*, 1 Vet.App. 118, 121 (1991)); *see also* R. at 1643 (acknowledgment by decision review officer in hearing that "[i]t is VA's responsibility to rate at the highest level for [SMC], without it being specifically asked for in a claim form").

[15] *Bradley*, 22 Vet.App. at 294; *see also AB v. Brown*, 6 Vet.App. 35, 38 (1992) (presuming that a claimant is seeking the maximum benefits allowed by law and regulation); 38 C.F.R. § 3.102(a) (2019) (noting VA's obligation to "render a decision which grants every benefit that can be supported in law").

[16] *Prejean v. West*, 13 Vet.App. 444, 447 (2000).

[17] *Turco v. Brown*, 9 Vet.App. 222, 224 (1996).

To obtain a higher level of aid and attendance, a claimant must satisfy the requirements of § 3.352(b). In addition to satisfying the requirements of 3.352(a), a veteran must be entitled to SMC at the rate provided in subsection (o) of section 1114, the maximum rate authorized under subsection (p), or the intermediate rate between subsections (n) and (o), *plus* the rate authorized under subsection (k) (hereinafter "the schedular requirements"). Meeting these requirements entitles a claimant to aid and attendance under subsection (r)(1). A further level of compensation is provided in subsection (r)(2), for a higher level of care, "if the Secretary finds that the veteran, in the absence of the provision of such care, would require hospitalization, nursing home care, or other residential institutional care."[18] The description for the requisite "higher level of care," discussed more fully below, is found in § 3.352(b)(3). Compensation under statutory subsections (r)(1) and (r)(2) is "in addition to" the compensation under the schedular requirements.[19]

Subsection (o), in relevant part, provides for a higher level of SMC for conditions entitling the veteran to two or more of the rates provided in subsections (l) through (n), no condition being considered twice. Subsection (p) allows for the next higher rate or an intermediate rate between any of the previous subsections if a veteran's service-connected disabilities exceed the requirements of a subsection.

The Board's determination whether a veteran is entitled to SMC is a finding of fact reviewed under the "clearly erroneous" standard,[20] as is the effective date for an award of SMC.[21] A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed."[22]

As always, the Board must support its determinations with an adequate statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court.[23] The statement of reasons or bases must explain the Board's

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[18] 38 U.S.C. § 1114(r)(2).

[19] 38 U.S.C. § 1114(r).

[20] *Breniser*, 25 Vet.App. at 68.

[21] *Evans v. West*, 12 Vet.App. 396, 401 (1999).

[22] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

[23] 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

reasons for discounting favorable evidence,[24] and discuss all issues raised by the claimant or the evidence of record.[25]

II. ANALYSIS

In the decision here on appeal, the Board made only one formal finding of fact, that Mrs. Lack "did not have entitlement to SMC at the [section] 1114(o) or 1114(p) level [the schedular requirements] prior to April 22, 2004."[26] The Board did not discuss when the evidence of record established the need for the basic level of aid and attendance or the higher level of care. The Board further stated that "the current appeal does not include a claim to any lesser level of SMC prior to April 22, 2004. Such a claim has not been adjudicated at the lower level nor is it otherwise currently before the Board."[27]

Mr. Lack essentially argues that the Board erred by failing to consider issues and unadjudicated claims reasonably raised by the record and that its statement of reasons or bases did not adequately explain that failure. He presents two theories by which he contends Mrs. Lack would have been entitled to SMC at the subsection (r)(2) level before April 22, 2004. First, he argues that the evidence raised a claim for loss of the use of both feet as a result of Mrs. Lack's hospitalization from June 1990 to September 1991. Together with an entitlement to basic aid and attendance, he reasons, such an award would have satisfied the requirement of two or more ratings under subsection (l), as required by subsection (o). He asserts that this combination would have satisfied the schedular requirements for aid and attendance under subsections (r)(1) and (r)(2). Second, he contends that the evidence shows that Mrs. Lack required outpatient oxygen therapy long before April 22, 2004, and therefore she was entitled to a 100% disability rating for restrictive lung disease at an earlier date. Together with the August 7, 1996, award of 100% disability for PTSD, he reasons, she would have been entitled to the highest rating under subsection (p) potentially as early as that date, satisfying the schedular requirements for aid and attendance at the subsection (r)(2) level. He further argues that the requirements for higher level of care were

[24] *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

[25] *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

[26] R. at 4.

[27] R. at 8.

satisfied potentially as early as his wife's return from the hospital. Finally, he argues that "the Board erred when it failed to consider entitlement to a higher rate of SMC under subsections lower than (r)(2)."[28]

The Secretary responds that the Board had no responsibility to address claims for loss of the use of both feet and total disability for restrictive lung disease because no such claims were before the Board. The Secretary contends that the Board adequately explained that the schedular requirements were not met before April 22, 2004. Additionally, the Secretary argues that Mrs. Lack never filed a Notice of Disagreement with the effective date assigned for her 100% disability rating for restrictive lung disease and characterizes the appellant's arguments about that issue as an impermissible attempt at a freestanding claim for earlier effective date. The Secretary therefore argues for affirmance.

A. The evidence of record raises an issue of eligibility for SMC aid and attendance under subsection (l) of section 1114, title 38, U.S. Code, before April 22, 2004.

In a March 2001 administrative appeal of the disability rating for Mrs. Lack's gastrointestinal condition, her attorney formally requested SMC for aid and attendance. Accompanying this request was an undated document entitled "A Day in the Life of Patricia Lack,"[29] in which she described her difficulties with daily activities of life, and the extensive assistance she required from her husband, including assistance with bathroom needs. Also attached to the request was a March 13, 2001, letter from her family practice physician supporting the request for SMC based on aid and attendance. The physician stated that he had read the "Day in the Life" document and summarized Mrs. Lack's condition as follows:

> Mrs. Lack's breathing problems continue to cause her to be dependent upon her husband, for her daily living activities, such as personal care. She cannot:
>
> a. Dress and undress without the aid of her husband.
>
> b. Attend to the daily wants of nature. She has to keep a portable potty next to her bed, so that her husband doesn't have to carry her all the way to the bathroom.

[28] Appellant's Brief (Br.) at 24.

[29] R. at 1924-28.

> c. On really bad days, she has to stay in bed all day, because of the difficulty with her breathing. Her husband must provide for her every need and want. He prepares and serves her meals in the bedroom.[30]

This evidence raised at least three factors listed in regulatory § 3.352(a), which VA was required to consider.[31]

Moreover, at least as early as 1998 other evidence in the record raised an issue of aid and attendance—at least at the statutory subsection (l) level. Testimony at a 1998 regional office hearing indicated that because of the combination of Mrs. Lack's diarrhea attacks and reduced lung capacity, her husband needed to carry her to and from the bathroom and back to the bed.[32] The October 1999 rating decision, which awarded a 30% rating for the gastrointestinal condition on the basis of clear and unmistakable error (CUE), stated that SMC compensation for aid and attendance was deferred.[33] Therefore, VA acknowledged that the evidence clearly raised the issue of SMC for aid and attendance, which was part and parcel of the disability claims on appeal, even before Mrs. Lack's attorney explicitly raised the issue.

The record includes a July 2001 addendum to a VA Compensation and Pension examination report,[34] in which the examiner reviewed the "Day in the Life" document, noting that Mrs. Lack had improved to the point that she cooked light meals, folded laundry and performed her morning ablutions.[35] The examiner concluded that "the objective findings . . . do not describe a condition meeting the requirements of *daily skilled services*."[36]

Subsequent adjudicative actions, however, did not resolve the aid and attendance issue. A July 2002 Supplemental Statement of the Case (SSOC) in the appeal for the gastrointestinal condition did not mention the request for aid and attendance.[37] The October 2002 Board decision

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[30] R. at 2380.

[31] *See supra* note 11 and accompanying text.

[32] R. at 2623-24.

[33] R. at 2530.

[34] The report itself is not included in the record.

[35] R. at 2302.

[36] R. at 2303 (emphasis added). The Court notes that "skilled services" are not required under section 1114(l) and further that "[i]t 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) (2019) (emphasis added).

[37] R. at 2252-58 (July 2002 SSOC).

of the appeal of the gastrointestinal condition stated that the aid and attendance request had been referred to the regional office.[38]

There is no further mention of aid and attendance in the record until the May 2004 rating decision. This decision raised the disability rating for the restrictive lung disease to 100% and granted SMC for aid and attendance, without specifying the level of the award. This rating decision referred to an undated report of an "Examination for Housebound Status or Permanent Need for Regular Aid and Attendance,"[39] transmitted to VA by Dr. Richard Robbins, the VA pulmonologist who treated Mrs. Lack. The report diagnosed Mrs. Lack with pulmonary fibrosis, and checked a box stating that she "requires the daily health care services of a skilled provider[,] without which [she] would require hospital, nursing home[,] or other institutional care."[40] The rating decision states that this examination report was received on April 22, 2004,[41] assigning this date as the effective date for the award of SMC aid and attendance "because that is the date that you filed your claim."[42]

Though VA initially took the position that the award of aid and attendance, effective April 22, 2004, was at the subsection (l) level,[43] subsequent decisions awarded compensation at the subsection (r)(2) level.[44] The Board never explained, however, why Mrs. Lack would not have been entitled to an earlier award for aid and attendance under subsection (l). The record before the Court is incomplete as to when VA became aware of Mrs. Lack's need for aid and assistance to the extent that an award of SMC under subsection (l) would have been required without a separate claim for that benefit.

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[38] R. at 2226. Referral was inappropriate because SMC is part of the disability claims that support SMC. The referral meant that the request for aid and attendance lost its place in the queue of VA priorities. *Cf. Young v. Shinseki*, 25 Vet.App. 201, 204 (2012).

[39] R. at 2167.

[40] R. at 2168.

[41] R. at 2131.

[42] *Id.*

[43] R. at 1887 (July 2005 Statement of the Case stating that the aid and attendance award "is considered under the (l) rate"), 2033 (Sept. 2004 rating decision stating aid and attendance was at the section 1114(l) level and that the veteran was not eligible at the (r)(1) or (r)(2) level).

[44] *See* R. at 1435 (Apr. 2008 Board decision). The May 2008 rating decision implementing this Board decision assigned an effective date of June 25, 2004, the date Mrs. Lack requested an increase in the level of her aid and attendance compensation. A March 2009 rating decision found CUE in the assignment of the effective date, however, and changed the effective date to April 22, 2004, the date that the aid and attendance examination report was received from Dr. Robbins.

Because the Board had a duty to consider all issues reasonably raised by the record and maximize benefits, the Board clearly erred in stating that the appeal included no claim for SMC at a lower level. The Court has jurisdiction to remand to the Board any matters that were reasonably raised below that the Board should have decided, regarding a claim properly before the Court, but failed to do so.[45] In considering this matter on remand, the Board must make findings on when and at what levels the evidence established entitlement to SMC for aid and attendance.

B. The Board decision did not resolve the reasonably raised issue whether the veteran was entitled to SMC for the loss of use of both feet.

During her 7½ months in the hospital, during which she was bedridden and sometimes comatose, Mrs. Lack developed "bilateral [equinus] deformities of her feet," and was therefore "not able to ambulate."[46] Mr. Lack argues that this condition constituted loss of use of both feet under subsection (l) of section 1114, title 38, U.S. Code. He characterizes this condition as a residual of the GSW. In any view of the matter, if loss of use of the feet continued until after the effective date of service connection for the conditions attributable to the GSW,[47] the foot condition would be "as the result of service-connected disability."[48] This Court has recently held that the statutory phrase "as a result of" includes a "multi-link causal chain between the service-connected disability and the loss of use."[49] The Court further emphasized that there is no need to file a separate claim for SMC benefits, but that SMC benefits should be considered whenever "the medical evidence indicates potential eligibility."[50]

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[45] *Clemmons v. Shinseki*, 25 Vet.App. 1, 3 (2009); *Barringer v. Peake*, 22 Vet.App. 242, 244 (2008).

[46] R. at 47. This deformity is one "in which the foot is turned downward and the heel is elevated, so that only the front part of the foot touches the ground. The term *equinus* refers to a horse, an animal actually walking on modified toes." 5 ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER T-14 (2007) (describing the related condition of talipes equinus, a similar congenital deformity).

[47] Appellant's Br. at 21, 24.

[48] 38 U.S.C. § 1114; *see also* 38 C.F.R. § 3.310 (2019) (allowing for secondary service connection of a disability that is "proximately due to or the result of a service-connected disease or injury").

[49] *Payne v. Wilkie*, No. 17-3439, 2019 WL 3757614, at *3, *5 (Vet. App. Aug. 9, 2019). The holding in *Payne* had to do with subsection 1114(k), but, generally, identical phrases used in different parts of the same act are intended to have the same meaning. *See Estate of Covant v. Niklos Drilling Co.*, 505 U.S. 469, 479 (1992); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Voracek v. Nicholson*, 421 F.3d 1299, 1304 (Fed. Cir. 2005).

[50] *Payne*, 2019 WL 3757614, at *6.

Hospital records show that Mrs. Lack underwent Achilles tendon lengthening surgery in February 1991 to treat the equinus deformities.[51] The record before the Court is inconclusive as to whether, when, and to what extent this procedure was effective in restoring the use of her feet.

The Board stated that "[d]ue to an Achilles issue related to an induced coma, [Mrs. Lack] never regained full use of her legs, and [Mr. Lack] had to carry her wherever needed until she was issued a wheelchair." [52] The Court further notes that Mrs. Lack, in her "Day in the Life" letter, stated that she had worn casts on her feet for 6 weeks after returning home in March 1991, and could not walk "for over a year."[53] She also testified that she could not walk as of June 3, 1992.[54]

The Board did not find, however, whether Mrs. Lack continued to have loss of use of both feet for some period after June 3, 1992, [55] and the Court is unable to assess whether this omission prejudiced Mr. Lack.[56] If the Board finds that the loss of use of feet extended beyond that date, Mrs. Lack would have been entitled to SMC under section 1114(l) until she may have regained the use of her feet, and the Board would need to consider the issue of staged ratings.[57]

It is less clear whether she would have been entitled to SMC for aid and attendance under sections 1114(r)(1) or (r)(2). Subsection (o) requires that no condition be considered twice, and the Court has held that the requirements of subsection (o) are not met when the need for aid and attendance is based on the loss of use of both feet.[58]

However, Mrs. Lack's need for aid and attendance might be established on or about June 3, 1992, based instead on her gastrointestinal condition and reduced lung capacity. Again, the Board needs to make findings to facilitate the Court's review of this issue.

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[51] R. at 42.

[52] R. at 5.

[53] R. at 2382.

[54] R. at 2402.

[55] *See* R. at 2352 (Apr. 2001 Board decision establishing June 3, 1992, as effective date for conditions caused by GSW).

[56] *See* 38 U.S.C. § 7261(b)(2) (Court must "take due account of the rule of prejudicial error"); *Newhouse v. Nicholson*, 497 F.3d 1298, 1301 (Fed. Cir. 2007).

[57] *See Fenderson v. West*, 12 Vet.App. 119 (1999). The compensation for aid and attendance under section 1114(l) exceeds that of section 1114(s), which was awarded as of June 3, 1992.

[58] *Breniser*, 25 Vet.App. at 78.

C. The evidence of record reasonably raises the issue whether the veteran was entitled to aid and attendance at the subsection (r)(1) or (r)(2) level as of March 2, 2004.

To reiterate, the May 2004 rating decision granted a 100% disability rating for restrictive lung disease, effective March 2, 2004,[59] and awarded increased SMC under section 1114(p) and § 3.350(f)(4).[60] The rating decision states that it "assigned an effective date of March 2, 2004, because that is the date that the treatment records show that an order for home oxygen was requested."[61] Additionally, the rating decision awarded SMC for aid and attendance, effective April 22, 2004, the date VA received the report from Dr. Robbins.

Mr. Lack argues that the record shows that Mrs. Lack required outpatient oxygen therapy before March 2, 2004. He reasons that she was therefore entitled to an earlier effective date for the 100% rating for restrictive lung disease, which combined with the 100% rating for PTSD, should have led to an award of SMC at the subsection (r)(2) level, potentially effective as early as August 1997.

The Secretary correctly states, however, that Mrs. Lack never appealed the effective date assigned to the 100% disability rating in the May 2004 rating decision. The decision therefore became final and can be addressed at this point only by a request for revision based on CUE.[62]

That conclusion, however, does not end the analysis. The May 2004 rating decision establishes that the schedular requirements of subsections (r)(1) and (r)(2) were satisfied as of March 2, 2004. The Board, however, stated without explanation that "[Mrs. Lack] was entitled to SMC under section 1114(p) beginning April 22, 2004."[63] The May 2004 rating decision awarded an effective date of April 22, 2004, concluding that the requirements for increased care under subsection (r)(2) were not established until receipt of Dr. Robbins's report on that date.

Subsection (r)(2) requires that the initial determination of the need for such increased care must be made by a VA physician or contract physician. The applicable regulation requires that an unlicensed person may provide the higher level of care "under the regular supervision of a licensed

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[59] R. at 2231-32.

[60] R. at 2133.

[61] R. at 2131; *see* R. at 1102 (VA clinical progress note referring to need for oxygen). A 100% rating requires certain levels of lung capacity measurements, such as a forced expiratory volume less than 40%, "or [alternatively]; requires outpatient oxygen therapy." 38 C.F.R. § 4.97, Diagnostic Code 6844 (2019).

[62] *See* 38 U.S.C. § 5109A; 38 C.F.R. § 3.105(a) (2019).

[63] R. at 7-8.

health care professional," which includes a registered nurse.[64] "Regular supervision" means that consultation with the health care professional takes place at least once a month; the consultation may be by telephone.[65]

In that regard, the Board did not discuss evidence to the effect that Mr. Lack provided such care in consultation with health care physicians including VA physicians. At a 2014 Board hearing Mr. Lack testified that at the hospital he had been trained to care for Mrs. Lack and that when she returned from the hospital, he received further instruction from a nurse who visited their house anywhere from twice a week to twice a month.[66] Furthermore, at an August 2006 hearing before a decision review officer (DRO), Mr. Lack testified that he had telephone contacts with Dr. Robbins and his staff from two to eight times a month. On the same day as the DRO hearing, the Lacks submitted a letter from Dr. Robbins stating:

> This is to confirm that Larry Lack, husband of Patty Lack, has been in contact with me or the technicians in our department at least once a month. In my professional opinion, her respiratory limitation is severe enough that if Larry Lack was not able to care for her, she would require an extended care facility.[67]

The Board did not explain why this evidence did not suffice to establish the requisite subsection (r)(2) higher level of care at least by March 2, 2004. Further, the Board did not explain why Mrs. Lack would not have been entitled to SMC at the (r)(1) level on that date. The April 22, 2004, report states that she required assistance with all her activities of daily living and "has required this assistance for quite some time."[68] These omissions constitute a failure to discuss favorable evidence.

The foregoing deficiencies frustrate judicial review and require remand.[69] Because Mrs. Lack died before October 10, 2008, the Board must make its determinations "based on evidence that was either physically or constructively in the veteran's file at the time of [her] death."[70]

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[64] 38 C.F.R. § 3.352(b)(3).

[65] *Id.* § (b)(4).

[66] R. at 958, 961.

[67] R. at 1615.

[68] R. at 2168.

[69] *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

[70] *Ralston v. West*, 13 Vet.App. 108 (1999); *see also Bell v. Derwinski*, 2 Vet.App. 611 (1992).

III. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's September 13, 2017, decision and REMANDS the issues of an earlier effective date for SMC aid and attendance under 38 U.S.C. § 1114(l), (r)(1), and r(2) for readjudication consistent with this decision.

DATED: October 15, 2019

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