

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 May 2024

DOCKET NUMBER: AR20230001355

APPLICANT REQUESTS: in effect,

- correction of her records to show she was medically retired due to physical disability instead of discharged due to disability with severance pay
- an increase in her disability rating
- a personal appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Two Statements of Support
- Chronological Record of Medical Care (12 pages)
- Three DA Forms 3349 (Physical Profile), 21 June 2010, 13 September 2010, and 22 October 2010
- Department of Veterans Affairs (VA) Form 21-0810 (VA/DOD Joint Disability Evaluation Board Claim), 14 July 2010
- Memorandum, subject: Misplaced Original Medical Records, 20 July 2010
- Compensation and Pension Evaluation (22 pages), 3 August 2010
- Medical Evaluation Board (MEB), 27 August 2010
- DA Form 3947 (MEB Proceedings), 2 September 2010
- DA Form 7652 (Physical Disability Evaluation System (PDES) Commander's Performance and Functional Statement), 4 October 2010
- Printout by the Doctor
- DA Form 199 (Physical Evaluation Board (PEB) Proceedings), 12 October 2010
- Emails for Request for Board Statement, 21 October 2010
- DA Form 5893 (Soldier's MEB/PEB Counseling Checklist), 26 October 2010
- Memorandum, subject: Exception to Policy – Request for Formal PEB Hearing, 26 October 2010
- Letter, U.S. Army Physical Evaluation Board, 5 November 2010
- VA Disability Evaluation System Proposed Rating, 24 November 2010
- DA Form 5893, 15 December 2010
- PDES Pilot Program Election Page and DA Form 199 (Signature and Counseling Page), 15 December 2010

- DD Form 214 (Certificate of Release or Discharge from Active Duty), 27 March 2011
- VA Rating Decision, 29 March 2011
- VA Decision Review Officer Decision, 20 August 2013
- Letter to Applicant from Case Management Division, Army Review Boards Agency (ARBA), 10 October 2013
- Title 38 of the Code of Federal Regulations (CFR), Part 4.124a, Schedule of Ratings – Neurological Conditions and Convulsive Disorders
- M21-1 (Adjudication Procedures Manual), Part X, Subpart i, Chapter 6, Section J - Integrated Disability Evaluation System (IDES) Final Ratings
- M21-1, Part V, Subpart iii, Chapter 12, Section A - Neurological Conditions and Convulsive Disorders

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20140009962 on 6 February 2015.

2. The applicant states, in effect:

a. She was discharged after 11 September 2001 and her PEB relied upon Department of Defense (DoD) or Army guidelines that conflicted with the VA Schedule for Rating Disabilities (VASRD).

b. The disability rating of 10 percent for migraines was incorrectly assigned, which the Army relied upon to determine her disability separation. The rater that completed her IDES claim incorrectly wrote that she had headaches that averaged one time in 2 months, which conflicts with what is written in her "GEN MED" examination. Although it is stated that they were non-prostrating, her "STRS" show different in their severity. They show severe, minimally moderate severe upon separation, as well as the examination completed immediately (7 days) after separation. She was on permanent profile and deemed nondeployable prior to separation.

c. A review of her MEB examination shows she experienced headaches 2-3 times per week, lasting anywhere from 2 hours to 5 hours. There was also no mention of the lay statements provided by her ex-husband and her classmate or the memorandum provided with assistance from the MEB/PEB Outreach Counsel. These statements would have made a difference in her rating accession.

d. The VASRD, now the 38 CFR Part 4, shows her rating should have been at a minimum 30 percent. Her application for an increase in her disability was erroneously closed and she resubmitted the claim, which led to an increase in her evaluation to

50 percent, then she was decreased back to 30 percent in August 2014 where she has remained since. However, the severity of her headaches has worsened since discharge.

3. The applicant provides:

a. Two statements:

(1) From her ex-husband, which states he witnessed the applicant experience major episodes of painful migraines. Some of them causing her to be dysfunctional for a period to where she had to sit in dark rooms until the migraine was gone. She is unable to interact and fully function with the kids when a migraine begins to come on. She has tried different medications for her migraines, but the effects of some of the medications that she has tried hindered her performance, from being doped up to where she cannot be awakened from her sleep, to getting into a car wreck because she hallucinated from one of the medications, or unable to sleep through the night and being exhausted during the day. The migraines were worse during the summer months and more frequent lately, but she continues to have them and when she does, they come on strong.

(2) A lay statement from [REDACTED] which states there had been several occasions where he saw the applicant in a lot of pain due to her reoccurring migraine attacks. He witnessed endless nights or her having chills, sweating, and vomiting. She would wake up very fatigued and would go days with having no appetite and not eating at all. There were times when she would be driving and had to pull over because she was having tunnel vision and complaining about how her eyes hurt. When she would speak during migraine attacks, she would have problems concentrating on simple things like watching a movie, reading, and she would have trouble finding the words to say during a normal conversation.

b. A chronological record of medical care from 24 February 2010 to 18 June 2010, which shows the applicant was seen in the neurology clinic for recurrent migraine headaches.

c. DA Form 3349, dated 21 June 2010, shows the applicant was issued a temporary profile by the Neurology Clinic at Fort Hood, TX. The profile states she was unable to ruck march, no marching, no body armor, no Kevlar, no load bearing equipment, no heavy lifting, no extreme exertion, no combatives, no running, jumping, climbing, leaping or impact activities. It states physical training in the gym with weights or walk at own pace and distance, no temperatures above 80 degrees for more than two hours, wear sunglasses outdoors when appropriate, and take meds as directed.

d. VA Form 21-0810 dated 14 July 2010, which shows she submitted a VA/DOD Joint Disability Evaluation Board Claim for refractory headaches.

e. A memorandum dated 20 July 2010, from the Outpatient Medical Records Branch, which states the applicant's original medical records were misplaced and a temporary medical record was created, containing information from 14 April 2006 to present.

f. A Compensation and Pension Evaluation dated 3 August 2010, which shows the applicant underwent a screening examination for all body systems, not just specific conditions claimed by the applicant.

g. A DA Form 3947 shows a MEB convened on 2 September 2010. The applicant was diagnosed with the following medical conditions and referred to a PEB:

(1) Migraine headaches, medically unacceptable, which originated about 13 November 2007 and incurred while entitled to base pay and did not exist prior to military service.

(2) The following medical conditions were found to be medically acceptable:

- Menorrhagia
- Dysmenorrhea
- Bacterial vaginosis
- Left ankle strain
- Left trapezius strain
- Left wrist ganglion cyst
- Adjustment disorder, not constituting a physical disability

h. DD Form 3349, dated 13 September 2010, shows the applicant was issued a nondeployable, permanent profile for headaches, refractory to therapy by the Medical Evaluations Clinic.

i. DA Form 7652, dated 4 October 2010, indicated the applicant's medical conditions prohibited her from serving in a line medical company and deploying with her unit. She was able to perform administrative duties with little to no problems. However, she did not have the ability to effectively serve as a combat medic in any capacity. In the commander's opinion, she was best suited for a medical discharge from the Army. As a result of an inability to perform the duties required of her military occupational specialty (MOS), the commander did not recommend retaining the applicant.

j. A printout, undated, provided by the applicant's doctor.

k. A DA Form 199 shows on 12 October 2010, an informal PEB convened to consider the applicant's physical condition. The PEB found the applicant unfit due to migraine headaches. The PEB recommended a disability rating of 10 percent. Her

medical condition was considered to be permanent in accordance with VA Schedule for Rating Disabilities code 8100. The PEB recommended that the applicant be separated with severance pay, if otherwise qualified. It was noted that the applicant's disability rating was less than 30 percent. Soldiers with a disability rating of less than 30 percent, and with less than 20 years of service, required separation from service with disability severance pay. The applicant was counseled regarding the PEB findings and determination. She did not concur and requested a formal hearing.

l. Email correspondence dated 21 October 2010, between the applicant and the MEB/PEB Outreach Counsel, which states the applicant submitted her request to be found unfit.

m. DA Form 3349, dated 22 October 2010, shows the applicant was issued a permanent profile by the Neurology Clinic at Fort Hood, TX for headaches triggered by exertion, shoulder pain, MEB in progress, and nondeployable.

n. DA Form 5893 dated 26 October 2010, which was given to the applicant by the Physical Evaluation Board Liaison Officer (PEBLO) who was responsible for counseling Soldiers throughout all phases of the PDES. The counseling checklist explains what the applicant was to expect throughout her disability processing.

o. A memorandum, dated 26 October 2010, shows the applicant requested an exception to policy for requesting a formal PEB hearing at Fort Sam Houston, TX. She explained the reasons for her request and stated that she did not believe that she was "fit for duty" and requested that she be found "unfit," rated at 30 percent for prostrating attacks that occur more than once per month over the past several months, and permanently retired.

p. A letter from the U.S. Army Physical Evaluation Board, dated 5 November 2010, the Texas PEB found the applicant physically unfit to continue military service due to migraine headaches.

q. VA Disability Evaluation System Proposed Rating, dated 24 November 2010, states the disability determination was made under the Disability Evaluation System (DES) Pilot Program, a joint initiative between the Department of Defense and the Department of Veterans Affairs in the case of the applicant, who was referred to a PEB as unfit for continued military service. The VA made the following proposed ratings:

- Migraine headaches, 10 percent (DES rating)
- Left ankle strain, 10 percent (VA rating)
- Bacterial vaginosis, 10 percent (VA rating)
- Adjustment disorder with depressed mood, 10 percent (VA rating)
- Left wrist ganglion cyst, 0 percent (VA rating)

- Left trapezius strain, 0 percent (VA rating)

r. DA Form 5893, dated 15 December 2010, shows the applicant was counseled by the PEBLO.

s. On 15 December 2010, the applicant initialed and signed an informal reconsideration indicating that she concurred with the PEB findings. She waived her right to a formal hearing and did not request reconsideration of the VA ratings.

t. The applicant's DD Form 214 shows she was discharged on 27 March 2011, due to disability, severance pay, non-combat (enhanced), in the rank and pay grade of SGT/E-5. She completed 4 years, 11 months, and 22 days of creditable active service.

u. VA rating decision, dated 29 March 2011, shows:

(1) VA granted service connection for the following conditions, effective 28 March 2011:

- Migraine headaches, rated at 10 percent
- Left ankle strain, rated at 10 percent
- Bacterial vaginosis, rated at 10 percent
- Adjustment disorder with depressed mood, rated at 10 percent
- Left wrist, nontender cyst, also diagnosed as left wrist ganglion cyst, rated at 0 percent
- Left trapezius strain, rated at 0 percent

(2) It was noted under the reasons for decision that a higher evaluation of 30 percent was not warranted unless evidence demonstrates characteristic prostrating attacks occurring on an average of once a month over the last several months.

v. VA decision review officer decision, dated 20 August 2013, shows the VA reevaluated the applicant's conditions. The VA determined that her service-connected conditions for migraine headaches and adjustment disorder had worsened and granted the following increase to her disability ratings with an effective date of 2 August 2012:

(1) Migraine headaches increased from 10 percent disabling to 50 percent. The evaluation of migraine headaches increased to 50 percent based on very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability. It states this is the highest schedular evaluation allowed under the law for this condition. Since there is a possibility of improvement, the assigned evaluation is not considered permanent and is subject to a future review examination.

(2) Post-traumatic stress disorder (PTSD), major depressive disorder (previously diagnosed as adjustment disorder with depressed mood), increased from 10 percent disabling to 50 percent.

w. A letter from the Case Management Division, ARBA, dated 10 October 2013, which states a review of the applicant's application with attachments did not contain sufficient evidence to support her request. In order for the ABCMR to consider her application, she must provide a copy of her military medical records.

x. A copy of Title 38 of the CFR, Part 4.124a, Schedule of Ratings – Neurological Conditions and Convulsive Disorders, which states with the exceptions noted in that section, disability from the diseases and their residuals may be rated from 10 percent to 100 percent in proportion to the impairment of motor, sensory, or mental function. It notes under miscellaneous diseases, migraine:

(1) With very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability, rating 50 percent.

(2) With characteristic prostrating attacks occurring on an average once a month over last several months, rating 30 percent.

(3) With characteristic prostrating attacks averaging one in 2 months over last several months, rating 10 percent.

(4) With less frequent attacks, rating 0 percent.

y. M21-1, Part X, Subpart i, Chapter 6, Section J - Integrated Disability Evaluation System (IDES) Final Ratings, which outlines the procedures for final rating decisions.

z. M21-1, Part V, Subpart iii, Chapter 12, Section A - Neurological Conditions and Convulsive Disorders, which states migraines are evaluated primarily on the frequency of attacks and the degree to which symptoms are prostrating.

4. A review of the applicant's service records show:

a. DD Form 4/1 (Enlistment/Reenlistment Document Armed Forces of the United States) shows the applicant enlisted in the Regular Army on 6 April 2006. She completed her initial training and was awarded MOS, 68W (Health Care Specialist).

b. Orders Number 010-0126, dated 10 January 2011, issued by Headquarters, III Corps and Fort Hood, Fort Hood, TX, shows the applicant was discharged effective 27 March 2011, with 10 percent disability and authorized disability severance pay in the pay grade of E-5.

5. The ABCMR considered the applicant's request to correct her military records to show she was retired due to physical disability in ABCMR Docket Number AR 20140009962 on 5 February 2015. The Board determined that the evidence presented did not demonstrate the existence of a probable error or injustice. The available evidence showed the applicant was evaluated by a PEB while on active duty and found unfit for duty due to a medical condition rated at 10 percent disabling. The applicant concurred with the finding and was subsequently discharged with severance pay.

6. On 2 May 2023, the U.S. Army Physical Disability Agency (USAPDA) legal advisor rendered an advisory opinion in the processing of this case. She opined:

a. Disability ratings for DoD disability purposes are determined by the VA. As is reflected in the VA rating decision, the rating for migraines was 10 percent at the time of the IDES processing. The Services do not independently determine the ratings. Further, ratings, for DoD purposes are a snapshot in time, determined at the time of separation and not subject to fluctuations due to improvement or deterioration after separation. The exception to this is error made in the original rating decision, outlined more fully in the VA Adjudication Manual M21-1, Part X, Subpart I, 6.K.8. If any of the situations outlined in that section apply, the applicant may be entitled to an adjustment. In that case, the applicant should supply the supporting documentation from the VA indicating an increase is warranted. Depending on the amount of any increase, a change in separation characterization may be warranted. At present, there is no evidence to support a change to either the applicant's rating or separated with severance pay determination.

b. There is currently insufficient evidence to support the applicant's request for an increase in disability percentage or a recharacterization as a disability retirement. USAPDA therefore find the applicant's request to be legally insufficient.

7. On 3 May 2023, the advisory opinion was forwarded to the applicant for acknowledgment and/or response. The applicant has not provided a response to date.

#### 8. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant believes that the 10% disability rating she received from the Army for her Migraine Headaches condition should have been 30% (medical retirement) or maybe even 50%. She believes the rating she received conflicts with laws that govern VASRD (Veterans Affairs Schedule for Rating Disabilities).



2. The ABCMR ROP summarized the applicant's record and the circumstances surrounding the case. The applicant entered Regular Army service 06Apr2006. Her MOS was Healthcare Specialist. She was deployed 20061115 to 20071204 in Korea. She was discharged 27Mar2011 with narrative reason disability severance pay under provisions of AR 635-40, chapter 4. Her service was characterized as honorable.

3. Pertinent medical and related records

a. 10Mar2006 (signature date) Report of Medical History (DD Form 2807-1) for enlistment showed no history of head injury or history of frequent or severe headaches.

b. 24Oct2007 (Allgood ACH, S. Korea) head CT: Normal. The study was ordered for "chronic headache syndrome".

c. 26Feb2008 Neurology Clinic Womack AMC. Headaches felt like a "tension" around the temples. Pain was sometimes 10/10. Headaches were debilitating while deployed in Korea. Headache frequency and intensity had diminished since returning CONUS. The headache frequency no longer required prophylaxis. The plan was to try a third abortive triptan and Fioricet for symptomatic (abortive) treatment.

d. 24Oct2008 head CT, Womack AMC: Normal.

e. 07Jan2009 brain MRI, Womack AMC: Normal.

f. 23Nov2009 Darnall AMC. Labs ordered to rule out medical causes of the headaches were normal: Iron, magnesium, prolactin, complete blood count, diabetes, thyroid, and H. pylori.

g. 21Apr2010 and 18Jun2010 Neurology Darnall AMC. The applicant presented for assessment of the headache condition. She currently had a headache with pain 3/10—she had not taken any pain medication. There was no history of head trauma. Headache triggers had not been identified except it was noted they were worse with stress and the start of the menstrual cycle. Headache frequency was 2- 4x/week and localized in the occiput area. Headaches were accompanied by nausea but never preceded by aura. They were relieved by sleeping or a darkroom. Zomig with Naprosyn worked if she caught the headache in time. Nortriptyline at bedtime for prophylaxis was also effective but she was too sleepy the next morning. Headaches were not relieved by Topamax, Midrin, Maxalt, Fioricet, Imitrex injection, and Effexor. She didn't like needles, so Botox was not an option. Headaches were interfering with work at least 2 days per week. She was started on verapamil (calcium channel blocker). She was referred for Medical Evaluation Board Clinic IAW AR 40-501, chapter 3 section 30(g).

- h. 19May2010 brain MRI Fort Hood. Normal
- i. 18Jun2010, she was issued a temporary P2 physical profile for refractory to therapy disabling 1 x per week/MEB in progress.
- j. 30Jun2010 Report of Medical History (DD Form 2807-1) for MED Boards. The applicant endorsed headaches were accompanied by dizziness, visual impairment/eye pain, sensitivity to light/sound/smells and vomiting. Headaches increased in the past year from 2-3/week to 4-5/week.
- k. 02Aug2010 General Medical Examination C&P. Headaches occurred 2-3 times per week lasting on average from 2-5 hours. Headaches were accompanied by some light/noise/smell sensitivity, dizziness, and visual changes. Headaches occurred on workdays primarily, during work hours, but she denied missing work during the headaches. She was able to seclude herself in a quiet dark room if necessary. The headaches had not caused her to leave work, inability to function at work or required her to call in sick. The following medications failed: Midrin, Excedrin Migraine, Topamax, Imitrex, Fioricet, Effexor and Tramadol. The current medication regimen provided fair results: Abortive medication: Reglan, Darvocet. Preventive medication: Depakote, Verapamil, and nortriptyline. The head and neurologic examinations were normal. Diagnosis: Refractory Migrainous Headaches. The headaches were characterized by the VA examiner as "primarily non-prostrating".
- l. 27Aug2010 Medical Evaluation Board NARSUM (narrative summary). Headache onset was in late 2007 while stationed at Camp Casey, S. Korea without known injury/trauma. She reported severe headaches 3-5 times/week lasting 2-5 hours with duration and severity reduced by rapidly taking abortive medication at the onset. If taken at the onset, abortive medication was generally effective within 45-60 minutes; however, a dark environment and sleep was most efficacious. Headaches were accompanied by nausea, dizziness and about twice per month, emesis. She did not stay home or leave work due to headaches. She had not been directed to rest, sleep, or leave work by supervisors but they had noted the headaches reduce efficiency and limit her duties. During peak intensity she could not drive, use a computer or other automated device with illuminated screen. The MEB provider endorsed the headaches were primarily non-prostrating although they did impact performance.
- m. 01Sep2010, she was issued a permanent P3 physical profile for Headaches Refractory to Therapy. All functional activities (DA Form 3349, block 4) were prohibited which included carrying and firing individually assigned weapon and deployment.
- n. 02Sep2010 MEB Proceedings. The MEB found the Migraine Headache condition medically unacceptable IAW AR 40-501, chapter 3-30g.

o. 15Oct2010 Neurology Darnall AMC. Current headache pain 3/10. The applicant reported daily headaches. The headaches were accompanied with nausea. The headaches were relieved by sleep, Darvocet (which caused sleepiness), and a combination of Zomig plus Naprosyn. Diagnosis: Headache Syndromes. She was in the MEB process. The headaches were determined medically unacceptable; she could only perform administrative duties. She could not march with a fighting load, wear body armor, or reliably function in combat.

p. 25Oct2010 TBI Primary Care Darnall AMC. The applicant reported headaches for the past 3-4 years. The headaches occurred 3-5 times per week.

q. 17Nov2010 Medical Evaluation Clinic. The applicant presented to sick call reporting a severe headache for the past 5 hours accompanied by vomiting. She was treated with an antiemetic pill and given quarters for the day.

r. 24Nov2010 Disability Evaluation System Proposed Rating revealed that the VA established service connection for Migraine Headaches at 10% under 8100. The narrative explained that although her headaches were not prostrating in the strictest sense, she did report having to lie down in a dark room while at work. In addition, documentation indicated her headache condition was a moderate, chronic condition. A 30% evaluation was not warranted unless evidence demonstrated characteristic prostrating attacks occurring on average once per month over the last several months.

s. 10Dec2010 Informal PEB. The PEB, under reconsideration in response to the applicant's October 2010 appeal and neurology notes, found the Migraine Headaches condition unfitting for continued service. The prior DA Form 199 30Sep2010 was superseded. The narrative indicated that although the Migraine Headaches condition did not prevent completion of her administrative duties, the condition was unfitting because the condition did not allow her to reasonably perform her MOS Healthcare Specialist duties. The case was adjudicated as part of the Integrated Disability Evaluation System (IDES); therefore, a 10% rating was applied as proposed in the VA Rating Decision dated 24Nov2010. The 10% rating under discharge code 8100, was effective 28Mar2011. Disposition separation with severance pay was recommended.

t. 29Mar2011 Rating Decision. The VA issued this rating decision 2 days after the applicant was discharged from service. The 10% rating for the Migraine Headaches condition was carried forward unchanged and effective 28Mar2011. *The 24Nov2010 Disability Evaluation System Proposed Rating and 29Mar2011 and 29Mar2011 Rating Decision both contained only evidence pertaining to her time in military service.*

u. 16Jul2013 Headaches DBQ Exam. The following changes were noted in the headache condition: She currently experienced headaches at least weekly and they could last from 1-4 days. She stated she currently experienced at least three

incapacitating headaches each month. An antiemetic (Promethazine) had been added to her take-as-needed medications (an indication that she was experiencing more nausea than previously). Also noted was new associated symptom, heat intolerance. And finally, she was working as a Temple VAMC Addictions Specialist and reported frequent absences from work due to her headaches. The VA examiner indicated that she had characteristic prostrating attacks of migraine headaches more frequently than once per month. They also endorsed that she experienced frequent prostrating and prolonged attacks of migraine headache pain.

v. 20Aug2013 Decision Review Officer Decision increased the rating for Migraine Headaches from 10% to 50% disabling effective 02Aug2012 (more than one year after discharge from military service). *It is important to note that the rating was not back dated to 28Mar2011.* The narrative indicated the headaches were rated for very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability. 50% is the highest possible rating for this condition. The evidence in support of this rating included the 16Jul2013 Headaches DBQ exam.

#### 4. Conclusion/Opinion

The entire case was carefully reviewed. This case was adjudicated as a part of IDES and as such per regulation, the PEB obtained ratings from the 24Nov2010 VA Rating Decision. A second decision dated 29Mar2011 also showed a 10% rating. The applicant stated that she applied to the VA for a higher rating and was successful in achieving a 50% rating. She contends this supports her belief that the headache condition warranted 30% or 50% rating from the Army. However, the 20Aug2013 Decision Review Officer Decision used some evidence from records that took place after discharge, for example, 'the VA migraines examination, VAMC Dallas TX dated 16Jul2013' (noted above as 16Jul2013 Headaches DBQ Exam). This exam took place more than 2 years after discharge from service and reflected worsening in the headache condition. As is permitted by laws that govern VA rating, the VA adjusted the rating for Migraine Headaches from 10% to 50% disabling effective 02Aug2012 based on the severity of the condition at the time (report of incapacitating episodes and frequent absence from work). In contrast, the PEB (under a different set of regulations for the Army) provides one final rating for conditions it finds unfitting for continued service and stable for permanent rating. It is also important to note, per 38 CFR 4.124a, DC 8100, the term prostrating means "causing extreme exhaustion, powerlessness, debilitation or incapacitation with substantial inability to engage in ordinary activities." Based on the description of headaches provided while in service, both the VA C&P examiner and MEB provider characterized the headaches as primarily non-prostrating—the applicant was still able to complete administrative tasks, etc. It should also be noted that during the 3-4 years the headache condition existed, the available record showed one sick call visit (17Nov2010) and no emergency room visits. It was also reported that taking abortive medication quickly at the onset of headaches reduced their duration and severity. Based on records available for review, the applicant's Migraine Headaches

condition impacted duty performance (the reason the condition was found unfitting): The condition decreased efficiency and limited some duties (she could not lift patients, for example). However, in the ARBA Medical Reviewer's opinion, the available evidence did not support that the headache condition was largely characteristically prostrating or productive of severe economic inadaptability while the applicant was in service. Therefore, no error was found in the 10% rating supplied by the VA rating authority and applied by the PEB.

**BOARD DISCUSSION:**

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board concurred with the conclusion of the USPDA Legal Advisor and the ARBA Medical Advisor that the evidence shows the Army properly applied the VA rating for her unfitting condition and, absent a VA decision to change the original 10% rating for this condition, there is no basis for the relief the applicant has requested. Based on a preponderance of the evidence, the Board determined the applicant's discharge for disability with severance pay is not in error or unjust.

**BOARD VOTE:**

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20140009962 on 6 February 2015.

10/2/2024

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CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, United States Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system (PDES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and AR 635-40 (Disability Evaluation for Retention, Retirement or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in an MEB; when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an MOS Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and PEB. The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time

severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

2. Title 38 U.S. Code, Section 1110 (General - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

3. Title 38 U.S. Code, Section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

4. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. Once a determination of physical unfitness is made, all disabilities are rated using the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

5. Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

6. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a



discharge, which may be warranted on equity or relief from injustice. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

8. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

9. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//