



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

SS XXX XX [REDACTED]

Docket No. 240924-476858

Represented by

Gordon A. Graham, Agent

DATE: April 22, 2025

ORDER

A rating in excess of 50 percent for migraine-headaches is denied.

Special monthly compensation (SMC) based on aid and attendance is granted.

FINDINGS OF FACT

1. The Veteran's headaches are manifested by very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability and her related symptomatology, such as pain and sensitivity to light/sound and sensory changes, is contemplated by the currently assigned maximum schedular evaluation.
2. The Veteran's service-connected disabilities cause her to be so helpless as to be in need of regular aid and attendance of another person.

CONCLUSIONS OF LAW

1. The criteria for a rating in excess of 50 percent for headaches are not met. 38 U.S.C. §§ 1155, 7105; 38 C.F.R. § 3.321 (b), 4.1, 4.3, 4.10, 4.124a, DC 8100.
2. The criteria for SMC based on the need for aid and attendance are met. 38 U.S.C. §§ 1114 (l), 5107; 38 C.F.R. §§ 3.102, 3.350(b), 3.352.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served in the United States Army from March 2020 to August 2020, October 2020 to July 2021, and from August 2021 to February 2022.

A July 12, 2024, rating decision increased the rating for migraines to 50 percent, effective January 3, 2024. An August 15, 2024, rating decision granted service connection for female sexual arousal disorder, SMC based on loss of use of a creative organ, and denied SMC aid and attendance/housebound. The Veteran timely appealed the July 12, 2024, and August 15, 2024, rating decisions to the Board and requested the Board's Direct Review docket in a September 2024 VA Form 10182 and appealed only the above issues. To the extent the Veteran's representative argued the August 15, 2024, rating decision denied entitlement to an increased rating for migraine headaches, the Board finds the July 2024 rating decision addressed the increased rating. Additionally, an extraschedular rating will be addressed below.

Based upon the selection of the Direct Review option, the Board may only consider the evidence of record as of July 12, 2024, and August 15, 2024—the date of the rating decisions on appeal. *See* 38 C.F.R. § 20.301. If the Veteran submitted evidence that was added to the record after July 12, 2024, and August 15, 2024, the Board did not consider it. If the Veteran wishes to have VA consider any evidence that was not considered, a supplemental claim should be submitted identifying such evidence. *See* 38 C.F.R. § 3.2501.

The Veteran, through her agent representative, waived the right to select a different review option on September 24, 2024. *See* 9/24/2024, VA Form 10182.

Increased Rating

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities, found in 38 C.F.R., Part 4. The percentages are based on the average impairment of earning capacity as a result of service-connected disability, and separate diagnostic codes identify the various disabilities and the criteria for specific ratings. 38 U.S.C. § 1155; 38 C.F.R. § 4.1.

If two disability evaluations are potentially applicable, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. All reasonable doubt as to the degree of disability will be resolved in favor of the claimant. 38 C.F.R. § 4.3.

Where entitlement to compensation has already been established and an increase in the disability rating is at issue, the primary concern is the present level of disability. *Francisco v. Brown*, 7 Vet. App. 55, 58 (1994). However, the Board must also consider staged ratings. *Hart v. Mansfield*, 21 Vet. App. 505, 509-10 (2007).

The evaluation of the same disability under several diagnostic codes, known as pyramiding, must be avoided; however, separate ratings may be assigned for distinct disabilities resulting from the same injury so long as the symptomatology for one condition is not duplicative of or overlapping with the symptomatology of the other. *Esteban v. Brown*, 6 Vet. App. 259, 262 (1994); 38 C.F.R. § 4.14.

The Veteran is competent to report symptoms and experiences observable by her senses. *See Jandrea v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007); 38 C.F.R. § 3.159(a).

1. Entitlement to a rating in excess of 50 percent for migraine-headaches

The Veteran, through her agent representative, contends a rating in excess of 50 percent is warranted. Essentially, the agent contends that the August 2024 rating decision implicitly denied an extraschedular rating and that the agent and Veteran are not attorneys and should be given the benefit of the doubt and an extraschedular rating is warranted. In this regard, the Board will address the extraschedular contentions, but as noted above, finds that the rating decision on appeal is from July 2024 as the Veteran's migraine rating was addressed in that decision and the Veteran/agent did not subsequently request a review option, such as a higher-level review of that migraine claim or file a supplemental claim. The Veteran receives the maximum schedular rating for the entire period on appeal. A 50 percent evaluation has been assigned from January 3, 2024.

Under 38 C.F.R. § 4.124a, DC 8100, in pertinent part, a 50 percent rating is appropriate with very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability.

Here, because of the successive nature of the rating criteria in DC 8100, such that the evaluation for each higher disability rating includes the criteria of each lower disability rating (at least what could be considered most of them), each of the criteria in the 50 percent rating must be met in order to warrant such a rating. Section 4.7 is not applicable to DCs that apply successive rating criteria, such as DC 8100. *See Johnson v. Wilkie*, 30 Vet. App. 245, 252 (2018) (holding that criteria of DC 8100 are successive).

Though Diagnostic Code 8100 does not provide a definition for “prostrating,” prostration is defined as “extreme exhaustion or powerlessness.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1554 (31st ed. 2007). Similarly, the term “productive of severe economic inadaptability” is also not defined in veterans’ law. However, the Court has stated that this term is not synonymous with being completely unable to work and VA has conceded that the phrase “productive of” could be read to mean either “producing” or “capable of producing” economic inadaptability. *See Pierce v. Principi*, 18 Vet. App. 440, 446-47 (2004) (stating that nothing in DC 8100 requires that the claimant be completely unable to work in order to qualify for a 50% rating”).

Additionally, “Characteristic” is “a trait, quality, or property or a group of them distinguishing an individual, group, or type.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 376 (1966). “Prostrating” means “lacking in vitality or will: powerless to rise: laid low.” *Id.* at 1822. “Completely” is defined as “to complete degree: entirely.” *Id.* at 465. In other words, the headaches must render the veteran entirely powerless. *Johnson v. Wilkie*, 30 Vet. App. 245, 252 (2018).

The Veteran underwent an examination in June 2024. *See* 6/26/2024, C&P Exam. She had Botox every three months and Ubrel. The Veteran had pulsating or throbbing head pain, pain on both sides, pain that worsened with physical activity, and pain on her temples behind the eyes. She also had sensitivity to light and sound, change in vision, and sensory changes. Her head pain typically lasted less than one day. She had characteristic prostrating attacks of migraine/non-migraine headache pain occurring greater than once per month, and she also had completely prostrating and prolonged attacks of migraines/non-migraine pain greater than once per month. She had missed two to four weeks of work in the past 12 months.

In this matter, the Board finds that the Veteran’s migraine headaches are rated at the maximum schedular level. 38 U.S.C. § 1155, 5107; 38 C.F.R. §§ 3.321(b)(1), 4.124, DC 8100. As such, the Board finds that there is an implicit raising of extraschedular consideration.

There is a three-step inquiry for determining whether a veteran is entitled to an extraschedular rating. *Thun v. Peake*, 22 Vet. App. 111, 115-16 (2008). Initially, the Board must determine whether the evidence presents such an exceptional disability picture that the available schedular ratings for the service-connected disability are inadequate. *See Doucette v. Shulkin*, 28 Vet. App. 366 (2017). Second, if the schedular rating does not contemplate the veteran’s level of disability and symptomatology and is found inadequate, the Board must determine whether the veteran’s disability picture exhibits other related factors such as marked interference with employment and frequent periods of hospitalization. *Thun*, 22 Vet. App. at 116. Third, if the first two *Thun* elements have been satisfied, then the case must be referred to the Under Secretary for Benefits of the Director, Compensation Service to determine whether, to accord justice, the veteran’s disability picture requires the assignment of an extraschedular rating. *Id.*

The Court revisited the meaning of *Thun*'s first element, holding that it is not "a mechanical test that is satisfied whenever a veteran presents a symptom not expressly listed in the [DC]." *Long v. Wilkie*, 33 Vet. App. 167 (2020). The key to the first *Thun* element is exceptionality and requires a "totality of the factors" inquiry. The Court held that "the sole focus of *Thun*'s first step is on the ability of the ratings schedule to evaluate any impairment manifested by the veteran's symptomology" and that symptomology "is exceptional...when it is of such nature or severity that conventional ratings tools are not adequate to evaluate it properly." *Id.* at 174. The Court further noted that "functional effects" are relevant to *Thun*'s second step, while symptoms and functional impairments are the "operative focus" of *Thun*'s first step. *Id.* at 175.

The Board finds that referral for extraschedular consideration is not warranted after reviewing the totality of relevant factors, to include relevant medical and lay evidence as well as the applicable diagnostic code's criteria. As noted above, DC 8100 contemplates "severe economic inadaptability." Also, the 50 percent rating contemplates very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability. The term "completely prostrating," as used in the rating schedule contemplates the complete scope of all symptoms to the extent they result in extreme exhaustion or powerlessness with essentially total inability to engage in ordinary activities. Therefore, the severity of the symptoms associated with her headaches is contemplated by the rating schedule's use of a broad and non-exclusive continuum.

2. Entitlement to special monthly compensation based on aid and attendance

The Veteran asserts entitlement to SMC as based on the need for aid and attendance.

SMC is available when, 'as the result of service-connected disability,' a veteran suffers additional hardships above and beyond those contemplated by VA's schedule for rating disabilities." *Breniser v. Shinseki*, 25 Vet. App. 64, 68 (2011) (citing 38 U.S.C. §§ 1114 (k)-(s)). Section 1114(l) provides five distinct ways for a veteran, "as the result of service-connected disability," to qualify for this rate of SMC: (1) anatomical loss or loss of use of both feet; (2) anatomical loss or loss of use of one hand and one foot; (3) blindness in both eyes with 5/200

visual acuity or less; (4) being permanently bedridden; or (5) having “such significant disabilities as to be in need of regular aid and attendance.” 38 U.S.C. § 1114 (l).

To be deemed so helpless as to be in need of regular aid and attendance, there must be at least one of the following: (1) an inability to dress or undress or to keep ordinarily clean and presentable independently; (2) frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without assistance; (3) an inability to feed independently through loss of coordination of upper extremities or through extreme weakness; (4) an inability to attend to the wants of nature; or (5) incapacity, either physical or mental, that requires care or assistance on a regular basis to protect from hazards or dangers incident in the daily environment. 38 C.F.R. § 3.352(a); *Turco v. Brown*, 9 Vet. App. 222 (1996). Being bedridden also is a proper basis for such a determination. 38 C.F.R. § 3.352(a). The need for aid and attendance does not have to be constant. *Id.*

Under 38 U.S.C. § 1114(s), SMC is payable at the housebound rate if the Veteran has a single service-connected disability rated as 100 percent and either of the following are met: (1) there is additional service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems; or (2) he or she is permanently housebound by reason of service-connected disability or disabilities. 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i).

The requirement of “permanently housebound” will be considered to have been met when the veteran is substantially confined to his or her house (ward or clinical areas, if institutionalized) or immediate premises due to a service-connected disability or disabilities which it is reasonably certain will remain throughout his or her lifetime.

An aid and attendance examination was provided in May 2024. *See* 5/30/2024, C&P Exam. The Veteran was not permanently bedridden. She used an orthopedic appliance to keep her back straight and to help with fibromyalgia related back pain. Her son, or at the time spouse, would help her put it on. The Veteran had dizziness where she would feel like the room was spinning and was off balanced. She would

sleep during these times or use a cane to ambulate. The Veteran would forget where objects were in her home and forget to pay bills. The Veteran would not climb steps. The Veteran would generally stay home and care for her two-year old child. She only leaves the house for medical appointments. The Veteran reported she would need someone nearby when she showered due to her seizure disorder. She would occasionally need assistance with dressing, using the bathroom, and grooming due to pain from her fibromyalgia. The Veteran had decreased range of motion in her extremities due to her fibromyalgia. She also had leg weakness. Balance deficits were noted.

Private treatment reports showed her symptoms in January 2024. *See* 5/29/2024, Medical Treatment Record – Non-Government Facility. She had an unsteady gait accusing falls, as well as seizures, loss of consciousness, vertigo, memory loss, impaired concertation and fatigue. She was unable to drive and required assistance to leave her home. The Veteran also needed help with bathing, tending to hygiene needs, laundry, meal preparation, and medication management.

After a review of all of the evidence, the Board finds that the criteria for entitlement to special monthly compensation based on the need for aid and attendance are met. The Veteran asserts that she is in need of aid and attendance of another person as her family assists her in her day-to-day activities. Initially, the Board acknowledges the Veteran is at home with her young child. However, the evidence also shows she rarely leaves home and does not leave without the assistance of another. She performs no chores at home, is forgetful with bills and medication, and requires assistance with hygiene due to her service-connected disorders.

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In sum, the evidence of record tends to establish that the Veteran's service-connected disabilities render her so helpless as to require regular aid and attendance with activities of daily living. As such, the Veteran meets the criteria for entitlement to SMC based on the need of regular aid and attendance. 38 C.F.R. § 5107(b); *see Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014) (noting that the benefit of the doubt rule is a unique standard of proof, and "the nation, 'in recognition of our debt to our veterans,' has 'taken upon itself the risk of error' in awarding such benefits").



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Board of Veterans' Appeals

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G.M., Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.