# In the United States Court of Federal Claims

No. 08-246C
Filed: January 30, 2009
**UNPUBLISHED**

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| JANE DOE,[*] | * |
| Plaintiff, *pro se* | * |
| v. | * |
| THE UNITED STATES, | * |
| Defendant. | * |

**Jane Doe,** Plaintiff, *pro se*.

**Lauren Springer Moore**, United States Department of Justice, Washington, D.C., for Defendant.

**MEMORANDUM OPINION AND ORDER**

[*] To protect the privacy interests of Plaintiff, on January 16, 2009, the court issued an order directing the Clerk of the United States Court of Federal Claims to seal this case file and re-caption the case as "*Jane Doe* v. *United States*."

## I. RELEVANT FACTS.[1]

On November 6, 1993, Plaintiff enlisted in the Washington Air National Guard. *See* AR at 3. In December 1997, Plaintiff began to have symptoms related to pelvic organ prolapse.[2] *See* Compl. ¶ 1. Plaintiff was on extended active duty at the time, but was advised that her condition was not incurred in the line of duty. *Id*. Therefore, Plaintiff sought civilian healthcare alternatives and was diagnosed with a prolapsed uterus,[3] cystocele,[4] and rectocele.[5] *Id*. Initially, Plaintiff's conditions were treated with a pessary,[6] Kegel exercises, and restrictions on weightlifting, but these measures failed to alleviate Plaintiff's symptoms. *Id*.

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[1] The facts recited herein were derived from: the April 7, 2008 Complaint ("Compl."); Plaintiff's Exhibits In Support Of The Complaint ("Pl. Ex. 1-27"); the July 7, 2008 Administrative Record ("AR"); the Defendant ("Government")'s July 7, 2008 Motion To Dismiss Or, In the Alternate, Motion For Judgment Upon The Administrative Record ("Gov't Mot. Dismiss"); and the Government's July 7, 2008 Statement of Facts In Support Of The Government's Motion To Dismiss Or, In the Alternate, Motion For Judgment Upon The Administrative Record ("Gov't Facts In Support").

[2] "Prolapse" is "(1) the falling down, or sinking, of a part or viscus." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007) ("DORLAND'S") at 1548. "Viscus" is "any large interior organ in one of the great cavities of the body, especially in the abdomen." *Id*. at 2095.

[3] "Prolapsed Uterus" (second degree) is the "downward displacement of the uterus so that . . . the cervix is outside the [vaginal] orifice." DORLAND'S at 1548.

[4] "Cystocele" is the "hernial protrusion of the urinary bladder, usually through the vaginal wall." DORLAND'S at 471.

[5] "Rectocele" is the "hernial protrusion of part of the rectum into the vagina." DORLAND'S at 1632.

[6] A "pessary" is "an instrument placed in the vagina to support the uterus or rectum[.]" DORLAND'S at 1441.

On June 22, 1998, Plaintiff initiated a Line of Duty ("LOD") Determination,[7] conducted to

[7] Neither party provided the court with an overview of the administrative process for compensating members of the Armed Forces who becomes injured or disabled. The process, however, is described in Air Force Instruction ("AFI") 36-3212, AFI 36-2910, and the "Compensation And Benefits Handbook For Seriously Ill And Injured Members Of The Armed Forces" ("AF Handbook"), published by the National Resource Directory in October of 2008, *available at*: https://www.my.af.mil/gcss-af/USAF/AFP40/d/1073755231/Files/C&BHandbook.pdf.

As these sources explain, when a member of the Armed Forces becomes wounded, injured, or ill, the member will go through the Disability Evaluation System ("DES"), that operates under Title 10 and Title 38 of the United States Code. *See* AF Handbook at 5. If the injury results in a permanent disability or the member's inability to perform military duties for more than twenty-four hours, a LOD Determination will be initiated. *See* AFI 36-2910 at 6. "The LOD determination process is initiated with a medical officer's review of the member's illness, injury, disease, or death. The medical officer conducting the review should be the medical officer that first provided treatment, or who is assigned nearest to the civilian facility that first provided treatment." *Id*. at 8.

In addition to a LOD Determination,

> if [a member of the Armed Forces] suffer[s] a permanent or long-lasting effect from a wound, illness, or injury, [a] doctor will refer [the member] to the DES process by writing a narrative summary of [the member's] condition. The doctor sends [the member's] case summary and a copy of [his or her] medical record to the nearest designated military treatment facility commander, who assigns a Physical Evaluation Board Liaison Officer ("PEBLO") to assist [the member] through the DES process . . . The Air Force evaluates a member for retention[,] and if their condition(s) is limiting (not unfitting) they will assign an assignment limitation code and re-evaluate the member at a later date. If the condition is not expected to improve within 12 months and the condition is permanently unfitting they will be referred to a Medical Evaluation Board ("MEB").

AF Handbook at 7. The MEB, generally made up of medical professions, will review the service member's record and decide if the member meets medical retention standards. *Id*. at 8. "If they determine that [the member does] not meet the medical retention standards, they will forward a recommendation to the [Physical Evaluation Board ("PEB")]." *Id*.

The PEB will then determine if a member is fit or unfit for service and will assign the member a rating between 0-100 percent, signifying the severity of any disability, based on the VA Schedule for Rating Disabilities ("VASRD"). *Id*. at 8-9. The PEB also determines a service member's disposition: "return to duty, separation, or permanent or temporary retirement." *Id*. at 9. If the member is separated or retired, compensation is provided for those disabilities incurred "in the line of duty." *Id*. at 12. Upon receiving the informal PEB's decision, the service member can either

determine if a service member's disease was incurred in the line of duty and if the member is eligible for medical care and incapacitation pay and allowances. *See* Pl. Ex. 1. On July 20, 1999, the Air Force determined that Plaintiff's medical conditions were not incurred in the line of duty. *Id*. In February 1999, Plaintiff had a hysterectomy,[8] with anterior and posterior colporrhaphy.[9] *See* Compl. ¶ 1. Plaintiff, however, continued experiencing pelvic organ prolapse symptoms and also began to experience urinary and fecal incontinence. *Id*. On July 7, 1999, Plaintiff appealed the July 20, 1999 LOD Determination to the Air Force Board for the Correction of Military Records ("AFBCMR"). *See* Compl. ¶ 2. On August 18, 2000, the AFBCMR granted Plaintiff's request to reverse the July 20, 1999 LOD Determination and held that Plaintiff's pelvic prolapse, cystocele and rectocele were incurred in the line of duty and rendered her incapacitated for worldwide duty. *See* Pl. Ex. 1.

On December 4, 2001, a Medical Evaluation Board ("MEB") diagnosed Plaintiff with: "(1) Stage II (mild) pelvic organ prolapse; (2) Dyspareunia;[10] (3) Fecal Incontinence; (4) Urge Incontinence (mild)." Pl. Ex. 7 (AF Form 618); *see also* Gov't Facts In Support ¶ 2. The MEB recommended that Plaintiff be referred to the Department of the Air Force's informal Physical Evaluation Board ("PEB"). Gov't Facts In Support ¶ 2; *see also* Pl. Ex. 7; AR at 4.

On January 9, 2002, the informal PEB recommended that Plaintiff be discharged with severance pay corresponding to a 20% disability rating for the "unfitting conditions" of "urinary urge incontinence associated with fecal incontinence secondary to stage II pelvic organ prolapse, status post total vaginal hysterectomy with anterior-posterior colporrhaphy, improved on ditropan." Pl. Ex. 21 (AF Form 356).

On February 25, 2002, Plaintiff accepted the informal PEB's decision,[11] and did not appeal to a formal PEB. *See* AR at 12. On April 8, 2002, Plaintiff was honorably discharged with

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request a formal PEB review or accept the informal PEB findings. *Id*. Ultimately, the service member may appeal the decision of the PEB by applying to the Air Force Board for Correction of Military Records ("AFBCMR"). *Id*. at 18. An application to the AFBCMR is "the highest administrative appeal available for the Air Force." *Id*.

[8] "Hysterectomy" is an "operation . . . excising the entire uterus through an incision in the abdominal wall or through the vagina." DORLAND'S at 921.

[9] "Colporrhaphy" is an "operation . . . suturing the vagina." DORLAND'S at 395.

[10] "Dyspareunia" is "difficult or painful sexual intercourse." DORLAND'S at 586.

[11] Plaintiff later claims, however, that she did not knowingly waive her right to further review of her disability rating. *See* AR 7-9; *see also infra* p. 6.

severance pay and a disability rating of 20%, pursuant to 10 U.S.C. § 1203,[12] and the Veterans Administration Schedule for Rating Disability ("VASRD"), 38 C.F.R. § 4 *et. seq.* *See* Compl. ¶ 3; *see also* Pl. Ex. 2.

On August 22, 2006, approximately four and a half years after the January 9, 2002 PEB Decision issued, Plaintiff filed a second Application with the AFBCMR, claiming that the PEB incorrectly assigned Plaintiff a 20% disability separation instead of a 50% disability retirement. *See* AR at 7-9. In the August 22, 2006 Application, Plaintiff pointed out that the PEB did not rate her cystocele and rectocele and that the PEB listed both urinary and fecal incontinence as "unfitting

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[12] Section 1203 of Title 10 of the United States Code states:

> (a) Separation.-- Upon a determination by the Secretary concerned that a member described in section 1201(c) of this title is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in section 1201(c)(3) of this title, the member may be separated from the member's armed force, with severance pay computed under section 1212 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).
>
> (b) Required determinations of disability.--Determinations referred to in subsection (a) are determinations by the Secretary that--
>
> (1) the member has less than 20 years of service computed under section 1 208 of this title;
>
> (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence;
>
> (3) based upon accepted medical principles, the disability is or may be of a permanent nature; and
>
> (4) either--
>
> (A) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, and the disability was (i) the proximate result of performing active duty, (ii) incurred in line of duty in time of war or national emergency, or (iii) incurred in line of duty after September 14, 1978[.]

10 U.S.C. § 1203.

conditions," however, the AF Form 356, completed by the PEB, listed only the diagnostic code "7517," for "Bladder, injury of."[13] *Id*.[14]

Plaintiff's August 22, 2006 Application also explained that Plaintiff did not knowingly waive her right to a hearing before the formal PEB, when she accepted the informal PEB's January 2, 2002 Decision, because she "disagreed with the [informal PEB] findings," but was advised by her Physical Evaluation Board Liaison Officer ("PEBLO") that an appeal to the formal PEB would not be successful. *Id*. Since Plaintiff had no independent knowledge about the VASRD, she relied on her "limited discussion" with the PEBLO. *Id*.

On April 27, 2007, Plaintiff's August 22, 2006 AFBCMR Application was denied.[15] *See* AR at 1. The AFBCMR accepted the recommendations of the Air Force Personnel Center, that "service-connected medical conditions incurred, but not found unfitting while still on active duty, are not compensated under Title 10, U.S.C. [Armed Forces]; however, under Title 38, U.S.C. [Veterans' Benefits], the [VA] may compensate veterans for these conditions." *Id*. at 3-5. The VA's "rating is not controlling over the Air Force and the [VA]'s determination alone is insufficient to overcome the original finding by the informal PEB." *Id*. at 5. Therefore, the AFBCMR concluded that "[a]fter careful consideration of [Plaintiff's] application and military records . . . the evidence presented did not demonstrate the existence of probable material error or injustice." *Id*.

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[13] Section 4.115b of Title 38 of the Code of Federal Regulations states that bladder injuries are to be "[r]ate[d] as voiding dysfunction." *See* 38 C.F.R. 4.115b. Pursuant to Section 4.115a, a voiding dysfunction that "[r]equir[es] the wearing of absorbent materials which must be changed less than 2 times per day" has a 20% disability rating. *See* 38 C.F.R. 4.115a.

[14] Plaintiff's August 22, 2006 AFBCMR Application states:

> Using the same medical records and statements less than 6 months later, the [Department of Veterans Affairs ("VA")] found that the proper diagnostic code is '7623 Pregnancy, surgical complications of: With rectocele or cystocele.' My military records establish that I had BOTH a cystocele and a rectocele. The VA determined that my urinary and fecal incontinence are residuals of the cystocele and rectocele. The AF Form 356 does not separate the urinary and fecal incontinence; and rates only the symptom of urinary incontinence, while ignoring the underlying condition.

AR at 7-9 (emphasis in original).

[15] Although Plaintiff's August 12, 2006 AFBCMR Application was not timely filed, the AFBCMR excused this failure and accepted Plaintiff's application "in the interest of justice." AR at 5.

## II. PROCEDURAL HISTORY.

On April 7, 2008, Plaintiff filed a *pro se* Complaint in the United States Court of Federal Claims, alleging that Plaintiff has been the victim of error or injustice and the AFBCMR's April 27, 2007 Final Decision was "unsupported by substantial evidence." Compl. ¶ 5. The Complaint requests that Plaintiff's disability rating be calculated by combining a 60% rating for fecal incontinence, a 50% rating for cystocele and rectocele, and a 20% rating for urinary incontinence, for a combined disability rating of 80%.[16] *See* Compl. (Request For Relief). In the alternative, the Complaint requests that Plaintiff's disability discharge be revoked and Plaintiff be granted a

[16] Plaintiff's August 22, 2006 AFBCMR Application requested a disability rating of 50%. *See* AR at 7-9. In the April 7, 2008 Complaint, however, Plaintiff requests a disability rating of 80%. *See* Compl. (Request For Relief). No explanation or citation was provided for how the Air Force calculates a total disability rating or why Plaintiff believes a 60% rating for fecal incontinence, a 50% rating for cystocele and rectocele, and a 20% rating for urinary incontinence would equate to a total disability rating of 80%. *See generally* Compl. The Compensation and Benefits Handbook offers the following explanation:

> Example: Member with three unfitting conditions rated 60, 30, and 20 percent:
> - First rating is 60 percent of the whole person, leaving the member with 40 percent efficiency.
> - Second rating is 30 percent of the 40 percent efficiency, which is a loss of 12 percent efficiency (.30 X .40 = .12). This is added to the original disability percentage of 60, for a cumulative score of 72 percent combined disability from the first two conditions. This leaves the member with 28 percent efficiency.
> - Third rating is 20 percent of the 28 percent efficiency, which is a loss of 6 percent efficiency (.20 X .28 = [.056, or] 5.6 [percent,] which is rounded up to 6). Added to the combined disability in the second rating of 72, and the rating becomes 78 percent.
> - The combined rating of 78 percent must be rounded to the nearest 10, giving the member a combined rating of 80 percent.

AF Handbook at 11.

disability retirement as of April 8, 2002, pursuant to 10 U.S.C. § 1201.[17] *Id*. On April 7, 2008, Plaintiff also filed a Motion For Leave To Proceed In Forma Pauperis, that was granted on September 8, 2008.

On June 3, 2008, the Government filed a Motion For Extension Of Time to answer Plaintiff's Complaint until July 7, 2008, that was granted on June 4, 2008.

On July 7, 2008, the Government filed the Administrative Record and a Motion To Dismiss Or, In The Alternative, Motion For Judgment Upon The Administrative Record. On August 6, 2008, Plaintiff filed a Motion For Extension Of Time to file a response. The court granted Plaintiff's Motion on September 8, 2008.

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[17] Section 1201 of Title 10 of the United States Code states:

> (a) Retirement.--Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).
>
> (b) Required determinations of disability.--Determinations referred to in subsection (a) are determinations by the Secretary that–
>
> (1) based upon accepted medical principles, the disability is of a permanent nature and stable;
>
> (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
>
> (3) either--
>
> (A) the member has at least 20 years of service computed under section 1208 of this title; or
>
> (B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination[.]

10 U.S.C. § 1201(a).

On September 24, 2008, Plaintiff filed a Response[18] ("Pl. Resp."), together with a Motion For Remand to the AFBCMR, pursuant to 28 U.S.C. § 1491(a)(2).[19] *See* Pl. Resp. at 4. On October 27, 2008, the Government filed a Reply ("Gov't Reply").

## III. DISCUSSION.

### A. Jurisdiction.

The United States Court of Federal Claims has jurisdiction under the Tucker Act, 28 U.S.C. § 1491, "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act, however, is "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . the Act merely confers jurisdiction upon [the United States Court of Federal Claims] whenever the substantive right exists." *United States* v. *Testan*, 424 U.S. 392, 398 (1976) (citations omitted). Therefore, to pursue a substantive right under the Tucker Act, a plaintiff must identify and plead an independent contractual relationship, Constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages. *See Todd* v. *United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act[.]"); *see also Fisher* v. *United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc*) ("The Tucker Act . . . does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that cerates the right to money damages. In the parlance of Tucker Act cases, that source must be 'money-mandating.'") (citations omitted).

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[18] Plaintiff titled the September 24, 2008 filing "Plaintiff's Reply To Defendant's Motion To Dismiss" and "Plaintiff's Reply To Defendant's Motion For Judgment Upon The Administrative Record," however, the court refers to this filing as Plaintiff's Response.

[19] Section 1491, Title 28, of the United States Code states:

> The United States Court of Federal Claims shall have jurisdiction to . . . provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, *the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just*.

28 U.S.C. § 1491(a)(1)-(2) (emphasis added).

### B. Justiciability.

When final military decisions are challenged, the court is obligated first to consider the justiciability of the legal question presented. *See Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953) ("[J]udges are not given the task of running the [military]. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates."). The United States Court of Appeals for the Federal Circuit specifically has held that "determining who is fit or unfit to serve in the armed services is not a judicial province." *Heisig* v. *United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (holding that the merits of the military's decisions to release a service member from active duty are non-justiciable).

Nevertheless, the United States Court of Federal Claims has authority to ascertain the procedural validity of a military decision. *See Murphy* v. *United States*, 993 F.2d 871, 873 (Fed. Cir. 1993) ("When the military is given unlimited discretion by Congress, it is nevertheless bound to follow its own procedural regulations if it chooses to implement some."). Therefore, when the military issues a final decision, the court can review that decision to ensure it was made in a proper procedural manner. *See Adkins* v. *United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) ("[A]lthough the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy." (emphasis in original)); *see also Heisig*, 719 F.2d at 1156 ("[A]lthough judicial review of military service determinations with monetary consequences is available . . . '[r]eview of the administrative decision is limited to determining whether the . . . action was arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which [the complainant] has been seriously prejudiced.'" (citing *Clayton* v. *United States*, 225 Ct. Cl. 593, 595 (1980))). Accordingly, the court "'will not disturb the decision of [a] corrections board unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence.'" *Barnes* v. *United States*, 473 F.3d 1356, 1361 (Fed. Cir. 2007) (quoting *Chambers* v. *United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005)).

### C. *Pro Se* Pleading Requirements.

In the United States Court of Federal Claims, the pleadings of a *pro se* plaintiff are held to a less stringent standard than those of litigants represented by counsel. *See Hughs* v. *Rowe*, 449 U.S. 5, 9 (1980) (*Pro se* complaints, "however inartfully pleaded," are held to "less stringent standards than formal pleadings drafted by lawyers." (quotation and citation omitted)). Indeed, it has been the tradition of the court to examine the record "to see if [a *pro se*] plaintiff has a cause of action somewhere displayed." *Ruderer* v. *United States*, 412 F.2d 1285, 1292 (Ct. Cl. 1969). Nevertheless, while the court may excuse ambiguities in a *pro se* plaintiff's complaint, the court "does not excuse [a complaint's] failures." *Henke* v. *United States*, 60 F.3d 795, 799 (Fed. Cir. 1995).

### D. Standard For Failure To State A Claim Upon Which Relief Can Be Granted - RCFC 12(b)(6).

Dismissal for failure to state a claim under Rule 12(b)(6) of the United States Court of Federal Claims "is proper only when a plaintiff 'can prove no set of facts in support of his claim which would entitle him to relief.'" *Adams* v. *United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004) (quoting *Leider* v. *United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002)); *see also* RCFC 12(b)(6) ("[A] party may assert the following defenses by motion: (6) failure to state a claim upon which relief can be granted."). In reviewing a motion to dismiss for failure to state a claim, this court "must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *United Pac. Ins. Co.* v. *United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006) (citations omitted).

### E. Standard For Judgment On The Administrative Record - RCFC 52.1.

The standard of review for a motion for judgment on the administrative record, pursuant to RCFC 52.1, is similar but not identical to a motion for summary judgment under RCFC 56. *Bannum, Inc.* v. *United States*, 404 F.3d 1346, 1355 (Fed. Cir. 2005). The standard for a motion for summary judgment is whether the moving party has proved its case as a matter of fact and law or whether a genuine issue of material fact precludes judgment. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original). In contrast, the standard for judgment on the administrative record is narrower, *i.e.*, given all the disputed and undisputed facts in the administrative record, whether the plaintiff has met the burden of proof to show that the decision was not in accordance with the law. *See Bannum*, 404 F.3d at 1357 (instructing the court to make "factual findings under RCFC 52.1 from the [limited] record evidence as if it were conducting a trial on the record."). The existence of a material question of fact neither precludes granting a motion for judgment on the administrative record, nor requires the court to conduct evidentiary proceedings. *Id*. A plaintiff also must establish a deficiency with "cogent and clearly convincing evidence," overcoming the strong presumption that the Government discharged its duties correctly, lawfully, and in good faith. *See Martinez* v. *United States*, 77 Fed. Cl. 318, 324 (2007) (citations omitted); *Wyatt* v. *United States*, 23 Cl. Ct. 314, 319 (1991) (holding that review of a military correction board's decision is limited to the administrative record before the deciding official or officials).

### F. The Government's July 7, 2008 Motion To Dismiss, Pursuant To RCFC 12(b)(6).

#### 1. The Government's Argument.

The Government moves to dismiss Plaintiff's April 7, 2008 Complaint, pursuant to RCFC 12(b)(6), because Plaintiff failed to "'identify a substantive source of law that establishes specific

fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties.'" Gov't Mot. Dismiss at 8 (quoting *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003)). To receive "retirement" status, a military member must meet the conditions of 10 U.S.C. § 1201, *i.e.*, be found by the Secretary of the Air Force to: (i) be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability;" (ii) have a permanent disability; and (iii) receive a disability rating of at least 30%, if the military member does not have twenty years of service. *See* 10 U.S.C. § 1201(a), (b)(1), (b)(3)(B). Even if the Secretary of the Air Force finds that a military member is "unfit" for duty, based upon a permanent disability rating of at least 30 percent, the Government argues that there is no requirement under 10 U.S.C. § 1201 for the member to be retired. *See* Gov't Mot. Dismiss at 7. The Government argues that the statute's use of "may,"[20] is dispositive and "there is no judicially enforceable duty for the Secretary to retire [Plaintiff] under 10 U.S.C. § 1201." *Id*. Therefore, since Plaintiff cannot point to a substantive rule of law requiring the Air Force to accord her the status of "disability retirement," the April 7, 2008 Complaint must be dismissed for failure to state a claim upon which relief can be granted. *Id*. at 8.

**2. The Plaintiff's Response.**

Plaintiff responds that the April 7, 2008 Complaint states a claim upon which this court can grant relief, because 10 U.S.C. § 1201, "a substantive rule of law requiring her disability retirement," is at issue. Pl. Resp. at 1. As the United States Court of Appeals for the Federal Circuit held in *Fisher* v. *United States*, 402 F.3d 1167 (Fed. Cir. 2005):

> Despite the presence of the word "may" in [10 U.S.C. § 1201], in *Sawyer* [v. *United States*, 930 F.2d 1577, 1580 (Fed. Cir. 1991),] we determined that the Secretary has *no discretion whether to pay out retirement funds once a disability is found qualifying*. Thus, we held that the statute is money-mandating because when the requirements of the statute are met - *i.e.*, when the Secretary determines that a service

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[20] Section 1201 of Title 10 of the United States Code states:

> (a) Retirement. Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary *may retire* the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

10 U.S.C. § 1201(a) (emphasis added).

> member is unfit for duty because of a physical disability, and that disability is permanent and stable and is not the result of the member's intentional misconduct or willful neglect - the member is entitled to compensation.

*Id*. at 1174-75 (internal citations omitted) (emphasis added).

Therefore, the Government's Motion To Dismiss, pursuant to RCFC 12(b)(6), should be denied. *See* Pl. Resp. at 1.

**3. The Government's Reply.**

The Government concedes that 10 U.S.C. § 1201 is a money-mandating statute, "conferring this court with jurisdiction to entertain [Plaintiff's] claim for disability retirement." Gov't Reply at 2 (citing *Fisher*, 402 F.3d at 1174-75). The Government however, emphasizes that 10 U.S.C. § 1201 *does not require* that Plaintiff be disability retired. Instead, Section 1201 *enables* the Secretary of the military departments to authorize disability retirement pay *when the Secretary determines* that a service member meets the requirements of the statute. *See* Gov't Reply at 2.

**4. The Court's Resolution.**

In *Fisher* v. *United States*, the United States Court of Appeals for the Federal Circuit stated that, in cases involving suits against the United States for money damages, "the question of the court's jurisdictional grant blends with the merits of the claim[, and] [t]his mixture has been a source of confusion for litigants and a struggle for courts." *Fisher*, 402 F.3d at 1171-72. To resolve this problem, the United States Court of Federal Claims was instructed:

> [w]hen a complaint is filed alleging a Tucker Act claim based on a Constitutional provision, statute, or regulation, the . . . court at the outset shall determine, either in response to a motion by the Government or *sua sponte* (the court is always responsible for its own jurisdiction), whether the Constitutional provision, statute, or regulation is one that is money-mandating . . . For purposes of the case before the trial court, the determination that the source is money-mandating shall be determinative both as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action.

*Id*. at 1173 (internal citations omitted).

If the United States Court of Federal Claims is satisfied that the jurisdictional prerequisites are met, "the consequence of a ruling by the court on the merits, that plaintiff's case does not fit within the scope of the source, is simply this: plaintiff loses on the merits for failing to state a claim on which relief can be granted." *Id*. at 1175-76.

In this case, the court has subject matter jurisdiction over Plaintiff's claim for disability retirement, pursuant to 10 U.S.C. § 1201, because "[Section] 1201 is understood as money-mandating" and serves as the separate source of substantive law required by the Tucker Act. *See Fisher*, 402 F.3d at 1174-75 (10 U.S.C. § 1201 is "a classic Tucker Act suit for money and the related remedies the [United States Court of Federal Claims] is authorized to grant."); *see also Sawyer*, 930 F.2d at 1580-81 (holding that claims challenging disability status under 10 U.S.C. § 1201, are within the jurisdiction of the United States Court of Federal Claims).

The Complaint, however, also alleges that "the United States . . .violated the [Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et. seq*.]" and that this court has subject matter jurisdiction over this action "pursuant to the [APA]." Compl. (Opening Paragraph and Jurisdiction). Because the APA is not a money-mandating statute, the court does not have jurisdiction over these claims. *See Murphy*, 993 F.2d at 874 ("[T]he Claims Court has no authority to invoke the APA."). Therefore, references to the APA, in the opening paragraph and jurisdictional section of the April 7, 2008 Complaint, must be dismissed.

As to Plaintiff's alleged failure to state a claim upon which relief can be granted, the Complaint alleges that Plaintiff is entitled to disability retirement, pursuant to 10 U.S.C. § 1201. *See generally* Compl. Section 1201 of Title 10 of the United States Code provides that the Secretary of the applicable military department "*may* retire the member, with retired pay computed under section 1401 of this title," *if* the member meets the requirements of the statute. 10 U.S.C. § 1201(a) (emphasis added); *see also Sawyer*, 930 F.2d at 1580 ("The Secretary has no discretion whether or not to pay active duty service members, they are statutorily entitled to the pay of their positions until the entitlement is lawfully terminated. And once he finds a disability qualifying, he likewise has no discretion whether to pay out retirement funds.") (internal citation omitted). The member must: (i) be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability;" (ii) be permanently disabled; (iii) not become disabled during a period of unauthorized absence or a result of the member's intentional misconduct or willful neglect; *and* (iv) receive a disability rating of at least 30%, if the military member does not have twenty years of service. *See* 10 U.S.C. § 1201(a), (b)(1), (2), (3)(B) (emphasis added).

The Government does not dispute that the AFBCMR found that Plaintiff's pelvic prolapse, cystocele, and rectocele occurred in the "line of duty" and was "incapacitat[ing] for worldwide duty," and that Plaintiff was entitled to incapacitation pay, pursuant to 10 U.S.C. 1203.[21] *See* Compl. ¶ 2;

[21] Section 1203 of Title 10 of the United States Code sets forth the requirements for separation from the armed services and severance pay. *See* 10 U.S.C. § 1203. A service member is accorded "separation" status under Section 1203, instead of "retirement" under Section 1201, if the service member has less than twenty years of service and receives a disability code of less than 30%. *Compare* 10 U.S.C. § 1203, *with* 10 U.S.C. § 1201. The other requirements for "retirement" or "separation," however, are similar. *See* 10 U.S.C. § 1201(a) ("Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability . . ."); *see also* 10 U.S.C. §

*see also* Pl. Ex. 1. The Complaint alleges that the AFBCMR's April 27, 2007 Final Decision erred in affirming an award of 20% disability. *See* Compl. ¶¶ 3, 5. But for procedural errors, alleged in paragraphs six through twenty-seven of the Complaint, an 80% disability rating would have been made, entitling Plaintiff to disability retirement, instead of disability separation. *Id*. ¶¶ 3, 5-27, (Request For Relief). Therefore, because sufficient facts are alleged to invoke the jurisdiction of the court, pursuant to 10 U.S.C. § 1201, the Government's Motion To Dismiss, pursuant to RCFC 12(b)(6), is denied, with the exception of the Complaint's references to the APA, which are dismissed.

The remaining issue is whether the AFBCMR's April 27, 2007 Final Decision to deny Plaintiff's August 22, 2006 Application for correction of her military records from a 20% disability rating to a 50% disability rating was arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accordance with law. *See Fisher*, 402 F.3d 1180.

### G. The Government's July 7, 2008 Motion For Judgment On The Administrative Record.

The Complaint sets forth a series of alleged errors committed by the Air Force.[22]

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1203(a) ("Upon a determination by the Secretary concerned that a member described in section 1201(c) of this title is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability[.]").

[22] Alleged Errors In The MEB Package's Narrative Summary:

- The "Chief Complaint" includes only dyspareunia, fecal incontinence, and urinary incontinence where it should have included cystocele and rectocele as described in the LOD Determination and in the medical documentation. *See* Compl. ¶ 7.
- In the "History of Present Illness" section of the Narrative Summary, Dr. Yi's statements are factually incorrect, because they were based on an earlier medical summary or are simply inaccurate. *Id*. ¶ 8.
- The "Physical Examination" section of the Narrative Summary fails to note the presence of cystocele. *Id*. ¶ 9.
- The "Laboratory/Radiology" section of the Narrative Summary inaccurately describes the results of a Defecography exam and ignores the results of an Endoanal Ultrasound and urodynamic studies. *Id*. ¶ 10.
- The "Consultations" section of the Narrative Summary omits and/or inaccurately describes the results of an Urogynecology consultation conducted over several months at Madigan Army Center and a Reconstructive Pelvic Surgery and Urogynecology consultation at Tripler Medical Center. *Id*. ¶ 11.
- The "Recommendations and Planned Therapy" section of the Narrative Summary entirely omits recommendations. *Id*. ¶ 12.
- The "Final Diagnosis" section of the Narrative Summary fails to list cystocele and

In addition, the Complaint alleges that the MEB violated Air Force Directives in failing to clearly and adequately describe Plaintiff's conditions and medical history. *Id*. ¶¶ 6-18. The PEB also failed to consider Plaintiff's cystocele and rectocele and ignored VASRD guidelines in combining fecal incontinence with the urinary incontinence. *Id*. ¶ 19. If the PEB had considered all of Plaintiff's conditions individually, she would have received a total disability rating of 80% and qualified for disability retirement. *Id*.; *see also* 10 U.S.C. §§ 1201. The Complaint also alleges that the AFBCMR erred in failing to correct the errors of the MEB and PEB, because it relied on the flawed recommendations of the Air Force Personnel Center as the basis for its decision. *Id*. ¶¶ 20-27. Because the AFBCMR "rubber-stamp[ed]" the decision of the PEB, the court is requested to determine that the April 27, 2007 AFBCMR Final Decision was "arbitrary, capricious, unsupported by substantial evidence, or contrary to applicable statutes or regulations[.]" Compl. (Opening Paragraph).

**1. The Government's Argument.**

The Government argues that it is entitled to judgment on the administrative record, because Plaintiff failed to raise certain allegations in the Complaint to the AFBCMR and the AFBCMR's decision was not arbitrary, capricious, unsupported by substantial evidence, or contrary to law or regulation. *See* Gov't Mot. Dismiss at 10, 16.

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rectocele as separate diagnoses. *Id*. ¶ 13.

- The "Line of Duty" section of the Narrative Summary fails to consider whether Plaintiff's fecal and urinary incontinence were subject to a LOD Determination. *Id*. ¶ 14.

Alleged Errors In The MEB's Report, AF From 618:

- The conditions of cystocele and rectocele were not included in the diagnosis report. *Id*. ¶ 16.
- The medical conditions covered by Plaintiff's corrected LOD Determination, prolapsed uterus, cystocele, and rectocele, were not listed on AF Form 618, and the medical conditions listed on AF Form 618, Item 23, do not have a valid LOD Determination covering them. *Id*. ¶ 17.
- In the "Diagnosis" section, the MEB erred by not using diagnostic terminology that correlated with the VASRD. *Id*. ¶ 18.

Alleged Errors By The PEB, In AF Form 356:

- The PEB erred in its factual findings by failing to fully explain the bases for its findings, ignoring VASRD guidelines, and omitting certain conditions that should have been listed on AF Form 356. The PEB failed to consider Plaintiff's cystocele and rectocele. *Id*. ¶ 19.

Specifically, Plaintiff failed to raise allegations of error committed by the MEB. *Id*. at 16. Therefore, those issues are waived. *Id*. Government contends that "'orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has [the] opportunity for correction in order to raise issues reviewable by the courts.'" *Id*. (quoting *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)). In addition, except for issues concerning cystocele, rectocele, and the VA rating, Plaintiff failed to challenge the informal PEB's findings; "[i]n fact, she accepted the informal PEB's findings," and did not request review by the formal PEB. *Id*. at 17 (citing AR at 12).

As to the cystocele, rectocele, and VA rating, the AFBCMR's April 27, 2007 Final Decision that Plaintiff failed to demonstrate the existence of probable material error or injustice was not arbitrary or capricious. *Id*. at 11. First, the PEB considered Plaintiff's cystocele and rectocele, although the PEB did not use the words "cystocele" and "rectocele." *Id*. "Cystocele" is the prolapse, or protrusion, of the bladder, a pelvic organ, into the vagina. *Id*. at 11-12. "Rectocele" is the prolapse of the rectum, a pelvic organ, into the vagina. *Id*. at 12. On Form 356, the PEB described Plaintiff's unfitting conditions to be: "'urinary urge incontinence associated with fecal incontinence *secondary to stage II pelvic organ prolapse*[.]'" *Id*. (quoting AF Form 356) (emphasis added). Therefore, the Administrative Record confirms that "the informal PEB considered the fact that [Plaintiff] suffered from stage II pelvic organ prolapse, *i.e.*, cystocele and rectocele, which caused urinary and fecal incontinence, unfitting conditions." *Id*.

Moreover, Plaintiff stated in the August 22, 2006 AFBCMR Application that "'[a]s of Aug. 9, 2002, the VA awarded me a disability of 50% as required by the VASRD for a 'cystocele' and a 'rectocele.' Although these conditions may not be unfitting directly, the residuals of urinary and fecal incontinence are unfitting.'" *Id*. (quoting Pl. Ex. 3 (Plaintiff's August 22, 2006 AFBCMR Application)). Because both Plaintiff and the PEB acknowledged that Plaintiff's cystocele and rectocele - standing alone - are not "unfitting," the decision of the AFBCMR was not arbitrary and capricious. *Id*. at 12-13.

In response to Plaintiff's contention that the AFBCMR violated the law by not granting her an 80% disability rating based upon the VA's rating of 50% percent, the Government further contends that "VA determinations of disability are not binding upon the Air Force." *Id*. at 14. Moreover, "[a]ccording to DOD Directive 1332.18, '[t]he sole standard to be used in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of the office, grade, rank, or rating because of disease or injury incurred while entitled to basic pay.'" *Id*. at 13 (quoting DOD Directive 1332.18 ¶ 2). Plaintiff, however, fails to recognize that the VA "administers its program under Title 38 of the United States Code, and may rate any service-connected condition without regard to fitness, whereas the Air Force may rate only those conditions which make the member unfit for continued military service." *Id*. (citing *Haskins*, 51 Fed. Cl. at 826 (stating that the military uses the VASRD "to determine fitness for performing the duties of office, grade, and rank, whereas the VA uses the VASRD to determine the disability ratings based on an evaluation of the individual's capacity to function and perform tasks in the civilian world.")). Therefore, Plaintiff has failed to present evidence sufficient to demonstrate that

the AFBCMR's April 27, 2007 Final Decision violated any law, regulation, or was otherwise arbitrary or capricious. *Id*. at 15-16.

**2. The Plaintiff's Response.**

Plaintiff responds that the AFBCMR, and the Air Force opinions relied on by the AFBCMR, failed to address Plaintiff's concerns as evidenced in "Block 17" [23] of the Application For Correction Of Military Record. *See* Pl. Resp. at 2. Plaintiff argues that she was not adequately informed of her

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[23] In Block 17 of Plaintiff's August 22, 2006 AFBCMR Application states:

> Both the AF Form 618 Medical Board Report and the AF Form 356 Findings and Recommended Disposition of USAF Physical Evaluation Board list my urinary and fecal incontinence as unfitting conditions. The AF Form 356 lists the diagnostic code as "7517," which is listed in 38 CFR Part 4, subsection 4.115b as "Bladder, injury of: Rate as voiding dysfunction." Using the same medical records and statements less than 6 months later, the VA found that the proper diagnostic code is "7623 Pregnancy, surgical complications of: With rectocele or cystocele." My military records establish that I had BOTH a cystocele and a rectocele. The VA has determined that my urinary and fecal incontinence are residuals of the cystocele and rectocele. The AF Form does not separate the urinary and fecal incontinence; and rates only the symptom of urinary incontinence, while ignoring the underlying condition. I contend this was an error and is unjust.
>
> Initially, I disagreed with the findings of the informal Physical Evaluation Board and I requested a formal Physical Evaluation Board. In preparation for the formal hearing, I had several conversations with MSGt Crawford, who was the PEBLO during my processing. He explained that I had to be 'dead or dying' in order to get a disability rating of 30% or greater, because the Air Force would have to pay me retirement benefits for the rest of my life. He said that the Formal Board was extremely aware of the fiscal impact and would avoid increasing my disability rating. Additionally, MSGt Crawford explained what I would need to prove to have my disability rating increased. His instructions only pertained to the urinary incontinence aspect of my disabilities. He did not explain the effect of an erroneous diagnostic code or incomplete diagnoses, nor did he discuss the possibility that the informal PEB diagnoses could mischaracterize my unfitting conditions, and thus impact the disability rating percentage. I did not have any familiarity with the VASRD nor 38 CFR part 4 and relied on MSG Crawford's limited discussion in electing to waive the formal PEB. Accordingly, I did not knowingly waive my right to further review of my disability rating. Appealing to the Board of Correction is the final administrative avenue of relief in my case.

AR at 8-9.

rights after initially disagreeing with the findings of the informal PEB. *Id.*; *see also* AR at 8-9. Consequently, Plaintiff claims she did not knowingly waive her right to a formal PEB hearing. *See* Pl. Resp. at 2; AR at 8-9. Plaintiff also argues that the AFBCMR failed to consider errors and omissions in Plaintiff's medical record. *See* Pl. Resp. at 3.

**3. The Government's Reply.**

The Government replies that the AFBCMR's April 27, 2007 Final Decision "took note of [Plaintiff's] complete submission in judging the merits of the case[.]" Gov't Reply at 3 (quoting AR at 5 (AFBCMR's April 27, 2007 Final Decision)). Although the AFBCMR "did not specifically mention note 17 in its decision, by its own statement, it considered all of [Plaintiff's] arguments." *Id*. at 3-4. Even if the AFBCMR failed to consider Plaintiff's alleged non-voluntary waiver of her right to appeal to the formal PEB, this was harmless error: "assuming that the AFBCMR did not, but should have considered whether MSGt Crawford provided Ms. [Doe] with the information she asserts he failed to provide, she cannot point to any material error or injustice caused by such an omission." *Id*. at 4. (citing *Chayra* v. *United States*, 23 Cl. Ct. 172, 178 (1991) ("[P]laintiff must show by cogent and clearly convincing evidence . . . a material legal error or injustice in the correction board proceeding.")). Because Plaintiff failed to challenge the findings of the informal PEB before a formal PEB, Plaintiff cannot now prove that her alleged non-voluntary waiver of her right to appeal to a formal PEB is sufficient to overcome the substantial evidence supporting the AFBCMR Decision in this case. *Id*. at 5.

**4. The Court's Resolution.**

Plaintiff's August 22, 2006 AFBCMR Application presented the AFBCMR with three issues: (1) whether the PEB should have rated Plaintiff's disability based on cystocele and rectocele, the residuals of which are urinary and fecal incontinence, as the VA subsequently did, using VASRD code 7623 "Pregnancy, surgical complications of: With rectocele or cystocele;" (2) that the PEB recognized the conditions of urinary and fecal incontinence, but failed to rate them separately on Form 356; and (3) whether the statute of limitations for AFBCMR consideration had run because Plaintiff knowingly waived her right to appeal the PEB's findings.[24] *See* AR at 7-9 (Plaintiff's August 22, 2006 AFBCMR Application).

This court has jurisdiction to determine whether AFBCMR's April 27, 2007 Final Decision addressed each of these issues in a manner that was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence. *See Barnes*, 473 F.3d at 1361. Accordingly, the court's jurisdiction is limited only to the arguments asserted by Plaintiff before the AFBCMR. *See Metz* v. *United States*, 466 F.3d 991, 999 (Fed. Cir. 2006) (holding that because the plaintiff did not

[24] The court need not address Plaintiff's argument in her August 22, 2006 AFBCMR Application regarding her alleged involuntary waiver, because the AFBCMR concluded in the Final Decision that Plaintiff's "[A]pplication was not timely filed; however, it is in the interest of justice to excuse the failure to timely filed." *See* AR at 5.

assert that his separation was involuntary due to ineffective counsel before the AFBCMR, the plaintiff waived his ability to challenge the decision of the AFBCMR on voluntariness grounds); *see also L.A. Tucker Truck Lines*, 344 U.S. at 37 ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."). The court does not have jurisdiction to adjudicate the allegations in paragraphs six through eighteen of the Complaint, because those allegations deal with alleged errors made by the MEB that were not presented before the AFBCMR for review. *See* Compl. ¶¶ 6-18; *see also Rominger* v. *United States*, 72 Fed. Cl. 268, 272 (2006) ("We do not review the underlying medical determination of the Physical [Evaluation] Board; review is limited to the Correction Board's denial of [Plaintiff's] application for review on the basis of the record before it."). Therefore, the claims are waived and must be dismissed, with prejudice.

The AFBCMR received and reviewed two Air Force evaluations of Plaintiff's Application: a February 2, 2007 Evaluation from the Air Force Physical Disability Division; and a February 26, 2007 Evaluation from an Air Force Judge Advocate. *See* AR at 11-13. Both evaluations emphasized the difference between the Armed Forces' use of the VASRD and the VA's use of the VASRD and recommended that the AFBCMR deny Plaintiff's August 22, 2006 Application. *Id*. The February 2, 2007 Air Force Evaluation stated that service-connected medical conditions not found unfitting by the Air Force are not compensated under Title 10 of the United States Code, even though they may be compensated by the VA under Title 38 of the Code. *Id*. at 11. The February 26, 2007 Evaluation of the Air Force Judge Advocate also discussed the differences between military and VA disability determinations and concluded that because Plaintiff's Application was "primarily supported" by the VA determination, Plaintiff failed to show by a preponderance of the evidence that the AFBCMR decision was erroneous or unjustified. *Id*. at 13.

In 1958, Congress mandated the issuance of the VASRD regulations to provide ratings for various medical conditions used by the VA to determine compensation awards for qualifying disabilities. *See* 38 U.S.C. § 1155 ("The Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations."). Sections 1201 and 1203 of Title 10 require the military departments use the VASRD. *See* 10 U.S.C. § 1201, 1203. For example, Section 1201 provides: "Determinations [that a service member is unfit for duty because of a physical disability] are determinations by the Secretary that . . . the disability is at least 30 percent *under the standard schedule of rating disabilities in use by the Department of Veterans Affairs* at the time of the determination[.]" 10 U.S.C. § 1201(b) (emphasis added). Although both the military departments and the VA use the VASRD, their use of the index differs. The military uses the VASRD, "to determine fitness for performing the duties of office, grade, and rank, whereas the VA uses the VASRD to determine the disability ratings based on an evaluation of the individual's capacity to function and perform tasks in the civilian world." *Haskins*, 51 Fed. Cl. at 826 (emphasis added); *see also* DOD Directive 1332.18, ¶ 3.3 ("[T]he sole standard to be used in making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of

the office, grade, rank or rating because of disease or injury incurred while entitled to basic pay."). Therefore, "[a]lthough a VA rating decision may be relevant to consideration of an appropriate disability rating, it is not binding on the service branch." *Lockwood* v. *United States*, 2008 WL 2372065 *8 (Fed. Cl. June 5, 2008); *see also Hinkle* v. *United States*, 229 Ct. Cl. 801, 804 (1982) ("Nor is the court or the Air Force bound by this decision of the Veterans Administration which operates under different laws and standards and for different purposes than the military when it comes to deciding disability entitlements").

The difference between the military's use of the VASRD and the VA's use does not, however, explain why *only* Plaintiff's urinary incontinence was found unfitting and rated under the VASRD by the PEB. The MEB Report, dated December 4, 2001, lists four diagnosis "which contribute or may contribute to make the qualifications of the individual for worldwide duty questionable." Pl. Ex. 7.[25] These conditions include: "(1) Stage II (mild) pelvic organ prolapse; (2) Dyspareunia; (3) Fecal Incontinence; (4) Urge Incontinence (mild)." *Id*. Plaintiff's medical records confirm that Plaintiff suffers from all of the conditions identified by the MEB. For example, the Narrative Summary of Plaintiff's Medical Record Report, produced April 19, 2001, discusses Plaintiff's "stage I pelvic organ prolapse and anterior wall defect." Pl. Ex. 13. A January 5, 2001 medical report indicates, however, that Plaintiff has Stage II pelvic organ prolapse, dyspareunia, fecal incontinence, and urge incontinence. *See* Pl. Ex. 15. After reviewing Plaintiff's medical history, the PEB determined that Plaintiff's "unfitting conditions" included "urinary urge incontinence associated with fecal incontinence secondary to stage II pelvic organ prolapse, status post total vaginal hysterectomy with anterior-posterior colporrhaphy, improved on ditropan." Pl. Ex. 21. In the next column, however, the PEB assigned Plaintiff the diagnostic code of "7517" for "Bladder, injury of," with the following remarks: "SSG [Doe]'s medical condition prevents her from reasonably performing the duties of her office, grade, rank or rating." *Id*. These remarks offer no explanation why Plaintiff's pelvic organ prolapse and fecal incontinence were listed as "unfitting conditions," and were repeatedly referenced in Plaintiff's medical history, but were not assigned diagnostic codes by the PEB. *Id*. Only Plaintiff's urinary incontinence was compensated. *Id*.

Plaintiff's August 22, 2006 AFBCMR Application claimed that: (1) the PEB should have rated Plaintiff's disability based on cystocele and rectocele, and (2) the PEB also should have rated Plaintiff's fecal incontinence separate from her urinary incontinence. *See* AR at 7-9. The February

[25] Throughout this Memorandum Opinion And Order, the court cites to exhibits provided by Plaintiff. Although the "scope of review is based upon the administrative record provided to the court," *Rominger*, 72 Fed. Cl. at 272, the administrative record, filed by the Government, fails to provide the court with several critical documents, *i.e.*, Plaintiff's August 22, 2006 AFBCMR Application; Plaintiff's February 27, 2002 updated LOD Determination; and the PEB's January 9, 2002 Findings and Recommendations. Page ten of the administrative record notes that Plaintiff's military personnel records, which the AFBCMR reviewed, are "withheld;" yet these documents are needed for the court to determine if the AFBCMR's April 27, 2007 Final Decision is based on substantial evidence. Consequently, the court relied on Plaintiff's submission of these documents.

2, 2007 Air Force Evaluation, stated that "[t]he applicant requests her diagnosis of cystocele and rectocele be reflected on the AF Form 356, Findings and Recommended Disposition of [the PEB]" but concludes that "these two conditions, in and of themselves, are not unfitting conditions and therefore would not have increased the disability rating any higher than the 20 percent that was already awarded for her urinary urge incontinence." *Id*. at 11. Although a more detailed explanation as to why Plaintiff's cystocele or rectocele are not "unfitting" would have helped the court in reviewing the actions of the AFBCMR, the court nonetheless recognizes that great deference is owed military administrators, particularly regarding decisions of fitness or unfitness to serve in the Armed Forces. *See Dodson* v. *U.S. Gov't, Dept. of Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993) ("[M]ilitary administrators are presumed to act lawfully and in good faith like other public officers, and the military is entitled to substantial deference in the governance of its affairs."). Therefore, the court accepts this explanation regarding Plaintiff's cystocele and rectocele. The February 2 and February 26, 2007 Air Force Evaluations, however, fail to address Plaintiff's fecal incontinence and why this condition did not receive a VASRD rating. *See* AR at 11. The February 26, 2007 Evaluation, by the Air Force Judge Advocate, characterizes Plaintiff's complaint as a request that she be retired with a 50% disability, but again does not mention Plaintiff's fecal incontinence. *Id*. at 12-13. Although the AFBCMR stated that it "agree[ed] with the opinion and recommendation of the Air Force offices of primary responsibility and adopt[s] their rationale as the basis for [the AFBCMR's] conclusion," the AFBCMR provided no analysis for the decision not to correct Plaintiff's military record to reflect her fecal incontinence. *Id*. at 5. Therefore, even if the court accepts the AFBCMR's conclusion that Plaintiff's cystocele and rectocele should not be given a disability rating because they are not, in and of themselves, unfitting conditions, the court finds that the AFBCMR failed to address Plaintiff's additional claim - that her fecal incontinence should have been separately rated by the PEB under the VASRD.

Finally, the court notes that 10 U.S.C. § 1201, 10 U.S.C. § 1203, and Air Force regulations seem to require a formal LOD determination for the disability upon which retirement or separation from the Armed Forces is granted. For example, 10 U.S.C. § 1203 states:

> (b) *Required determinations of disability*.--Determinations referred to in subsection (a) are determinations by the Secretary that--
>
> > (1) the member has less than 20 years of service computed under section 1208 of this title;
> >
> > (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence;
> >
> > (3) based upon accepted medical principles, the disability is or may be of a permanent nature; and
> >
> > (4) either--
> >
> > > (A) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, and the disability was (i) the proximate result of performing active duty, (ii) *incurred in line of duty* in time

> of war or national emergency, or (iii) *incurred in line of duty* after September 14, 1978[.]

10 U.S.C. § 1203 (emphasis added). In addition, Air Force Instruction 36-3212, Chapter 3: Physical Evaluation Board, states that "Chapter 61, 10 U.S.C., requires a line of duty determination for each unfitting defect or condition." AFI 36-3212 at 19. Because there is no evidence in the Administrative Record that Plaintiff's conditions were the proximate result of performing active duty, qualifying her for separation under 10 U.S.C. § 1203(b)(4)(A)(i), the statute requires Plaintiff's disability to have been incurred in the line of duty, in accordance with 10 U.S.C. § 1203(b)(4)(A)(ii) or (iii). On August 18, 2000, Plaintiff received a revised and more favorable LOD Determination as the result of an appeal of the June 22, 1998 LOD Determination to the AFBCMR. *See* Pl. Ex. 1, 8. The AFBCMR concluded that Plaintiff's conditions of "prolapsed uterus, cystocele, and rectocele" were incurred in the line of duty. *See* Pl. Ex. 1. The AFBCMR Decision, however, does not discuss Plaintiff's urinary incontinence, the condition for which Plaintiff ultimately received her disability separation from the Armed Forces. *Id*. This notable omission raises the issue of whether the Air Force fully complied with 10 U.S.C. § 1203 and AFI 36-3212. *Id*.

The United States Court of Federal Claims has recognized that although "courts afford great deference to the decisions of boards for the correction of military records, that deference is not absolute. Correction boards are obligated to 'examine relevant data and articulate a satisfactory explanation for their decisions.'" *Rominger*, 72 Fed. Cl. at 273 (quoting *Van Cleave* v. *United States*, 66 Fed. Cl. at 133, 136 (2005)). In this case, the AFBCMR failed to address all of the issues raised in Plaintiff's August 22, 2006 Application For Correction Of Military Record and failed to sufficiently explain why it upheld the January 9, 2002 PEB Decision to separate Plaintiff with a 20% disability rating. Therefore, the court does not have a sufficient record to determine whether the decisions of the AFBCMR were arbitrary, capricious, or contrary to law, without a more adequate evaluation of Plaintiff's August 22, 2006 AFBCMR Application and explanation of the AFBCMR's ultimate decision. Particularly, the AFBCMR should explain why Plaintiff's fecal incontinence is listed as an unfitting condition on Form 356 by the PEB, but does not receive a separate diagnostic code under the VASRD.

## IV. CONCLUSION.

For these reasons, the Government's July 7, 2008 Motion For Judgment Upon The Administrative Record is denied. The case is remanded to the AFBCMR for 120 days to address the concerns identified in this Memorandum Opinion and Order.

**IT IS SO ORDERED.**

**SUSAN G. BRADEN**
**Judge**