21-1432

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT J. LABONTE, JR.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the U.S. Court of Federal Claims in Case No. 18-1784C, Judge Richard A. Hertling.

OPENING BRIEF OF APPELLANT

Renée A. Burbank, Supervising Attorney
Brandon Baum, Law Student Intern*
Lernik Begian, Law Student Intern*
Rhea Christmas, Law Student Intern*
Alexander Fischer, Law Student Intern*
Casey Smith, Law Student Intern*

Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-3928
Renee.Burbank@ylsclinics.org
**Law Student Appearances pending*

Counsel for Appellant

CERTIFICATE OF INTEREST

Counsel for Appellant certifies the following:

1. The full name of every party or amicus represented by me is: Robert J. LaBonte, Jr.

2. The name of the real party in interest if the party named in the caption is not the real party in interest is: None.

3. All parent corporations and any publicly held corporations that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or who are expected to appear in this Court, in addition to the counsel who have already appeared in this appeal, are: Michael Wishnie, Supervising Attorney; Sebastian Bates, Law Graduate; Brandon Baum, Lernik Begian, Rhea Christmas, Alexander Fischer, Casey Smith, Samuel Davis, Diana Lee, Julia Coppelman, Matthew Handley, Catherine McCarthy, Jared Quigley, John Super, Law Student Interns.

5. The following cases are those known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal: None.

6. The following information is required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees): N/A.

Dated: March 19, 2021

Respectfully submitted,

/s/ Renée A. Burbank
Renée A. Burbank
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-3928
Renee.Burbank@ylsclinics.org

Counsel for Appellant

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STATEMENT OF RELATED CASES

Appellant is unaware of any other appeals stemming from this action that were previously before this Court or any other appellate court, or of any pending cases in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

The U.S. Court of Federal Claims' jurisdiction was proper under the Tucker Act. 28 U.S.C. § 1491. The U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction to review final judgments rendered by the U.S. Court of Federal Claims. 28 U.S.C. § 1295(a)(3). Review is timely because the Court of Federal Claims dismissed Mr. LaBonte's disability retirement claim in a final order on October 30, 2020, and Mr. LaBonte filed a notice of appeal on December 15, 2020.

STATEMENT OF ISSUES

The Court of Federal Claims held that military correction boards established under 10 U.S.C. § 1552 may not grant disability retirement to servicemembers whose "Certificate of Release or Discharge From Active Duty," a standard separation document known as a "DD-214" form, contains reference to a court martial. The questions presented are:

1. Whether the Army Board for the Correction of Military Records may exercise its powers under § 1552 to grant Mr. LaBonte disability retirement and amend his DD-214 accordingly; or
2. Whether, in the alternative, the Board may grant retroactive disability retirement without amending a DD-214, because amending the form is not required by statute or regulation.

PRELIMINARY STATEMENT

Mr. LaBonte faithfully served his country during the Iraq War. While stationed in Tikrit, Iraq in 2004, he developed disabling post-traumatic stress disorder ("PTSD"), fell from a 30-foot guard tower, and sustained a traumatic brain injury ("TBI"), among other disabilities. Mr. LaBonte sought help from his supervisors and Army medical providers multiple times. But time and time again, the Army failed to provide him with medical care for his injuries or refer him for disability retirement evaluation, as it was required to do by statute and its own

regulations. Mr. LaBonte returned home in 2005 for a family matter and overstayed without leave to recover from his injuries—a behavior consistent with his disabilities, as the Army later conceded. When he voluntarily returned to service six months later, an Army special court martial sentenced him to months of confinement and a Bad Conduct discharge.

Since then, Mr. LaBonte has fought to obtain the disability retirement he was—and still is—owed when he became permanently and severely disabled in service. He obtained clemency on his court-martial sentence from the Army Discharge Review Board ("ADRB") in 2014, removing his punitive discharge. Next, Mr. LaBonte sought retroactive disability retirement from the Army Board for the Correction of Military Records ("ABCMR" or "Board"), which has broad power to amend military records to "correct an error or remove an injustice." 10 U.S.C. § 1552(a) (enabling statute for corrections boards). Yet, instead of correcting the injustice in Mr. LaBonte's record as it is mandated to do, the Board repeatedly denied him relief in cursory decisions that failed to consider critical medical evidence.

In the court below, the government asserted a *post hoc* claim that the Board cannot grant Mr. LaBonte disability retirement because of the court martial for which he has already been granted clemency. The court agreed, relying on the fact that the ADRB did not, when it granted clemency, amend Mr. LaBonte's

separation document to remove the references to his court martial. The court erroneously held that this separation document, the DD-214, is a record "related" to courts martial, and therefore, that 10 U.S.C. § 1552(f) bars the Board from amending it to reflect a disability retirement. Congress adopted § 1552(f), however, to prevent the Board from overturning court-martial convictions, not to prevent corrections to standard personnel records or to prohibit the Board from granting disability retirement that a veteran is owed pursuant to 10 U.S.C. § 1201. A contrary conclusion betrays the structure, purpose, and history of § 1552—a statute that gives servicemembers the opportunity to have errors and injustices in their military records corrected.

STATEMENT OF THE CASE

Mr. LaBonte deployed to Iraq in 2003 in support of Operation Iraqi Freedom. When he became injured and incurred severe disabilities, he was denied medical care, court-martialed, and discharged with a Bad Conduct characterization.

In 2014, Mr. LaBonte successfully petitioned the ADRB for clemency. Appx1830. The ADRB upgraded his characterization of discharge to "General Under Honorable Conditions," which made him eligible to seek retroactive disability retirement. Mr. LaBonte then applied to the ABCMR for disability retirement as well as for a variety of corrections to his DD-214. Although the Board granted several of the corrections Mr. LaBonte requested, Appx128-132, it

initially denied Mr. LaBonte's request for retroactive medical retirement because soldiers with punitive discharges from courts martial are ineligible for disability processing, Appx162. Army leadership reversed that stance and directed the Board to review the merits of his disability retirement claim because there was "sufficient evidence to grant additional relief." Appx128. The ABCMR did so and denied Mr. LaBonte's claim on its merits, relying on a cursory and error-filled medical opinion by a medical official known by his colleagues as "Dr. Denies Everything." Appx185-187, Appx2598.

Mr. LaBonte sought judicial review of the ABCMR's denial before the U.S. Court of Federal Claims. The court found that the ABCMR relied on "a medical opinion that failed to consider medical evidence" as required by law, and thus remanded the case with instructions that the Board obtain a new medical opinion. Appx2716-2717. On remand, the ABCMR obtained a second medical opinion, which largely incorporated the previous unlawful opinion, and again denied Mr. LaBonte's application. Appx2724-2769.

Mr. LaBonte returned to the Court of Federal Claims. This time, the court dismissed the case for failure to state a claim for which relief can be granted. Appx16.

Mr. LaBonte timely appealed to this Court.

SUMMARY OF FACTS

a. Service and Separation

Mr. LaBonte enlisted in the Army in 2002 at the age of eighteen. Appx646-647, Appx339. In late 2003, he deployed to Tikrit, Iraq, where his duties exposed him to frequent mortar fire, small arms fire, and rocket attacks. Appx340-341. His unit engaged in several firefights with insurgents and often encountered improvised explosive devices, which severely injured members of his unit and Iraqi civilians. *Id*.

Near the end of his deployment, on or about February 6, 2004, Mr. LaBonte fell from a 30-foot guard tower. Appx334-335, Appx342. He lost consciousness and has no memory of what led to his fall. Appx342. He was found face down and unconscious in a pool of blood near the base of the tower by a fellow military police officer. Appx334. Mr. LaBonte was bleeding profusely from a large facial gash and rambling incoherently. Appx335; *see also* Appx2820 (contemporaneous picture of Mr. LaBonte's gash and injury). He was taken to a medical-aid center, where he received stitches but was given no other medical treatment. Appx917.

Following his fall, Mr. LaBonte began experiencing a number of debilitating symptoms. He had difficulty sleeping, experienced frequent nightmares, and would wake up in the night in a panic. Appx918. The fall exacerbated service-related

depression and anxiety that Mr. LaBonte suffered prior to this injury. *See* Appx309-310. He also suffered back pain and severe headaches. Appx343-344.

Mr. LaBonte returned to Fort Hood in April 2004 after his combat tour. Appx344. He repeatedly told his chain of command, as well as his chaplain, about his symptoms and expressed that he felt physically and mentally unable to continue serving. Appx344-345. Neither the chaplain nor Mr. LaBonte's chain of command referred him for medical care. Appx344-346.

Mr. LaBonte also sought help at the Fort Hood Mental Health Clinic, Appx887, where an enlisted mental-health specialist without apparent qualification to make medical diagnoses misdiagnosed Mr. LaBonte with an adjustment disorder. Appx893 (diagnosis); Appx234 (2016 Army psychiatrist memorandum recognizing "there is no evidence" the intake was staffed by a qualified psychologist or psychiatrist). Again, Mr. LaBonte was not referred for further medical care. Appx921.

In 2004, Mr. LaBonte was assigned to a new unit scheduled to deploy to Iraq. *Id*. Mr. LaBonte immediately told his new chain of command that he was not mentally or physically fit to redeploy and that he was experiencing severe symptoms, including debilitating panic attacks. Appx922. His new chain of command did not refer him for medical care. Instead, they told him he would have to redeploy. *Id.*

In November 2005, shortly before his scheduled redeployment, Mr. LaBonte took emergency leave to attend his grandfather's funeral in Connecticut. *Id.* He overstayed and became absent without leave ("AWOL") for about six months. Appx1814, Appx1816. Mr. LaBonte returned to base voluntarily in May 2006, Appx1816, and immediately sought help from his commanding officers, Appx347-348.

Mr. LaBonte was yet again denied a referral for evaluation or treatment. *Id.* Instead, the Army gave him a nonjudicial punishment for going AWOL, lowering his rank to private first class. *See* Appx1343, Appx1349. The Army then charged him with desertion. Appx1379. The Army convened a special court martial and tried Mr. LaBonte on October 23, 2006. Appx1293, Appx1322. Following the advice of his Army defense counsel, Mr. LaBonte pled guilty. Appx348, Appx1372, Appx1381.

Mr. LaBonte's sentence included a reduction in his pay grade to E-1, forfeiture of $849 pay per month for four months, four-months' confinement, and a Bad Conduct discharge. Appx1293. His pre-confinement medical examination—his last on-duty exam contrary to Army regulation requiring additional pre-discharge examination—listed symptoms that the VA and the Army would later diagnose as disabilities. Appx2292 (2006 pre-confinement medical examination), Appx429-437 (2014 VA service connection), Appx177-183 (2018 Army disability

evaluation). The Bad Conduct discharge made Mr. LaBonte presumptively ineligible for nearly all types of post-service care and benefits.
38 C.F.R. § 3.360(b) (barring VA from providing healthcare to a veteran with service-connected disabilities from a period of service ending in a Bad Conduct discharge). The ADRB's clemency restored his eligibility in 2014.
38 C.F.R. § 3.12(g) (stating that a discharge review board's upgrade to a General discharge qualifies a veteran for compensation and pension); Appx1830-1839.

b. Post-Discharge Diagnosis with PTSD and TBI

Following his separation, Mr. LaBonte continued to struggle with his undiagnosed conditions. Appx926-927. He struggled to retain employment and his personal relationships grew strained. *Id*.

Starting in 2012, at the behest of his father, Mr. LaBonte saw a series of medical professionals to address his conditions. Appx927. Two clinical psychiatrists independently evaluated and diagnosed Mr. LaBonte with service-connected PTSD. Appx308-316, Appx1479-1480. One of the psychiatrists concluded that at the time of his visit to the Fort Hood Mental Health Clinic in 2004, Mr. LaBonte was a "highly compromised individual" in need of further treatment. Appx539. In August 2015, a neurologist diagnosed Mr. LaBonte with TBI, noting that the injury damaged his central nervous system and impaired his motor skills. Appx301-307.

In 2014, the Department of Veterans Affairs ("VA") granted Mr. LaBonte disability benefits for service-connected PTSD and tinnitus. Appx429-430. In 2016, the VA also granted service connection for TBI, depression, headaches, painful scar, and ulcers, raising his combined disability rating to 100 percent. Appx239-241.

c. Discharge Upgrade at the ADRB

Following his PTSD diagnosis, Mr. LaBonte applied to the ADRB for a discharge upgrade. Appx1830-1834. In 2014, the ADRB unanimously voted to upgrade Mr. LaBonte's discharge characterization to "General, Under Honorable Conditions" and found that the length and quality of his service, his combat tour in Iraq, and his PTSD mitigated Mr. LaBonte's misconduct. Appx1839-1840. The ADRB also noted that "in light of the clear evidence of PTSD," a Bad Conduct discharge was "too harsh," and that "a firm diagnosis" of PTSD and TBI would have been mitigating at his trial, leading to a more lenient sentence. Appx1839. A newly issued DD-214 reflected the ADRB's unanimous decision. Appx754. The ADRB did not, however, change the narrative reason for Mr. LaBonte's discharge, which still states "Court-Martial, Other," or the related separation code. *Id*.

d. Petitioning the ABCMR

In November 2015, Mr. LaBonte petitioned the ABCMR for retroactive medical retirement by reason of permanent disability pursuant to 10 U.S.C. § 1201.

Appx258. Mr. LaBonte explained that he was entitled to retire because his permanent disabilities were incurred in service and made him unfit for duty and redeployment prior to his AWOL and subsequent discharge.

The ABCMR denied Mr. LaBonte's request for disability retirement. Appx127-132. However, the Deputy Assistant Secretary of the Army (Review Boards) reversed the Board's denial, noting there was "sufficient evidence" to grant additional relief. Appx198. The Board obtained an advisory opinion from the Agency's Psychiatrist finding Mr. LaBonte's PTSD a mitigating factor in his going AWOL. Appx233-235. The Deputy Assistant Secretary directed the Office of the Surgeon General to determine whether Mr. LaBonte should have been retired. Appx128-129.

As part of the evaluation process for retroactive disability retirement, two Army physicians on a medical evaluation board evaluated Mr. LaBonte. Appx177-183. They concluded that Mr. LaBonte did not meet medical retention standards in 2003 and 2004 and that his significant medical conditions prevented him from performing his duties at the time of separation. *Id*.

Following their evaluations, the medical report was sent to Dr. Eric L. Doane, the approving authority. Appx185-187. Dr. Doane was known to his colleagues to deny meritorious claims. Appx2598 (calling him "Dr. Denies Everything"). This case was no different. He ignored the conclusions reached by

the two evaluating physicians and refused to provide his approval. *See* Appx185-187. He instead wrote an error-laden memorandum that flatly mischaracterized some pieces of evidence and ignored others. *Id.* This memorandum became the Office of the Surgeon General's advisory opinion. Relying solely on Dr. Doane's opinion, the ABCMR denied Mr. LaBonte's claim. Appx188.

e. Initial Proceedings at the Court of Federal Claims and Remand

Mr. LaBonte timely filed a complaint in the Court of Federal Claims challenging the ABCMR's denial as arbitrary and capricious, lacking in substantial evidence, in bad faith, and a violation of his Fifth Amendment right to due process. Appx4, Appx18. The government moved to dismiss under Court of Federal Claims Rule ("RCFC") 12(b)(1) and (b)(6), or in the alternative for judgment on the agency record. Appx19, Appx2716. Following briefing and oral argument, the court preliminarily held that it had jurisdiction and vacated the ABCMR's denial as contrary to law because it "relied on a medical opinion that failed to consider medical evidence as required by 10 U.S.C. § 1552(h)(2)(B)." Appx2716-2717. The court remanded the case for the ABCMR to resolve Mr. LaBonte's claim after obtaining a new medical opinion. *Id.* The court also invited the Board to decide in the first instance whether it had authority to grant medical retirement to Mr. LaBonte in light of his court-martial conviction and clemency. *Id*.

Following the remand, the ABCMR obtained another medical advisory opinion. Appx2786-2787. This opinion did not consider the evidence beyond the previous flawed Dr. Doane memorandum. Appx2787. Instead, it merely replicated the erroneous reasoning of its predecessor almost verbatim and concluded there was "no evidence to support the need for disability processing." *Id*.

Mr. LaBonte submitted rebuttal comments highlighting the deficiencies of the second advisory opinion. Appx2770-2782. The ABCMR again denied Mr. LaBonte's claim, but made no claim that it lacked the power to provide the requested relief. Appx2724-2769. Instead, the decision again relied on the original flawed memorandum from Dr. Doane, as well as the new opinion which relied on and reiterated the same. Appx2763-2764.

f. Decision Below

Mr. LaBonte returned to the Court of Federal Claims. On review of the remand decision, the court granted the government's renewed motion to dismiss. Appx16. Although the court agreed that it possessed jurisdiction under the Tucker Act, 28 U.S.C. § 1491, and the Military Pay Act and disability retirement statute, 38 U.S.C. § 204, 10 U.S.C. § 1201, and that Mr. LaBonte's claim was timely, it held that the ABCMR lacked jurisdiction to grant relief, and therefore that Mr. LaBonte failed to state a claim upon which relief could be granted. Appx5-14. The court then dismissed Mr. LaBonte's remaining Fifth Amendment due process

claim because the court lacks jurisdiction over stand-alone due process claims. Appx14-15; 28 U.S.C. § 1491.

In assessing whether Mr. LaBonte had stated a cognizable claim, the court correctly held that Mr. LaBonte was eligible for retirement processing under the governing regulation for disability retirement. Appx8-10; *see also* Army Reg. 635-40, *Physical Evaluation for Retention, Retirement, or Separation* (Feb. 8, 2006). Paragraph 4-2 provides, in relevant part, that servicemembers who are not "under sentence of . . . punitive discharge" are eligible to undergo retirement evaluation. *Id.* In light of Mr. LaBonte's receiving clemency, which removed his punitive discharge and upgraded his discharge characterization to General, the court concluded that Mr. LaBonte was eligible for retirement processing.[1] Appx10. The court also rejected the government's view that paragraph 4-1 of the regulation—which limits eligibility for soldiers charged with an offense—forever precludes from disability retirement servicemembers charged with an offense under the Uniform Code of Military Justice. Appx9.

The court nonetheless held that the ABCMR lacked statutory authority to grant Mr. LaBonte relief, based on two interrelated conclusions.

[1] There are two types of punitive charges: Bad Conduct and Dishonorable; a General discharge is not a form of punitive discharge. Army Reg. 635-8, *Separation Processing and Documents* (Sept. 17, 2019), at 42.

First, the court determined that to grant disability retirement, the ABCMR would have to amend Mr. LaBonte's DD-214. Appx11. Pursuant to his discharge upgrade, Mr. LaBonte's DD-214 lists his discharge as "General, Under Honorable Conditions." However, the "Narrative Reason for Separation" states "Court-Martial, Other." The court assumed that Mr. LaBonte's narrative reason must change to reflect only disability retirement—with no mention of a court martial—to provide disability retirement. *Id.*

Second, the court held that the DD-214 is an administrative record "related" to courts martial, and that the Board can amend it only in limited circumstances under 10 U.S.C. § 1552(f). Appx12-14. More specifically, § 1552(f) limits the Board's power to correct "records of courts-martial and related administrative records pertaining to court-martial cases" unless the amendment "reflect[s] actions taken by reviewing authorities" or "action on the sentence of a court-martial for purposes of clemency." Appx10. The court relied largely on dictionary definitions of the word "related" to adopt a broad interpretation of the phrase "related administrative records." Appx12.

The court therefore held that neither exception in § 1552(f) allowed the Board to amend Mr. LaBonte's DD-214 to grant him relief, because Mr. LaBonte was not seeking clemency (he had already received it from the ADRB), nor was he

asking for corrections based on the reviewing authorities' action that would otherwise adjust the circumstances of his sentence. Appx14.

SUMMARY OF ARGUMENT

The trial court erred in holding that Mr. LaBonte did not state a claim for which relief can be granted. The Board can grant Mr. LaBonte the disability retirement the Army owes him. The Board exercises broad remedial authority under § 1552(a), which allows for the correction of military records when necessary to correct an error or remove an injustice, including granting retroactive disability retirement, and nothing in statute or regulation prevents the Board from granting Mr. LaBonte's retirement claim and changing his DD-214 to reflect that retirement status. In particular, § 1552(f) does not bar the Board from correcting Mr. LaBonte's DD-214. The DD-214, a generic form given to all servicemembers as a record of separation, is not a "related administrative record pertaining to court-martial cases" that the Board cannot correct. The trial court erred by focusing only on the statutory word "related," and by broadly overreading that term in a way that conflicts with the remainder of § 1552, its objectives, and its context. Furthermore, even if the prohibition in § 1552(f) encompassed correcting a DD-214, which it does not, the Board still would have the authority to grant disability retirement to Mr. LaBonte because no statute or regulation requires that the Board amend the "Narrative Reason for Separation" on his DD-214 to grant his requested relief.

ARGUMENT

I. Standard of Review

The Federal Circuit reviews *de novo* the Court of Federal Claims' dismissal, whether for failure to state a claim upon which relief may be granted or for lack of jurisdiction. *Mercier v. United States*, 786 F.3d 971, 980 (Fed. Cir. 2015) (failure to state a claim); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1363 (Fed. Cir. 2005) (lack of jurisdiction). It also reviews questions of statutory interpretation *de novo*. *Mohsenzadeh v. Lee*, 790 F.3d 1377, 1381 (Fed. Cir. 2015); *Energy E. Corp. v. United States*, 645 F.3d 1358, 1361 (Fed. Cir. 2011).

II. The Board Has the Power to Grant Disability Retirement and to Correct Mr. LaBonte's Records to Reflect That Retirement.

The ABCMR can grant Mr. LaBonte retroactive placement in disability retirement status, entitling him to backpay and other incidental benefits. The Board possesses broad remedial authority under 10 U.S.C. § 1552(a), its enabling statute, and § 1552(f) does not prevent the Board from granting disability retirement and making corresponding changes to Mr. LaBonte's DD-214.

a. The Board has Broad Authority to Correct Military Records and May Grant Mr. LaBonte Retroactive Disability Retirement Pay.

The ABCMR and the corrections boards for other military departments exercise broad remedial authority under § 1552(a) to correct errors generally, and grant retroactive disability retirement pay specifically. The enabling statute allows

the Secretary to "correct any military record" when "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). The ABCMR's jurisdiction extends to *any military record* of the Department of the Army. Army Reg. 15-185, *Army Board for Correction of Military Records* (Mar. 31, 2006), ¶ 2-3(a). In particular, under Department of Defense guidance, the ABCMR and its sister corrections boards serve the important function of correcting errors resulting from failure to recognize PTSD, TBIs, and other mental health conditions resulting from service and combat. *See, e.g.*, A.M. Kurta, Memorandum for Secretaries of the Military Departments, Dep't of Def., 1-2 (Aug. 25, 2017), https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf (instructing corrections boards to review applications based on matters relating to mental health conditions, including PTSD and TBI, with "liberal consideration" and explaining that the Boards' role is to give veterans an opportunity to receive relief even when a condition was diagnosed years later); C. Hagel, Memorandum for Secretaries of the Military Departments, 1-2, Secretary of the Navy (Sept. 3, 2014), https://archive.defense.gov/news/osd009883-14.pdf.

Pursuant to its broad remedial power under § 1552(a), the Board has the authority to grant retroactive disability retirement. For servicemembers who are not evaluated for disability retirement while in service, the corrections boards are the

"proper tribunal to determine eligibility for disability retirement." *Chambers v. United States*, 417 F.3d 1218, 1225 (Fed. Cir. 2005) (quoting *Friedman v. United States*, 310 F.2d 381, 396 (Ct. Cl. 1962)). Congress "entrusted the military boards with the task of determining whether a serviceman should be retired for disability" after he or she has been discharged. *Pope v. United States*, 77 Fed. Cl. 737, 741 (Fed. Cl. 2007); *see also McCord v. United States*, 131 Fed. Cl. 333, 347-49 (Fed. Cl. 2017) (remanding a case to the Board ordering it to grant disability retirement).

Section 1201 of Title 10 and Army Regulation 635-40 govern the Army's evaluation of disability retirement, including when the ABCMR is considering retroactive disability retirement. Under § 1201, the Army is to retire soldiers unfit for duty for a disability that is "permanent" and "stable" when that condition is at least 30 percent disabling under the VA rating schedule and occurred in the line of duty or as the proximate result of duty. Servicemembers who meet the statutory criteria for disability retirement under § 1201 are entitled to that compensation. *Fisher v. United States*, 402 F.3d 1167, 1175 (Fed. Cir. 2005) (noting Military Pay Act creates an entitlement to disability retirement for qualified servicemembers).

Army Regulation 635-40 sets additional limits on servicemembers' eligibility for retirement by preventing an active servicemember from undergoing evaluation for disability retirement while charged with an offense and undergoing a court martial. Army Reg. 635-40, ¶ 4-1. Paragraph 4-2 of the regulation provides

that soldiers "may not be referred for, or continue, disability processing if under sentence of dismissal or punitive discharge." *Id.* ¶ 4-2. Once a servicemember has obtained clemency and is no longer under a sentence of a punitive discharge, however, the Army may grant them retirement. Appx10.

Mr. LaBonte is entitled to disability retirement pay, and the Board has the authority to grant it. He is more than 30 percent disabled due to his service-connected disabilities, and the evidence demonstrates his disabilities were similarly disabling and rendered him unfit for duty prior to separation. Appx286-294 (Mr. LaBonte's brief before the ABCMR analyzing testimony from medical experts); *see, e.g.*, Appx539 (opining that Mr. LaBonte was a "highly compromised individual" in need of further treatment in 2004). Section 1201, therefore, entitles him to pay. And because the ADRB granted clemency to correct the injustice of his Bad Conduct discharge, he is no longer under a sentence of punitive discharge. Under both § 1552 and Army Regulation 635-40, the ABCMR has the authority to grant retroactive disability retirement pay to Mr. LaBonte. The Court of Federal Claims correctly analyzed this statutory and regulatory framework and held that because of Mr. LaBonte's clemency, the Army could award him disability evaluation and retirement under Army Regulation 635-40. Appx8-10.

b. The Board May Award Mr. LaBonte's Disability Retirement Consistent with § 1552(f).

The court below erred, however, in holding that 10 U.S.C. § 1552(f) creates a bar to the Board's otherwise broad authority to act in Mr. LaBonte's case by preventing the Board from amending his DD-214 to remove a reference to his court-martial conviction. Section 1552(f) does not obviate the Board's broader obligation to correct errors and injustices, nor does it conflict with the relief Mr. LaBonte requests.

Section 1552(f) states:

> (f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title…. action under subsection (a) may extend only to—
>
> (1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or
>
> (2) action on the sentence of a court-martial for purposes of clemency.

10 U.S.C. § 1552.

In other words, the ABCMR unquestionably has the authority to change references to courts martial on DD-214s when it acts under its clemency authority to provide upgrades for Bad Conduct or Dishonorable discharges. Here, the ADRB already granted Mr. LaBonte clemency and upgraded his discharge

characterization to General. Therefore, when he sought disability retirement before the ABCMR, Mr. LaBonte no longer needed to seek clemency for his punitive discharge to be eligible for disability retirement.

Moreover, the ABCMR could have changed the narrative reason for separation on Mr. LaBonte's DD-214 in order to reflect the ADRB grant of clemency, as correction boards have done before. Granting relief to a Marine in 2014, the Board for Correction of Naval Records amended the separation code and narrative reason for separation on his DD-214 from court-martial to "Secretarial Authority" *after* a discharge review board had already upgraded the servicemember's Bad Conduct discharge. Board for Correction of Naval Records ("BCNR"), 5448-14 / 8917-13 (June 17, 2014).[2] The board did not cite its clemency authority as the basis for the decision; rather, it explained that it was acting to correct an "administrative oversight not to change the reason for separation." *Id.* at 2.

Nothing in Mr. LaBonte's request for disability retirement implicates § 1552(f), as it requires no action on "records of courts-martial and related administrative records." This is true whether or not granting disability retirement results in a change to Mr. LaBonte's DD-214: a DD-214 is neither a court-martial

[2] Available in the Reading Room for BCNR decisions at https://boards.law.af.mil/NAVY/BCNR/CY2014/NR5448%2014.pdf.

record nor a related administrative record pertaining to a court-martial case. Thus, to the extent retirement processing requires a change to Mr. LaBonte's DD-214, the Board is empowered to act under § 1552(a) without running afoul of § 1552(f)'s limitations.

The decision below erred by interpreting "related administrative records pertaining to court-martial cases" to encompass a DD-214 form. The court's interpretation of § 1552(f) focused on one word in the statute, "related," and insisted that "the question comes down to whether the plaintiff's DD-214 is an administrative record 'related' to plaintiff's court-martial." Appx12. It relied on dictionary definitions of "related" (defined broadly to mean anything "[c]onnected in some way; having relationship to or with something else") to find that because Mr. LaBonte's DD-214 references his prior court martial, it is a "related administrative record." *Id.* (quoting *Related*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

This reasoning falls short. The decision ignores the remainder of the phrase in the statute, which reads in full, "related administrative record *pertaining to* court-martial cases." Appx11 (emphasis added). By ignoring the limiting phrase "pertaining to," the trial court rendered that phrase superfluous, violating the very principle of interpretation the court claimed to embrace. Appx12 ("Courts hesitate to adopt a statutory interpretation that renders another portion of the same law

surplusage.") (citing *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020)). To "pertain" to something means "to belong, to be connected (in various ways); e.g. as a native or inhabitant, as part of a whole, as an appendage or accessory, as dependent," *Pertain*, OXFORD ENGLISH DICTIONARY (2nd ed. 1989), or "to belong as a part, member, accessory, or product," *Pertain*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003). A DD-214 is not a part or product of a court martial; rather, it is issued to all servicemembers upon separation, regardless of whether they were court-martialed, and is produced by a separate entity from the court-martial convening authority, independent from any court-martial process. *See* Department of Defense Instruction ("DoDI") 1336.01, Enclosure 2, Enclosure 3. Therefore, in the plain text of the statute, Congress has spoken unambiguously: the statutory phrase "related administrative record pertaining to court-martial cases" does not refer to a DD-214.

Even accepting the trial court's emphasis on the term "related," the court erred by failing to read the word "related" with regard to the statutory provision's objectives and context. The Supreme Court has explained, when considering the term "related" multiple times across multiple statutes, that the term must be read in context because applying a literal definition of "related" is a "project doomed to failure" and "everything is related to everything else." *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (quoting *Cal. Div. of Labor Standards Enf't v. Dillingham*

Constr., Inc., 519 U.S. 316, 335 (1997) (Scalia, J., concurring)). If "extended to the furthest stretch of [its] indeterminacy," the statutory word "related" would "stop nowhere," and therefore, a court should look to legislative history and Congress' policy objectives to supply a limiting principle to the term. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015) (internal alterations and quotation marks omitted); *see also N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (explaining that an "uncritical literalism" is not of help when interpreting the phrase "relate to" and courts must look instead to "the objectives of the [ ] statute as a guide"). Where the term "related" is at issue, a court "must resolve [a] dispute by looking to 'the structure of [the statute] and its other provisions.'" *United States v. Woods*, 571 U.S. 31, 40 (2013) (quoting *Maracich*, 570 U.S. at 49). In particular, a statute's "context . . . may tug . . . in favor of a narrower reading" of the word "related." *Mellouli*, 135 S. Ct. at 1990 (quoting *Yates v. United States,* 574 U.S. 528, 539 (2015)) (alterations omitted).

Following the Supreme Court's direction on how to interpret "related" reveals that the trial court's interpretation of the term was too expansive. First, the policy objectives of § 1552(a) and (f)—to provide broad authority for the Board to correct records while avoiding overturning the findings of a court martial—support a narrower reading of "related" that excludes a DD-214. Second, the context of the remainder of Title 10 and regulations governing the court-martial process further

reveal the trial court's error. Last, long-held canons of statutory interpretation demonstrate that Mr. LaBonte's narrower reading of the word "related" to exclude a DD-214 is correct, and that the Board may exercise its authority to grant him disability retirement.

i. Congress did not intend § 1552(f) to apply to cases like Mr. LaBonte's.

Legislative history shows Congress did not adopt § 1552(f) to bar relief in cases like Mr. LaBonte's. Because "related" has different scopes in different contexts, it is appropriate to consult the statutory objective of § 1552(f) to determine the meaning of "related" in this particular context. *Mellouli*, 135 S. Ct. at 1990 (relying on the statute's "historical background" to interpret the reach of "related to"); *see also N.Y. & Presbyterian Hosp. v. United States*, 881 F.3d 877, 887 (Fed. Cir. 2018) ("Courts also may rely on legislative history to inform their interpretation of statutes.").

Congress meant to prevent only overturning legal judgments and sullying the integrity of the military-justice process. Changing Mr. LaBonte's narrative reason for separation on his current DD-214—a single line on a universal document that the ADRB already corrected to reflect its clemency action—falls far outside of the class of corrections Congress designed § 1552(f) to prevent.

Before the passage of § 1552, Congress handled changes in servicemembers' military records by passing private bills. Congress enacted § 1552 to delegate its

own broad authority to remedy injustices in servicemembers' records to the Board. *Oleson v. United States*, 172 Ct. Cl. 9, 18 (Ct. Cl. 1965) (noting that Congress meant for the Boards to have the authority to change records "just as Congress could do, and had done, by private act").

Later, Congress passed § 1552(f) as part of the Military Justice Act of 1983 to maintain the legal integrity of military-justice proceedings. The provision was introduced in S. 974, and the Senate Report that accompanied the bill clarifies the drafters' intent. *See* S. Rep. No. 98-53 (1983). The report explains that the purpose of the adjustment of the military correction boards' authority was to ensure that the boards did not "render *legal judgments* on the results of courts-martial by overturning, *as a matter of law, findings or sentences of courts-martial*." *Id.* at 11 (emphasis added). In other words, the subsection (f) amendment to § 1552 was meant to stop the boards from making corrections only where such corrections would legally overturn court-martial proceedings. Because "the members of these boards generally are laymen who have no judicial training," *id.* at 36, Congress wrote § 1552(f) to isolate the legal judgments of the military-justice system from the boards' authority, but to leave intact the boards' broad authority to correct error and remedy injustice, including errors and injustices related to court-martial outcomes. Section 1552(f) arose from Congress' desire to balance efficiency and justice—the boards were designed to correct injustices more swiftly than Congress

itself could, but in a way that would not corrupt the integrity of the procedures used in the military-justice system.

This Court and other courts of appeals have previously examined the legislative objective of § 1552(f) and have read it as consistent with the purpose of preventing the boards only from overturning legal judgments. The Court of Appeals for the Sixth Circuit, for example, has explained that subsection (f) prevents boards from "overturning, as a matter of law, findings or sentences" of courts martial, and found that the "clear statutory directive" of § 1552(f) is to prevent military corrections boards "from setting aside court-martials," *Bolton v. Dept. of Navy Bd. for Corr. of Naval Records*, 914 F.3d 401, 408 (6th Cir. 2019) (quoting, in part, S. Rep. No. 98-53, at 11 (1983)), which amending a DD-214 would plainly not do. This Court and the Court of Appeals for the D.C. Circuit have concluded the same. *See, e.g.*, *Cossio v. Donley*, 527 F. App'x 932, 935 (Fed. Cir. 2013) (per curiam) ("[T]he Board 'has no authority to void court-martial convictions.'") (citing § 1552(f)); *Kendall v. Army Bd. for Corr. of Military Records*, 996 F.2d 362, 364 & n.2 (D.C. Cir. 1993) (noting that the ABCMR "properly decided that it lacked jurisdiction" to set aside a conviction or delete the conviction record entirely); *Martinez v. United States*, 914 F.2d 1486, 1488 (Fed. Cir. 1990) (holding that § 1552(f) denies the ABCMR any "authority to void court-martial convictions").

Mr. LaBonte does not challenge the legal outcome of his court-martial process or seek to void his conviction, and correcting his DD-214 would not do so. Because Congress did not intend § 1552(f) to apply where no issues of military criminal justice were at stake, it did not intend § 1552(f) to apply to a case like Mr. LaBonte's.

ii. Statutory and regulatory context demonstrates that the DD-214 is not a related record under § 1552(f).

Regulatory and statutory context confirms the narrow scope of § 1552(f). Context is particularly critical when the breadth of the word "related" is at issue. *Mellouli*, 135 S. Ct. at 1990; *Woods*, 571 U.S. at 40. Although the word "related" may be indeterminate in isolation, the text is unambiguous in its statutory context. *See Bush v. United States*, 655 F.3d 1323, 1329 (Fed. Cir. 2011) ("Questions of statutory construction turn on 'the language itself, the *specific context* in which the language is used, and the *broader context* of the statute as a whole.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (emphasis added). Section 1552(f) extends only to a narrow set of records that document or are part of the court-martial proceedings themselves.

a. "Related" Records in the Statutory and Regulatory Context

To understand why a DD-214 is not included in the scope of the § 1552(f) provision, it is helpful to understand what is included. Section 1552(f) does not define either "records of courts-martial" or "other related administrative records."

However, other parts of Title 10 and other provisions of military law provide guidance.

Section 801(14) of Title 10 defines the phrase "records of courts-martial." "Record" when "used in connection with the proceedings of a court-martial" means:

> (A) an official written transcript, written summary, or other writing relating to the proceedings; or
>
> (B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.

10 U.S.C. § 801(14). As the court below acknowledged, a DD-214 is not a court-martial record, and the government has not argued otherwise. Appx11.

However, the lower court did err by adopting a mistakenly broad interpretation of the phrase "other writing relating to the proceeding" in § 801(14)(A). Appx13. Relying on the erroneous reading, the court was compelled to adopt an even broader definition of "related administrative records" to avoid rendering either phrase superfluous. *Id*. ("This broad definition gives effect both to § 801(14) and § 1552(f) and the records each covers.").

A broad reading of "other writing" is clearly inconsistent with the surrounding text. *See Yates*, 574 U.S. at 543 ("[A] word is given more precise content by the neighboring words with which it is associated.") (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)). Its context makes clear that "other

writing" is part of a narrow set of records documenting court-martial trials themselves, such as written transcripts, summaries, and audio and video recordings. "Related administrative records," though broader, are still confined to the documents that serve a role in a court martial other than documenting the trial.

Defining "related administrative records" in § 1552(f) to include only documents that are directly associated with the court-martial proceeding itself comports with how "related" is used in other statutory provisions pertaining to courts martial. For example, § 864 of Title 10, which details a judge advocate's review of a finding of guilt in a summary court martial and was, like § 1552(f), enacted in the Military Justice Act of 1983, provides that "[t]he record of trial and *related documents* in each case" should be sent to the judge advocate reviewing the case, who may "disapprove or approve," "remit, commute, or suspend," "order a rehearing," or "dismiss the charges." 10 U.S.C. § 864; 97 Stat. 1400, Sec. 7(a)(1) (emphasis added). This usage mirrors both the usage of "related" in § 1552(f) and favors a narrow reading of "related." *See Robers v. United States*, 572 U.S. 639, 643 (2014) ("[I]dentical words used in different parts of the same statute are ... presumed to have the same meaning.") (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006)).

The Manual for Courts-Martial ("MCM"), a manual issued by Executive Order that governs the administration of the Uniform Code of Military Justice

("UCMJ") and certain provisions of annual National Defense Authorization Acts,[3] gives meaning to both "records of courts-martial" and "related administrative records" consistent with the statutory context and legislative purpose. MCM (2019), https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates. The MCM requires that the military prepare and maintain a "record of trial" that includes not just official court-martial transcripts, summaries, and recordings that define "record" in § 801(14), but various other documents associated with the court martial itself. 10 U.S.C. § 801(14); MCM, Rules for Courts-Martial ("R.C.M.") 1112; *see, e.g.*, Appx1367 (Record of Trial). This includes documents such as: exhibits relevant to the trial, proof of service of the record on defense counsel, post-trial recommendations by reviewing authorities, and any recommendations for clemency. MCM, R.C.M. 1112. Many of these documents are administrative records. For example, Mr. LaBonte's record of trial includes copies of several "Personnel Action" forms that are administrative documents that describe the time he spent AWOL. Appx1340-43.

Thus, what the MCM calls the "record of trial" includes both the § 801(14) "records" and additional administrative documents. Together, they serve a critical

[3] "The UCMJ sets out the system's basic statutory structure, and the *MCM* is the UCMJ's principal implementing regulation." Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process*, 165 MIL. L. REV. 237, 241 (2000).

purpose in the review of court-martial decisions through the military appellate process. *See* MCM, R.C.M. 1112(f). These records are so critical to the integrity of the administration of military justice that a military judge can reduce the sentence of the accused if the record of trial is incomplete. MCM, R.C.M. 1112(d)(3)(C). It is precisely these records—records of court-martial trials and related administrative records crucial to the integrity of military justice—that the ABCMR is precluded from amending under § 1552(f).

b. A DD-214 Form is Not Within the Reach of § 1552(f).

The DD-214 form, the "Certificate of Release or Discharge From Active Duty," serves a very different role than the records envisioned by § 1552(f) to be outside the Board's power to correct. DoDI 1336.01 explains that a DD-214 provides a "complete summation of active military personnel service" and serves as "an authoritative source of personnel information for *administrative* purposes." DoDI 1336.01, at 3(a) (emphasis added). This includes everything from military specialty, Box 11, to decorations and medals received, Box 13. *See, e.g.*, Appx754 (Mr. LaBonte's DD-214). Every servicemember that leaves the armed forces "shall be given a completed DD Form 214." DoDI 1336.01, Enclosure 3, 3(c).

The DD-214 is a critical administrative record needed to access a number of both military and civilian services, such as "veterans benefits, reemployment rights, and unemployment insurance." DoDI 1336.01, Enclosure 2, 3(b). However,

the DD-214 serves no role in the administration of military justice. The MCM, the UCMJ, and Army Regulation 27-10[4]—together providing a comprehensive statutory and regulatory basis for military justice—make no mention of the DD-214 in their extensive documentation of procedure and law. The DD-214 does not document findings of fact or law, or provide any meaningful record of courts martial. To the extent a DD-214 even mentions a court martial, it reflects only the result of its sentence, and only if part of the sentence was a discharge. *See, e.g.*, Appx754 (DD-214 Box 28). Finally, the DD-214 is "not intended to have *any legal effect* on termination of a soldier's service." Army Reg. 635-8, ¶5-1 (emphasis added).

The expansive definition of "related" that the court below used stretches far beyond the reach demonstrated by its statutory and regulatory context. Under the trial court's reasoning, any record that even mentions a court martial would be beyond the correction of the Board—even if clearly in error—unless related to clemency or appellate review. Even records of deliberation and decisions of the Board itself involving courts martial could not be amended to correct an error. That cannot be the meaning of § 1552(f).

[4] Army Regulation 27-10 implements the MCM and builds on the procedures it creates. Army Reg. 27-10, *Military Justice* (November 20, 2020), ¶1-1.

iii. Canons of statutory construction support Mr. LaBonte's reading of § 1552(f).

Long-standing principles of statutory construction advise that here, the Board's authority under § 1552(a) to correct errors and injustices should be construed broadly, because the statute seeks to support members of the Armed Services and is remedial in nature. Section 1552(f) should be construed narrowly, in conjunction with the canon of construing exceptions to general policies narrowly, the canon against implied repeals, and the rule against absurdities.

First, the word "related" should be read in Mr. LaBonte's favor because statutes benefitting veterans and servicemembers "are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). It is a "longstanding canon" that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Kirkendall v. Dep't of Army*, 479 F.3d 830, 843-44 (Fed. Cir. 2007) (quoting *Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977)).

The Board's power under § 1552(a) to correct errors and injustices should also be read broadly because it is a remedial statute. When a "statute is remedial in nature," it "should be construed broadly to effectuate its purposes." *Wells Fargo & Co. v. United States.*, 827 F.3d 1026, 1036 (Fed. Cir. 2016) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)); *see also Smith v. Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994). Courts and executive officials interpreting § 1552 have

recognized that it "is remedial and to be liberally construed, rather than narrowly or technically." *Oleson*, 172 Ct. Cl. at 18; *see also Kalista v. Sec. of Navy*, 560 F. Supp. 608, 611 (D. Colo. 1983); *Correction of Mil. and Naval Records*, 40 U.S. Op. Atty. Gen. 504 (1947) (opining that § 1552 is a "remedial provision" "to be liberally construed with a view to effecting the intended purpose" of "correcting errors and removing injustices").

Therefore, the exception to the Board's authority in § 1552(a) set forth in § 1552(f) should be construed narrowly. An exception to a "general statement of policy" is "usually read ... narrowly in order to preserve the primary operation of the provision." *Maracich*, 570 U.S. at 60 (quoting *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)). This is especially true with exceptions to statutes which, like § 1552(a), are "humanitarian and remedial" in nature. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Restricting the Board's § 1552(a) authority to amend a DD-214 after a servicemember has been granted clemency would disrupt the primary operation of § 1552, a remedial statute intended to correct errors and remove injustices.

Further, because this case involves a collision between two federal statutes, the canon against implied repeals supports a narrow reading of the term "related." On one hand, § 1201 provides for disability retirement based on disabling service-related conditions. On the other hand, § 1552 governs a separate but sometimes

overlapping category of claims, namely those for military records corrections due to error or injustice, including when disability retirement was incorrectly or unjustly withheld. On their face, these statutes do not conflict or purport to amend or affect each other, and no explicit or clear congressional intent exists to suggest otherwise. Yet, the broad interpretation of § 1552(f) adopted by the court below creates a collision or conflict between § 1201 and § 1552 because it prevents servicemembers who are otherwise eligible for disability retirement under § 1201 from receiving it.

The canon against implied repeals favors a narrower reading of § 1552(f) that gives full effect to both statutes and avoids conflict between them. The Supreme Court recently reiterated the strong presumption against interpretations that create conflicts. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("[I]n approaching a claimed conflict, we come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.") (quoting *United States v. Fausto*, 484 U.S. 439, 452-53 (1988)) (internal quotations and alterations omitted). In sum, before the passage of § 1552(f), the correction boards had the statutory power to grant retroactive disability retirements; they retained the power after § 1552(f)'s passage, and nothing in the legislative history or purpose of § 1552(f) establishes otherwise or purports to change the scope of the

boards' power. This Court should affirm as much and note that § 1552(f) does not reflect a "clear manifest congressional intention to displace" § 1201 and outlaw certain retirement claims. *Id.* at 1617.

Courts also avoid certain constructions of statutory terms when such constructions would invite an "absurd result," *Dupuch-Carron v. Sec. of Health and Human Servs.*, 969 F.3d 1318, 1330 (Fed. Cir. 2020), as would occur with a broad reading of "related administrative records." It is appropriate for a court to consider the congressional intent surrounding its passage in order to "lend [the statutory term] its proper scope." *Id.* (quoting *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989)). In light of the legislative intent surrounding the passage of both § 1552(a) and § 1552(f), to give the boards broad authority to correct military records where an error or injustice exists, it would be absurd for the Boards to lack the authority to amend a DD-214 form in cases like Mr. LaBonte's, where a clear error and injustice remains present, and where doing so would not disrupt the legal findings of a court martial.

A broad over-reading of the term "related" to encompass a DD-214 also leads to an absurd and unfair result for Mr. LaBonte. The military correction boards expressly possess the authority to "act on a sentence for the purposes of clemency," under § 1552(f)(2), and accordingly, they can correct the narrative reason for separation to remove a reference to a court martial. *E.g.*, Air Force

Board for the Correction of Military Records, BC199602552d5 (July 12, 2016)[5] (changing an Air Force member's narrative reason for separation from court martial to "Secretarial Authority"). The corrections boards can do so even after a prior clemency action granted an upgrade to a non-punitive discharge characterization but failed to update the narrative reason and separation code on a DD-214 to remove references to the court-martial convictions. *E.g.*, Board for Correction of Naval Records, 5448-14 / 8917-13 (June 17, 2014)[6] (amending DD-214 *after* prior clemency action to remedy "administrative oversight"). It is absurd for Mr. LaBonte to not be able to receive further action on his sentence to relieve the impacts of his Bad Conduct discharge *only because he has already received clemency* from the ADRB. That result would be a wholly unfounded procedural bar, inconsistent with the Board's power and mandate to amend a servicemember's records and "grant thorough and fitting relief" to remedy an injustice present in a military record. *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Caddington v. United States*, 147 Ct. Cl. 629, 634 (1959)).

In short, § 1552 unambiguously allows the Board to grant Mr. LaBonte the relief he seeks. This Court should reject the trial court's overbroad reading of the

[5] Available at https://plus.lexis.com/api/permalink/7a1dc344-69d2-4af9-b7dc-b33cad69ac0c/?context=1530671.
[6] Available in the Reading Room for BCNR decisions at https://boards.law.af.mil/NAVY/BCNR/CY2014/NR5448%2014.pdf.

word "related." By over-reading and over-emphasizing the word "related," the trial court disrupts the statute's broad remedial objectives, context, and other provisions. That reading would once again deny Mr. LaBonte the relief that the Army has long owed him, which would be an absurd result out of line with Congress' intent to remedy errors and injustices present in servicemembers' records. This Court should hold that § 1552(f) does not prohibit the ABCMR from granting disability retirement and making associated corrections to Mr. LaBonte's DD-214.

III. The Board Need Not Amend Mr. LaBonte's DD-214 Form to Grant His Disability Retirement.

Even if the Court were to (incorrectly) hold that § 1552(f) prohibits correcting Mr. LaBonte's DD-214 because it currently states that he was court-martialed, the Court should nonetheless reverse the decision below and remand. This is because Mr. LaBonte does not primarily seek to correct his DD-214; he seeks disability retirement. Although it is appropriate and within the ABCMR's power to concomitantly change Mr. LaBonte's DD-214 to reflect disability retirement if it grants that retirement under 10 U.S.C. § 1201, the DD-214 correction is not intrinsically linked to retroactive disability retirement. In fact, the Army has already amended Mr. LaBonte's DD-214 once to, among others, add missing information regarding his awards. Appx191-92. Nothing prevents the

Board from granting Mr. LaBonte's disability retirement without removing the court-martial reference on his DD-214.

Contrary to the government's bare assertion that the Board *must* remove the court-martial reference to grant retroactive disability retirement, Appx2922, the Board can, and does, grant disability retirement by issuing retirement orders without ordering a specific correction to the veteran's DD-214. *See, e.g.*, ABCMR, 20130022069 (Sept. 12, 2014)[7] (granting servicemembers disability retirement by issuing new retirement orders, without mentioning their DD-214s); ABCMR, 20150007051 (May 28, 2015)[8] (same); ABCMR, 20120015742 (July 2, 2014)[9] (same). That practice is consistent with regulations which require that at the conclusion of the disability evaluation system process, the Army issue "retirement orders or other disposition instructions." Army Reg. 635-40, ¶ 4-24(b). Neither the government nor the Army has offered a legal basis for why it *must* amend the DD-214 in order to grant Mr. LaBonte his requested relief.

The Board itself has also never asserted that it *must* amend Mr. LaBonte's DD-214 in order to grant him disability retirement. The decision below says that

[7] Available in the Reading Room for ABCMR decisions at https://boards.law.af.mil/ARMY/BCMR/CY2013/20130022069%20.txt.
[8] Available in the Reading Room for ABCMR decisions at https://boards.law.af.mil/ARMY/BCMR/CY2015/20150007051%20.txt.
[9] Available in the Reading Room for ABCMR decisions at https://boards.law.af.mil/ARMY/BCMR/CY2012/20120015742.txt.

the Board asserted in its 2017 decision that it would need to correct Mr. LaBonte's DD-214 in order to grant the relief the he seeks, and the court relied on that statement to hold that amending the DD-214 is, in fact, necessary. Appx11. But the Board did not say that. It never stated that amending the DD-214 form was *necessary* to grant disability retirement; it simply *declined to* amend the DD-214. Appx232.

This Court should not afford any weight to the government's *post hoc* position. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019) ("[A] court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack.") (cleaned up). The agency's position has also been inconsistent, demonstrating that deference is not warranted. *See Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1340 (Fed. Cir. 2006) (refusing to defer to an agency's interpretation of a statute it implemented, partly because the agency acted inconsistently in similar cases and raised its position, for the first time, during litigation, showing it did not conduct "careful analysis" of its position). The Board's position has varied based on the forum in which it is presented. Appx2922; *see also* Army Review Bds. Agency, *Disability Appeals* (Sept. 21, 2020, 9:26 PM), https://arba.army.pentagon.mil/disability-appeals.html. Their website instructs servicemembers with court-martial convictions seeking disability retirement to

request clemency from the ADRB and then retirement from the ABCMR. The contrary position offered here is owed no weight.

Even assuming that, as a matter of internal practice, the Army changes a DD-214's "Narrative Reason for Separation" to reflect ABCMR's grants of retroactive retirement, that practice alone cannot excuse the Board from considering retirement claims, or correcting errors and injustices in a former servicemember's case. *See, e.g.*, *Strickland v. United States*, 69 Fed. Cl. 684, 706 (2006) (noting that a corrections board has "a duty to determine whether there has been error or injustice and, if there has been, to grant thorough and fitting relief"). This Court should not permit the Board to avoid its statutory duty to provide medical retirement to qualified servicemembers like Mr. LaBonte.

CONCLUSION

For years, the Army has failed to provide Mr. LaBonte with the disability evaluation and retirement that he was owed when he suffered a TBI and disabling PTSD while in service. Now, the government relies on an inconsistent and inaccurate reading of 10 U.S.C. § 1552 to justify the Army's continued inaction. This Court should use its power to correct these wrongs and provide Mr. LaBonte the opportunity to seek the relief to which he is entitled. Mr. LaBonte respectfully requests that this Court hold that 10 U.S.C. § 1552 does not interfere with the ABCMR's power to provide the relief Mr. LaBonte seeks, reverse the decision

below, and remand to the Court of Federal Claims for consideration of Mr. LaBonte's case on the merits.

Dated: March 19, 2021

Respectfully submitted,

/s/ Renée A. Burbank
Renée A. Burbank, Supervising Attorney
Brandon Baum, Law Student Intern*
Lernik Begian, Law Student Intern*
Rhea Christmas, Law Student Intern*
Alexander Fischer, Law Student Intern*
Casey Smith, Law Student Intern*
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School†
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-3928
Renee.Burbank@ylsclinics.org
**Law Student Appearances pending*

Counsel for Appellant

† This brief does not purport to state the positions of Yale Law School, if any.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). This brief contains 9538 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2021, Appellant's foregoing Opening Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

Dated: March 19, 2021

Respectfully submitted,

/s/ Renée A. Burbank
Renée A. Burbank
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Org.
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Tel: (203) 432-3928
Renee.Burbank@ylsclinics.org

Counsel for Appellant

ADDENDUM

In the United States Court of Federal Claims

No. 18-1784C
Filed: October 30, 2020
FOR PUBLICATION

ROBERT J. LABONTE, JR.,

***Plaintiff*,**

v.

UNITED STATES,

***Defendant*.**

Keywords: Motion to Dismiss; Jurisdiction; Failure to State a Claim; Rule 12(b)(1); Rule 12(b)(6); 10 U.S.C. § 1201; Military Disability Retirement; Court-Martial; 10 U.S.C. § 1552(f)

Renée A. Burbank, Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization, New Haven, CT, with *Lernik Begian*, *Alexander M. Fischer*, and *Casey Smith*, law students, practicing pursuant to Rule 83.3 of the Rules of the Court of Federal Claims, for the plaintiff.

Richard P. Schroeder, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., with *MAJ Nicholas D. Morjal*, U.S. Army Legal Services Agency, Ft. Belvoir, VA, of counsel, for the defendant.

MEMORANDUM OPINION

***HERTLING*, Judge**

The plaintiff, Robert J. LaBonte, seeks correction of his military records to receive disability retirement, back pay, and retirement benefits. He was discharged from the Army by court-martial, receiving a Bad Conduct Discharge. The Army has since granted the plaintiff clemency, upgrading the characterization of his discharge to General, Under Honorable Conditions. As a result of this upgrade to his discharge, the plaintiff claims that he is now entitled to disability retirement for his service-related post-traumatic stress disorder ("PTSD") and traumatic brain injury ("TBI").

On remand from this Court to the Army Board for Correction of Military Records ("ABCMR" or "the Board"), the Board denied his claim. The plaintiff challenges the Board's decision, moving for judgment on the administrative record. He also alleges that the Board violated his fifth amendment due-process rights. The defendant moves to dismiss, arguing that the Court does not have jurisdiction, and that the plaintiff fails to state a claim on which relief can be granted. In the alternative, the defendant cross-moves for judgment on the administrative record.

The Board lacks the statutory authority to grant the plaintiff the relief he seeks. Accordingly, the Court grants the defendant's motion to dismiss on the ground that the plaintiff has failed to state a claim on which relief can be granted. Rule 12(b)(6), Rules of the Court of Federal Claims ("RCFC"). Having dismissed the plaintiff's claim for relief under RCFC 12(b)(6), the Court does not have jurisdiction over the plaintiff's due-process claim standing alone. Accordingly, that claim is dismissed under RCFC 12(b)(1) and 12(h)(3). The parties' cross-motions for judgment on the administrative record are denied as moot.

I. BACKGROUND

A. Facts[1]

The plaintiff enlisted in the U.S. Army in 2002. (ECF 1, Pl.'s Compl. ¶ 17.) In 2004, during a deployment to Iraq, he fell out of a 30-foot guard tower. (*Id.* ¶ 25.) Another soldier found him, unconscious and bleeding from a head wound, at the base of the tower. (*Id.* ¶ 26.) The plaintiff received first aid from that soldier and stitches at the local aid station. (*Id.* ¶¶ 26-27.)

After returning from Iraq, the plaintiff sought help for symptoms of mental distress, anxiety, disrupted sleep, and panic attacks from his chain of command and from the Fort Hood Mental Health Clinic. (*Id.* ¶¶ 31-32, 36-38.) The plaintiff's chain of command referred him to an Army chaplain. (*Id.* ¶¶ 33-34.) An intake specialist at the Fort Hood Mental Health Clinic documented his symptoms and diagnosed him with an adjustment disorder. (*Id.* ¶ 39.)

In 2004, shortly after his visit to the Fort Hood Mental Health Clinic, the plaintiff learned that he was scheduled to deploy to Iraq again. (*Id.* ¶ 40.) He informed his chain-of-command that he was not mentally prepared to return to Iraq. (*Id.*) The plaintiff ultimately went absent without leave ("AWOL") for six months. (*Id.* ¶ 42.) In 2006, he voluntarily returned to Fort Hood. (*Id.* ¶ 43.) He pleaded guilty to a charge of desertion in a court-martial proceeding and was separated from the Army with a Bad Conduct Discharge. (*Id.* ¶¶ 46-47.)

The plaintiff subsequently received post-service assessments of his condition. In 2012, the plaintiff sought treatment from a clinical psychologist, who diagnosed him with PTSD stemming from his combat service in Iraq. (*Id.* ¶ 52.) In 2014, the plaintiff was evaluated by a psychiatrist, who diagnosed him with service-connected PTSD. (*Id.* ¶ 54.)

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[1] Because the Court grants the defendant's motion to dismiss under RCFC 12(b)(6), the facts as alleged in the complaint (ECF 1) are assumed to be true. This recitation of the facts does not therefore constitute findings of fact; rather, the Court provides a recitation of the facts as alleged by the plaintiff. For additional context, the Court also refers to facts derived from the administrative record in the case. These facts are included only to add context and to provide a more complete background; the Court does not rely on any factual claim aside from those contained in the plaintiff's complaint in deciding the defendant's motion to dismiss.

In 2014, the U.S. Department of Veterans Affairs ("VA") concluded that the plaintiff was eligible for VA benefits for service-connected PTSD, TBI, depression, headaches, back pain, tinnitus, a painful scar, and ulcers. (*Id.* ¶ 57.) In 2015, a neurologist found that the plaintiff had suffered a moderate TBI when he fell from the guard tower in 2004. (*Id.* ¶ 55.) In 2016, the plaintiff received a 100% service-connected disability rating from the VA. (*Id.* ¶ 56.) In the same year, an Army Review Boards Agency psychiatrist assessed the plaintiff and issued an advisory opinion. (AR 116-18.[2]) She concluded that "there is sufficient evidence to state that the [plaintiff's] PTSD is mitigating for the offenses which led to his discharge from the Army." (*Id.* at 118.)

B. Procedural history

After he received his PTSD diagnoses, the plaintiff sought formal review of his service history and post-discharge benefits. In 2014, the Army Discharge Review Board ("ADRB") upgraded the characterization of the plaintiff's discharge from Bad Conduct to General, Under Honorable Conditions. (Pl.'s Compl. ¶ 58.) The ADRB concluded that if the plaintiff would have had a PTSD diagnosis and an indication of TBI at the time of his court-martial, they would have been mitigating factors at his trial. (*Id.*)

In 2015, having secured the upgrade in his discharge, the plaintiff applied to the ABCMR for retroactive medical retirement. (*Id.* ¶ 59.) He alleged that he had had a permanent disability for PTSD, TBI, depression, and anxiety incurred during his service. He argued that the disability caused him to be unfit for service prior to his absence without leave, his court-martial, and his discharge. The Board found that "based on the available post-service medical evidence, it could be argued the [plaintiff] met the criteria for referral to the [Physical Disability Evaluation System ("PDES")] prior to going AWOL." (AR 115.) The Board, however, denied the plaintiff's request on the ground that it "is not empowered to set aside a conviction" under 10 U.S.C. § 1552. (AR 115; *see also* Pl.'s Compl. ¶ 61.)

After reviewing the Board's decision, Deputy Assistant Secretary of the Army Francine Blackmon found that "there [wa]s sufficient evidence to grant additional relief." (AR 11-12; *see also* Pl.'s Compl. ¶ 63.) Secretary Blackmon directed the Office of the Surgeon General "to determine if [the plaintiff] should have been retired or discharged by reason of physical disability through the Integrated Disability Evaluation System [("IDES")]." (AR 11; *see also* Pl.'s Compl. ¶ 63.)

Two Army physicians conducted an evaluation of the plaintiff as part of a Medical Evaluation Board ("MEB") to determine "whether PDES processing was warranted at the time

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[2] Citations to the Administrative Record submitted by the defendant (ECF 27, supplemented at ECF 44, ECF 49, and ECF 67) are denoted "AR" and followed by the page number denoted within the Administrative Record. As noted in footnote 1, this information is provided only for additional context and supplements the factual allegations in the complaint, but the Court does not rely on these facts in ruling on the motion to dismiss.

of separation." (AR 60; *see also* Pl.'s Compl. ¶¶ 67-71.) They concluded in their narrative summary that the plaintiff failed to meet medical-retention standards in 2003 because of his PTSD, generalized anxiety disorder, and major depressive disorder, and in 2004 because of his TBI. (Pl.'s Compl. ¶¶ 69-70; AR 62-65.) They found it "unlikely that any further interventions for these conditions would have returned the service member to duties consistent with their [*sic*] rank and [Military Occupational Specialty]." (AR 61; *see also* Pl.'s Compl. ¶ 70.)

Following the MEB's evaluation, Dr. Eric L. Doane issued a medical advisory opinion, reviewing the plaintiff's medical records for the ABCMR. (Pl.'s Compl. ¶ 84.) He found that at the time of the plaintiff's separation, there were no indications of disabling PTSD and no symptoms of TBI. (AR 68.) Dr. Doane concluded that the plaintiff was not in need of disability processing at the time of his separation. (*Id.* at 70.) The ABCMR adopted Dr. Doane's opinion in full as its sole basis for denying the plaintiff's claim. (Pl.'s Compl. ¶ 99; *see also* AR 71.)

In 2018, the plaintiff filed a complaint in this court. (ECF 1.) He alleged that the ABCMR's denial of his claim was arbitrary and capricious, in bad faith, unsupported by substantial evidence, and a violation of the due process clause of the fifth amendment. After briefing and oral argument, the Court (1) held that it had jurisdiction over the plaintiff's claim for medical retirement; (2) vacated the ABCMR's decision to deny the plaintiff's claim as contrary to law because the Board had "relied on a medical opinion that failed to consider medical evidence as required by 10 U.S.C. § 1552(h)(2)(B)"; (3) remanded to the Board to "obtain a further medical opinion that considers the medical evidence as required by law and thereafter resolve plaintiff's claim"; and (4) dismissed the remainder of the complaint for lack of jurisdiction. (ECF 57.)

In 2020, the Board, on remand, again denied the plaintiff's request for disability retirement. (AR 2369.) Pursuant to the remand order, the ABCMR obtained a medical advisory opinion from the Office of the Surgeon General. (*Id.* at 2432.) Dr. Denise M. Richardson issued an advisory opinion, which concluded that "there is no evidence to support the need for disability processing" because there is "a dearth of medical records available during [the plaintiff's] time in service." (*Id.*) The Board found that relief was not warranted based on a review of the 2016 Army Review Boards Agency psychiatrist's advisory opinion, the 2018 and 2020 reviews conducted by the Office of the Surgeon General physicians (Dr. Doane and Dr. Richardson), and the narrative summary of the 2018 MEB. The Board found that the evidence in favor of the plaintiff's claim was "outweighed by the other evidence of record addressing the state of disabilities in 2008 that indicate the [plaintiff] met medical retention standards prior to separation." (*Id.* at 2408-09.)

The plaintiff challenges the Board's latest decision and moves for judgment on the administrative record. (ECF 68.) The defendant renews its motion to dismiss and, in the alternative, cross-moves for judgment on the administrative record. (ECF 74.) The plaintiff has

responded (ECF 82), and the defendant has replied. (ECF 83.) The Court held oral argument on October 13, 2020.[3]

II. JURISDICTION

The Tucker Act, 28 U.S.C. § 1491, limits this Court's jurisdiction to causes of action based on money-mandating statutes and regulations. *Metz v. United States*, 466 F.3d 991, 995-98 (Fed. Cir. 2006). A statute is money-mandating when it is "reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003). The plaintiff bears the burden of proving subject-matter jurisdiction by a preponderance of the evidence. *Freeman v. United States*, 875 F.3d 623, 628 (Fed. Cir. 2017).

A. Money-Mandating Source

The plaintiff is not collaterally attacking his court-martial conviction, as the defendant contends, but instead the plaintiff asserts a disability-retirement claim. The statute governing military retirement for disability, 10 U.S.C. § 1201, is a money-mandating statute because "when the requirements of the statute are met—i.e., when the Secretary determines that a service 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." *Fisher v. United States*, 402 F.3d 1167, 1175 (Fed. Cir. 2005).

B. Class of Plaintiffs Entitled to Relief

The plaintiff must make "a nonfrivolous assertion that [he] is within the class of plaintiffs entitled to recover under the money-mandating source" but does not need to "make the additional nonfrivolous allegation that [he] is entitled to relief under the relevant money-mandating source." *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1309 (Fed. Cir. 2008). The issue is whether the plaintiff in this case made a nonfrivolous assertion that he is within the class of plaintiffs entitled to recover under the disability statute.

The Federal Circuit has found jurisdiction even when it was clear from the face of the plaintiff's complaint that he did not come within the reach of the money-mandating source. *See In re United States*, 463 F.3d 1328, 1334-35 (Fed. Cir. 2006). In *In re United States*, the plaintiff asserted a claim for damages under a money-mandating statute. *Id.* at 1334. A claim of unlawful discharge would have supported Tucker Act jurisdiction, so the plaintiff claimed that his non-appointment was a form of discharge to bring his claim under the statute. *Id.* The Federal Circuit found that this argument had no merit, but it held that the plaintiff had nonetheless established jurisdiction. *Id.* at 1335.

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[3] The Court acknowledges the excellent advocacy provided to the plaintiff by his law student representatives from the Yale Law School Veterans Legal Services Clinic.

The plaintiff here has likewise made a nonfrivolous assertion that he is within the class of plaintiffs entitled to recover under the disability statute. The defendant claims that the plaintiff is ineligible for disability retirement under 10 U.S.C. § 1201 because both his court-martial makes him ineligible under Army Regulation 635-40, and 10 U.S.C. § 1552(f) prohibits the Board from correcting his record to provide him disability retirement. The plaintiff asserts that the regulation does not preclude his claim because the clemency he received from the ADRB made him eligible under the regulation. He also argues that 10 U.S.C. § 1552(f) does not apply because his claim does not require the Board to correct a record of court-martial or a "related administrative record[ ]." As a result, the plaintiff argues that he is within the class of plaintiffs entitled to recover under 10 U.S.C. § 1201.

Even if the plaintiff's substantive claim for relief is without merit, it meets the bar set by *In re United States* to bring the plaintiff within the class entitled to relief under the disability statute and thereby satisfies the threshold to establish the Court's jurisdiction to resolve the plaintiff's claim.

Although the plaintiff successfully makes a nonfrivolous claim that he is within the class of plaintiffs entitled to recover under the disability statute, this showing merely meets the threshold for jurisdiction. On the merits, he must show that the Board can grant relief. The Federal Circuit held that "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." *Fisher*, 402 F.3d at 1175-76. The plaintiff's losing argument on the merits of his claim in *In re United States* had that consequence. *In re United States*, 463 F.3d at 1335 ("[T]he Court of Federal Claims should have dismissed [the plaintiff's] section 153(a) claim under its Rule 12(b)(6) for failure to state a claim upon which relief could be granted.").

C. Timeliness

The plaintiff's claim must be filed within six years after it first accrues. 28 U.S.C. § 2501; *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005). More than six years have passed since 2004, when the plaintiff claims that the Army failed to discharge him on medical grounds. At that time, the Army had not processed the plaintiff for or denied him disability retirement. Instead, the Board was the first to deny the plaintiff's retirement claim in 2018 after the plaintiff's discharge was upgraded.

A service member's failure to request a disability board prior to discharge "can invoke the statute of limitations when the service member has sufficient actual or constructive notice of his disability, and hence, of his entitlement to disability retirement pay, at the time of discharge." *Chambers*, 417 F.3d at 1226. The plaintiff did not request a disability review prior to his discharge, but he did report symptoms related to his later-diagnosed PTSD and TBI.

There is a difference between knowing one's symptoms and knowing one's condition. Despite identifying some symptoms, the plaintiff likely did not know either the extent of his disabilities or his entitlement to disability retirement. In *Colon v. United States*, for example, the plaintiff was "aware that he had trouble sleeping and suffered from anxiety," as was evidenced

by his military records. 71 Fed. Cl. 473, 482 (2006). Judge Lettow found that there was no evidence that the plaintiff "knew his mental condition was so severely disabling that it would have qualified him for disability retirement . . . ." *Id.* The court also considered that "the Army itself did not give any indication that it believed the plaintiff suffered from a mental disability." *Id. See also Johnson v. United States*, 123 Fed. Cl. 174, 179 (2015).

In this case, the plaintiff likewise was aware of his mental distress, anxiety, and disrupted sleep as documented in his visit to the Fort Hood Mental Health Clinic. (Pl.'s Compl. ¶ 37; AR 772.) There is no indication, however, that the plaintiff knew at the time that his conditions may have qualified him for disability retirement. The Army, as in *Colon*, did not give any indication at the time that it believed the plaintiff was suffering from a mental disability. The plaintiff therefore did not have "sufficient actual or constructive notice of his disability," and his claim did not accrue at that time for purpose of the statute of limitations. *See Chambers*, 417 F.3d at 1226.

The first-competent-board rule provides that "a claim for disability retirement pay generally does not accrue until an appropriate military board denies the claim in a final decision[] or refuses to hear the claim." *Sabree v. United States*, 90 Fed. Cl. 683, 694 (2009) (citing *Chambers*, 417 F.3d at 1224). The defendant argues that the ABCMR is not an appropriate military board because it is without the statutory or regulatory authority to provide the relief the plaintiff seeks. The plaintiff responds that he became eligible for retirement benefits when he received clemency, and that upon his clemency he submitted a timely application for relief to the ABCMR, an appropriate military board with the authority to award retirement benefits. Although the Court ultimately holds that the Board lacks statutory authority to provide relief to the plaintiff, that is a decision that goes to the merits of the claim, not the Board's or the Court's jurisdiction to reach the merits. The Board was the first military entity to consider and deny the plaintiff's disability-retirement claim. On that basis, the Court finds that the plaintiff's claim accrued when the Board first denied it in 2018. The plaintiff's claim is timely.

D. Prior Army Decisions

The Court's finding of jurisdiction is consistent with the Army's own actions in this case. The Board originally concluded that it could not set aside the plaintiff's conviction under § 1552, "and since his discharge resulted from his court-martial conviction, he [was] ineligible for processing through the PDES for possible medical retirement." (AR 115.) Secretary Blackmon found enough evidence to grant the plaintiff additional relief. (*Id.* at 11.) Invoking her authority under § 1552, she directed "that the [plaintiff's] case be referred to the Office of the Surgeon General to determine if he should have been retired or discharged by reason of physical disability through the [IDES]." (*Id.*) Following a medical advisory opinion, the Board in 2018 decided on the merits that the plaintiff was not eligible for disability processing. (*Id.* at 71.) After the Court remanded the case back to the Board, it again in 2020 decided the case on the merits. (*See id.* at 2408-09.) The Board has twice decided the plaintiff's claim on the merits. It has never interposed a jurisdictional impediment to resolving the plaintiff's claim for disability-retirement benefits. The Court recognizes the Board's prior determination of its jurisdiction and finds that it further demonstrates the appropriateness of the Court exercising jurisdiction in this case.

In sum, the Court has jurisdiction over the plaintiff's claim for disability retirement because the plaintiff has invoked a money-mandating statute, made a nonfrivolous assertion that he is within the class of plaintiffs entitled to recover under that statute, and filed his claim within six years of being denied relief.

III. FAILURE TO STATE A CLAIM

In addition to its jurisdictional challenge to the plaintiff's claim, the defendant moves to dismiss on the ground that the plaintiff fails to state a claim on which relief can be granted. The defendant argues that the plaintiff's court-martial conviction makes him ineligible for disability retirement. Specifically, the defendant argues that the plaintiff is not eligible for disability processing under Army Regulation 635-40, and that the Board is without authority under 10 U.S.C. § 1552(f) to correct the plaintiff's DD-214 Form to reflect a disability retirement.[4] The plaintiff disagrees with both these arguments.

A. Eligibility for Military Retirement Under the Army Regulation

The parties dispute whether the relevant Army regulation in effect at the time of the plaintiff's discharge precludes the relief the plaintiff seeks. *See* Army Reg. 635-40, *Physical Evaluation for Retention, Retirement, or Separation* (Feb. 8, 2006).[5] The Court holds that it does not.

Army Regulation 635-40 provided the eligibility criteria for disability evaluation. Paragraph 4-1 limited eligibility for soldiers charged with an offense:

> a. *Uniform Code of Military Justice action*. The case of a Soldier charged with an offense under the Uniform Code of Military Justice [("UCMJ")] or who is under investigation for an offense chargeable under the UCMJ which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless—
> (1) The investigation ends without charges.

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[4] "The DD Form 214 . . . is the authoritative source of information required for the administration of State and Federal laws applicable to personnel who have been discharged, released, or transferred to a Reserve Component while on active duty." Department of Defense Instruction 1336.01 ¶ 3(f) (Aug. 20, 2009). The document "provide[s] an accurate and complete summation of active military personnel service." *Id.* ¶ 3(a). Insofar as relevant here, the DD-214 contains a space for noting the narrative reason for a service member's separation from the service and a space for noting the characterization of the service member's service.

[5] Army Regulation 635-40 has changed since the time relevant to this case, but both parties accept the applicability of the version of the regulation in effect at the time of the plaintiff's court-martial.

> (2) The officer exercising proper court-martial jurisdiction dismisses the charges.
> (3) The officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence.

Id. ¶ 4-1 (italicization in original).

Paragraph 4-2 of Army Reg. 635-40 provided that soldiers "may not be referred for, or continue, disability processing if under sentence of dismissal or punitive discharge." *Id.* ¶ 4-2.

First, the parties dispute the reach of paragraph 4-1, but the Court does not read paragraph 4-1 in isolation. *See Analytical Graphics, Inc. v. United States*, 135 Fed. Cl. 378, 407 (2017) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) ("[T]he court must avoid an interpretation of a clause or word which renders other provisions of the statute inconsistent, meaningless, or superfluous.").

The defendant interprets paragraph 4-1 to preclude forever any service member charged with an offense under the UCMJ from disability processing. That interpretation, however, creates an inconsistency between paragraph 4-1 and paragraph 4-2. Not only would paragraph 4-2's limitation on service members under punitive discharge have been superfluous, but paragraph 4-2 also allowed a service member to be referred for disability processing if his sentence is suspended. *See* Army Reg. 635-40, ¶ 4-2 ("If the sentence is suspended, the Soldier's case may then be referred for disability processing.").

The plaintiff interprets paragraph 4-1 only to preclude service members undergoing a court-martial from being processed for disability retirement during the court-martial proceedings or the investigation leading to the court-martial. The plaintiff reads paragraph 4-2 to limit disability processing after conviction and sentencing by court-martial.

The plaintiff's interpretation provides consistency between paragraphs 4-1 and 4-2, when read together, and is preferred.

Second, the parties dispute whether the plaintiff remains subject to a punitive discharge. If the plaintiff remains subject to a punitive discharge, he would be disqualified from being processed for disability retirement under paragraph 4-2. The plaintiff argues that paragraph 4-2 does not apply because the characterization of his service was changed on his DD-214 to remove "Bad Conduct" from the Character of Service block. (*Compare* AR 637 *with* AR 638.) The defendant responds that the plaintiff is still under a punitive discharge because he was discharged pursuant to his court-martial conviction, which has not been reversed. The narrative reason for separation on the plaintiff's DD-214 is still denoted as "Court-Martial, Other." The question before the Court is whether the upgrade in the characterization of his discharge removed the plaintiff from under a punitive discharge.

The upgrade in characterization did have such an effect. A Navy regulation enumerates only two types of punitive discharges: bad conduct and dishonorable. 32 C.F.R. § 724.111.

While the parties have not pointed the Court to an equivalent Army regulation, the Army describes a punitive discharge in similar terms. *See, e.g.*, *United States v. Rush*, 51 M.J. 605, 607 (Army Ct. Crim. App. 1999) ("'[Congress] has demonstrated uncommon concern for punishments extending to dishonorable or bad-conduct discharges.'" (quoting *United States v. Johnson*, 31 C.M.R. 226, 231 (C.M.A. 1962)) (modification in original)).

Although the plaintiff was separated by court-martial, the punitive discharge—Bad Conduct Discharge—is no longer reflected in his official record, the DD-214. The punitive discharge limitation in paragraph 4-2 therefore does not apply to the plaintiff because he is no longer "under" a punitive discharge.

The plaintiff is not currently charged by or undergoing a court-martial and, having received clemency from the ADRB, is no longer subject to a punitive discharge. Therefore, by its own terms, Army Regulation 635-40, in effect at the time of the plaintiff's discharge, does not preclude the plaintiff from disability-retirement processing.

B. ABCMR Statutory Authority

The parties next dispute whether the Board is barred from granting the plaintiff relief due to 10 U.S.C. § 1552(f), which limits the Board's authority to correct records relating to a court-martial. The Court holds that the Board does not have the authority to correct the plaintiff's DD-214 to provide him disability retirement.

Section 1552 of Title 10 provides the Secretary of a military department the authority to "correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). When the correction involves "records of courts-martial and related administrative records pertaining to court-martial cases," the authority to correct a record is limited to "(1) correction of a record to reflect actions taken by reviewing authorities" under the UCMJ, or "(2) action on the sentence of a court-martial for purposes of clemency." *Id.* § 1552(f)(1)-(2).[6] Because the plaintiff does not ask the Board to make a correction based on actions by reviewing authorities under the UCMJ or

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[6] Section 1552(f) provides in full the following:

> (f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to--
>
> (1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or
>
> (2) action on the sentence of a court-martial for purposes of clemency.

10 U.S.C. § 1552(f)(1)-(2).

a correction for purposes of clemency, the Board lacks authority to make a correction to the plaintiff's record of courts-martial and related administrative records.

The threshold question is whether the Board would need to correct the plaintiff's DD-214 to award him disability retirement. The plaintiff's "narrative reason for separation" is noted as "Court-Martial, Other" on his DD-214. (AR 637.) His disability-retirement claim necessarily embodies the argument that he should have been medically discharged and separated prior to his court-martial conviction. The plaintiff claims that there is no regulation or statute preventing his records from reflecting both a court-martial conviction and a medical-retirement status, but the defendant argues that the Board would need to correct his DD-214 to reflect that the plaintiff was medically separated instead of separated pursuant to a court-martial conviction. Consistent with the defendant's position, the plaintiff originally asked the Board in 2015 to "correct his DD-214 . . . to remove the reason for his separation (e.g. court-martial conviction)." (Pl.'s Compl. ¶ 59.)

Although Secretary Blackmon subsequently determined that the evidence supported the plaintiff's request for relief, the Board's original decision in 2017 informs this discussion. The Board found that the plaintiff had requested "in effect" a correction of his DD-214 to show that "he was retired due to physical disability." (AR 86.) The Board concluded that because the plaintiff's court-martial made him ineligible for disability processing, there was "no basis to amend [his] DD Form 214 by changing the reason and authority for separation." (*Id.* at 115.) The Board itself therefore has answered the question; it would need to correct the plaintiff's DD-214 in order to grant the relief the plaintiff seeks.

Because the DD-214 would need to be changed in order to grant the plaintiff the relief he seeks, the next question is whether the DD-214 is a "record[ ] of courts-martial" or a "related administrative record[ ]." If it is, the Board's authority to correct the plaintiff's record is limited.

Courts generally interpret terms of a statute by their plain meaning. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end."). Courts begin with a "careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

Neither party claims that a DD-214 is a "record[ ] of courts-martial" under 10 U.S.C. § 1552(f). Section 801 of Title 10 defines the word "record":

> The term "record", when used in connection with the proceedings of a court-martial, means--
> (A) an official written transcript, written summary, or other writing relating to the proceedings; or
> (B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.

■

10 U.S.C.§ 801(14). Although the DD-214 notes the plaintiff's court-martial, it does not satisfy any of the terms reflected in this statute regarding that proceeding. Hence, it is not a "record[ ] of courts-martial."

The question comes down to whether the plaintiff's DD-214 is an administrative record "related" to the plaintiff's court-martial that the Board has no authority to change pursuant to the limitation of 10 U.S.C. § 1552(f). The defendant argues that the DD-214 is encompassed within the phrase "related administrative record[ ]" because the DD-214 notes the plaintiff's court-martial and is used for administrative purposes. The plaintiff does not dispute that a DD-214 is an administrative record, but argues that his DD-214 is not "related" in any way to his court-martial because every service member has a DD-214, and it is issued by an entity entirely separate from the court-martial authority. Relying on the statute's purpose of fostering an independent military criminal justice system and protecting the finality of its decisions, the plaintiff concludes that the statute only limits changes to the underlying factual record or alterations to the legal conclusions of a court-martial proceeding. He defines the phrase "related administrative record[ ]" as meaning "a non-original record that incorporates or reflects the facts or legal conclusions codified in a 'record' of a court-martial proceeding." (ECF 68 at 33-34.) As an example, the plaintiff points to a charging document from a court-martial.

The full phrase "related administrative record[ ]" is not defined in Title 10.[7] A DD-214 is—without question—an administrative document; it is one that all service members have. The Department of Defense describes it as the "authoritative source of personnel information for administrative purposes." Department of Defense Instruction 1336.01 ¶ 3(a) (Aug. 20, 2009). It is more difficult to determine whether the DD-214 is "related" to a court-martial whenever a service member's DD-214 notes the court-martial as a reason for discharge, but there is reason to find that it is related.

Dictionary definitions of the word "related" support a broad reading of the word. Dictionaries may aid a court in determining a statute's ordinary meaning. *Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020). According to the Oxford English Dictionary, "related" means "[c]onnected or having relation to something else." *Related, adj. and n.*, *Oxford English Dictionary* (3rd ed. 2009). Black's Law Dictionary defines "related" as meaning "[c]onnected in some way; having relationship to or with something else." *Related*, *Black's Law Dictionary* (11th ed. 2019).[8]

A broad reading of the word "related" also gives full effect to the meaning of the statute, especially when read in conjunction with § 801(14). Courts hesitate to adopt a statutory interpretation that renders another portion of the same law surplusage. *Maine Cmty. Health*

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[7] The phrase "related administrative records" in Section 1552 of Title 10 appears to be the only use of the phrase in Title 10.

[8] The other senses of the word provided in both dictionaries are not relevant to this discussion.

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Options v. United States, 140 S. Ct. 1308, 1323 (2020). The plaintiff would effectively read § 1552(f)'s limitation on "related administrative records" out of the law. We know from § 801(14) what records are directly related to a court-martial.

What would otherwise fall under the rubric of administrative records "related" to a court-martial not captured by § 801(14)? Most obviously, the indictment or other charging document fits the description, and so would the record of sentence. These records, however, appear to be encompassed by the broad category of "other writing relating to the proceeding" already captured by that statute.

For the phrase "related administrative record" to have any meaning, it must incorporate a broad definition of "related" to include any administrative document that is connected or has a relationship with a court-martial but is not part of, or contained within, the official records of the court-martial itself.

This broad definition gives effect both to § 801(14) and § 1552(f) and the records each covers. As so limned, § 1552(f) captures any administrative record that reflects the decision of the court-martial. The plaintiff's DD-214 reflects the decision of the court-martial by noting the court-martial as the reason for his separation. The DD-214 is therefore an administrative record "related" to the plaintiff's court-martial under § 1552(f).

The Court notes that its interpretation is consistent with the purpose of the statute as explained by its drafters.[9] The Report of the Senate Committee on Armed Services on the Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393 (1983), which created the provision, discusses the language of 10 U.S.C. § 1552(f). S. Rep. No. 98-53, at 36-37 (1983). The Committee's report notes that the provision "make[s] it clear" that the boards of correction of military records and the discharge review boards "have no authority to modify, as a matter of law, findings or sentences of courts-martial." *Id.* at 36. The exceptions in the statute left intact the authority for the boards to correct "personnel files" and "collateral records" resulting from review of a conviction pursuant to the UCMJ. *Id.* at 36-37.

The ADRB acted in accordance with this interpretation of the statute. When the ADRB granted the plaintiff clemency, it concluded that "[a] change in the reason for discharge is not authorized under the Federal statute." (AR 641.) "Clemency," it explained, "is an act of leniency that reduces the severity of the punishment imposed." (*Id.* at 646.) It could act only to change the characterization of service and not the reason for the plaintiff's separation from the Army because "[t]he ADRB may not upset the finality of a court-martial conviction." (*Id.*) The ADRB therefore found that it could not change the plaintiff's reason for discharge on his DD-

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[9] The Court interprets § 1552(f) based on the statute's language and not on its legislative history. The Court references the legislative history to demonstrate that it does not show a "'clearly expressed legislative intention'" contrary to Court's interpretation of the statutory language. *See Analytical Graphics, Inc.*, 135 Fed. Cl. at 408 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)).

214, even as an act of clemency. As does the Court, the ADRB—the Army board in charge of reviewing discharges—considers a DD-214 a "related administrative record" subject to § 1552(f)'s limitations.

The effect of the statutory language, as interpreted by the Court and the ADRB and understood by the Senate Committee responsible for the language, is to channel claims for post-conviction relief "into the judicial forums established for such actions by Congress in the UCMJ." S. Rep. No. 98-53, at 36.

The statute provides two exceptions to the limitation on the ability of corrections and discharge review boards to remove from a DD-214 a record of conviction by court-martial, but neither applies here. One exception is when the service member receives clemency on the sentence of a court-martial. The plaintiff is not seeking clemency on his sentence here. The second exception is when reviewing authorities constituted under the UCMJ revise or overturn a conviction. The plaintiff never appealed his conviction through the means authorized under the UCMJ, and the time for him to seek such review is long past.

In context, corrections boards and discharge review boards may only correct "personnel files" that reflect a conviction by court-martial when that conviction is overturned on appeal or by other processes provided for in the UCMJ. Otherwise, they may not do so. The DD-214 is an administrative record. The notation on it reflecting a conviction by court-martial leading to a service member's removal from the armed forces is "related" to the determination of the court-martial.

In sum, because the plaintiff's DD-214 is an administrative record "related," under 10 U.S.C. § 1552(f), to his conviction by court-martial and discharge from the Army, the Board is without authority to change the reason for separation due to the court-martial. Because such a change would be necessary for the Board to grant disability retirement in place of separation due to court-martial, the Board is without the authority to grant the plaintiff the relief he seeks. As a result, the Court may not grant the plaintiff relief and dismisses the plaintiff's claim for failure to state a claim on which relief can be granted.

IV. FIFTH AMENDMENT

The plaintiff argues that the ABCMR's decision violates his right to due process under the fifth amendment to the Constitution for two reasons: (1) the Board failed to consider competent medical evidence, denying him an opportunity to be heard at a meaningful time and in a meaningful manner; and (2) the Board applied a different presumption to the plaintiff's case than it does to similar cases, denying him the same fair process afforded to others.

The Court's dismissal of the plaintiff's claim for disability retirement for failure to state a claim upon which relief can be granted requires dismissal of the plaintiff's constitutional claim. This court has jurisdiction to hear due-process claims only in support of money-mandating claims. *See Holley v. United States*, 124 F.3d 1462, 1467 (Fed. Cir. 1997). This court "has full authority to consider constitutional issues relevant to an appeal that is properly before it." *Id.* The court, however, lacks jurisdiction to hear fifth amendment due-process claims standing

alone. *Wheeler v. United States*, 11 F.3d 156, 159 (Fed. Cir. 1993) (upholding a Court of Federal Claims decision dismissing a plaintiff's due-process claim because it dismissed the plaintiff's other claim for failure to state a claim upon which relief can be granted). In the absence of an applicable money-mandating statute, now lost to the plaintiff, the only recourse for the plaintiff's constitutional claim is federal district court. Accordingly, the plaintiff's fifth amendment claim is dismissed for lack of jurisdiction.

V. CONCLUSION

The ABCMR lacks authority to alter the plaintiff's DD-214 to remove the record of the plaintiff's court-martial conviction. The Board may not, therefore, revise the nature of the plaintiff's discharge. To find for the plaintiff, the Board would have to revise the plaintiff's DD-214 to revise the reason for the plaintiff's separation from the Army. This power the Board is denied by law. Accordingly, the plaintiff's Complaint fails to state a claim upon which relief can be granted and must be dismissed under RCFC 12(b)(6).

With the claim under the Military Pay Act dismissed, the Court does not have jurisdiction over the plaintiff's fifth amendment claim, which must be dismissed pursuant to RCFC 12(b)(1) and 12(h)(3). The parties' cross-motions for judgment on the administrative record are denied as moot.

The Court will issue an order in accordance with this opinion.

s/ Richard A. Hertling
Richard A. Hertling
Judge

In the United States Court of Federal Claims

No. 18-1784C
Filed: October 30, 2020
NOT FOR PUBLICATION

ROBERT J. LABONTE, JR.,

***Plaintiff*,**

v.

UNITED STATES,

Defendant.

ORDER

For the reasons provided in the Memorandum Opinion filed concurrently with this Order, the defendant's motion to dismiss (ECF 74) the complaint for failure to state a claim under Rule 12(b)(6) of the Rules of the Court of Federal Claims is **GRANTED**, and the complaint's first claim for relief for disability-retirement is **DISMISSED with prejudice**.

The defendant's motion to dismiss (ECF 74) the complaint for lack of jurisdiction under Rule 12(b)(1) of the Rules of the Court of Federal Claims is **GRANTED,** and the complaint's second claim for relief under the due process clause of the fifth amendment is **DISMISSED without prejudice**.

The plaintiff's motion for judgment on the administrative record (ECF 68) and the defendant's cross-motion for judgment on the administrative record (ECF 74) are **DENIED** as moot.

The Clerk is directed to enter final judgment for the defendant and close the case. No costs are awarded.

It is so **ORDERED**.

s/Richard A. Hertling
Richard A. Hertling
Judge

In the United States Court of Federal Claims

No. 18-1784 C
Filed: October 30, 2020

ROBERT J. LABONTE, JR.

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Memorandum Opinion and [separate] Order, filed October 30, 2020, granting defendant's motion to dismiss and denying as moot, the parties' cross-motions for judgment on the administrative record,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant, and plaintiff's claim for relief for disability-retirement is dismissed, with prejudice, for failure to state a claim upon which relief can be granted, and plaintiff's claim for relief under the due process clause of the fifth amendment is dismissed, without prejudice, for lack of jurisdiction. No costs are awarded.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.