No. 21-2095

United States Court of Appeals for the Federal Circuit

ROBERT L. DOYON,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-01964-LKG

BRIEF OF APPELLANT

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August 24, 2021

CERTIFICATE OF INTEREST

Case Numbers 2021-2095

Short Case Caption *Doyon v. United States*

Filing Party Robert L. Doyon

I certify the following information is accurate and complete to the best of my knowledge.

Date: August 24, 2021 Signature: */s/ Michael Clemente*
Name: Michael Clemente

1. Represented Entities. Provide the full names of all entities represented by undersigned counsel in this case.

Robert L. Doyon, an individual.

2. Real Party in Interest. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

N/A.

3. Parent Corporations and Stockholders. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

N/A.

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

Latham & Watkins LLP: Nathaniel McPherson (no longer with firm).

National Veterans Legal Services Program (of counsel to Mr. Doyon): Bart Stichman, Esther Leibfarth, David Sonenshine

5. **Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None.

6. **Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

Not applicable.

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STATEMENT OF RELATED CASES

No other appeal in or from the same civil action or proceeding in the lower court was previously before this or any other appellate court.

JURISDICTIONAL STATEMENT

This case involves a challenge to a decision from the Board for the Correction of Naval Records (BCNR or Board). The Board is "a civilian body within the military service, with broad-ranging authority . . . 'to correct an error or remove an injustice' in a military record." *Clinton v. Goldsmith*, 526 U.S. 529, 538 (1999) (quoting 10 U.S.C. § 1552(a)(1)). Plaintiff-Appellant Robert Doyon petitioned the BCNR to correct his records to show that he was not discharged because of a "personality disorder," but rather because his service-connected post-traumatic stress disorder (PTSD) resulted in a disability retirement. The BCNR denied the application, and Doyon brought suit in the Court of Federal Claims (CFC).

The Tucker Act confers jurisdiction on the CFC over a claim based on "money-mandating" statutes or regulations. *Martinez v. United States*, 333 F.3d 1295, 1302-03 (Fed. Cir. 2003). Here, the money-mandating statutes are 10 U.S.C. §§ 1552, 1201. *See* 10 U.S.C. § 1552(c)(1) (providing that the "Secretary concerned may pay . . . a claim for . . . pecuniary benefits, . . . if, as a result of correcting a record . . . the amount is found to be due the claimant on account of his . . . service"); *id.* § 1201 (mandating disability retirement pay and benefits for qualified service

members); *see also, e.g.*, *McCord v. United States*, 943 F.3d 1354, 1359 (Fed. Cir. 2019) ("Although § 1552 itself is not a 'money-mandating' statute, it becomes 'money-mandating' if a claimant was improperly denied benefits but became entitled to them under other provisions of law." (citation omitted)).

On January 13, 2021, the CFC granted the Government's motion for judgment on the administrative record and denied Doyon's cross-motion for judgment on the administrative record, Appx1-23, and it entered final judgment on January 14, 2021, Appx24. The CFC denied Doyon's motion for reconsideration on June 2, 2021, Appx25-32, and Doyon timely appealed on June 23, 2021, Appx2473. This Court has "jurisdiction over an appeal from a final decision of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3)." *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005).

STATEMENT OF THE ISSUES

1. Whether the BCNR erred by failing to give "liberal consideration" to Doyon's application seeking discharge relief related to his service-connected PTSD, including by failing to give liberal consideration when determining whether Doyon's PTSD led to his discharge.

2. Whether the BCNR's decision denying Doyon's application lacks substantial evidence.

INTRODUCTION

Robert Doyon served honorably in the Navy at the height of the Vietnam War. He acquired PTSD from the traumatic events he experienced during his second and third deployments, had a "nervous collapse," and was administratively separated from the Navy because he was unable to perform his duties. None of that is disputed. Instead, the dispute is over (1) whether Doyon's inability to perform his duties was caused by his PTSD or by an alleged "personality disorder" that predated his enlistment, and (2) whether the BCNR must give "liberal consideration" to Doyon's PTSD-related claim. Both issues should be resolved in Doyon's favor.

Doyon's life before the Vietnam War had no hint of a personality disorder or any other mental health problem. He did not get into trouble at school or elsewhere, he was well-liked and well-integrated in his local community, and his tightknit family was loving and supportive. If anything, Doyon's youth resembled the quaint idealism of a Rockwell painting: He sang in the choir, served as an altar boy, participated enthusiastically in the Boy Scouts, and looked forward to serving in the military, as his father and uncle had done. Doyon also had a clean bill of health, including in his medical examinations when he enlisted in the Navy.

All of that started to change halfway through Doyon's service when he witnessed a horrific fire that led to the greatest loss of life aboard a Navy ship since World War II. The experience deeply traumatized him and sparked his PTSD. Then,

after several of his friends deserted, Doyon became the target of harassment and death threats from his shipmates, exacerbating his PTSD. Doyon eventually had a complete breakdown and was hospitalized for two weeks. When he returned to duty, one of his friends was killed in front of him, only moments after announcing that he had become a father. Doyon's PTSD worsened to the point that he tried to kill himself. The Navy then discharged him, claiming that his struggles were due to a longstanding "personality disorder" that predated his service.

Doyon's life after the Navy was dominated by his undiagnosed PTSD, leading to suicidal depression, alcohol abuse, and near-constant mental distress. In 2013, after waking up to a suicide note that he did not remember writing, Doyon sought and received help from the Department of Veterans Affairs (VA). The VA twice diagnosed him with PTSD connected to his service in the Vietnam War. A third psychiatrist later confirmed that diagnosis, and also concluded that there was "no medical evidence" to support a diagnosis of "personality disorder."

Doyon was far from the only Vietnam veteran struggling from undiagnosed PTSD. The Department of Defense recognized as much starting in 2014, when it issued new guidance requiring the BCNR and other military correction boards to give "liberal consideration" to PTSD-related claims from veterans who served before PTSD was recognized as a diagnosis. Congress likewise mandated "liberal consideration" for such claimants, amending the BCNR's enabling statute.

Doyon then requested the BCNR to correct his military records to show that he was not discharged due to a "personality disorder," but rather because of his service-connected PTSD—a change in his discharge status that would result in disability retirement in his case. The BCNR denied the request without reference to "liberal consideration," concluding that the record contained sufficient evidence of a preexisting personality disorder, though not disputing Doyon's PTSD. The CFC agreed with the Board, claiming that although the "liberal consideration" mandate applies to "any petition for discharge relief," it does not apply to petitions seeking to change the reason for discharge to disability retirement.

The BCNR erred by refusing to give "liberal consideration" to Doyon's application. Under the Board's enabling statute, claims "for review of a discharge" relating to PTSD must be reviewed "with liberal consideration to the claimant that [PTSD] . . . potentially contributed to the circumstances resulting in the discharge." 10 U.S.C. § 1552(h)(1)-(2). That provision's plain meaning, structure, purpose, and legislative history all confirm that the BCNR needed to give liberal consideration here. It failed to do so, and the Government has yet to offer any defense for that error.

Liberal consideration was independently required by the mandatory guidance in memoranda from Secretary of Defense Chuck Hagel and Undersecretary of Defense Anthony Kurta. That guidance requires liberal consideration for "any

petition seeking discharge relief" related to PTSD, including requests to change the "narrative reason" for discharge or the "separation code." Appx1943. That is precisely what Doyon sought: His application asked the BCNR to change the separation code listed as the narrative reason for his discharge from unsuitability due to personality disorder to a PTSD-related disability retirement. The BCNR regularly resolves similar applications seeking disability retirement, and it was required to do so with liberal consideration here.

The BCNR's decision is also unsupported by substantial evidence. Even absent liberal consideration, Doyon's application should have been granted because there is no evidence that he had a personality disorder before enlisting in the Navy. To the contrary, the evidence overwhelmingly shows that PTSD caused his discharge: It is *undisputed* that Doyon acquired PTSD from the traumatic events he experienced during service, and that he subsequently became unable to perform his duties. The BCNR failed to address many of these facts, ignoring substantial parts of the record and compounding that error with a critical factual mistake.

For all of these reasons, the BCNR's decision, and the CFC's decision upholding it, should be reversed and judgment should be entered for Doyon.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Life Before Serving In The Vietnam War

Doyon grew up in a middle-class suburban neighborhood outside Boston. Appx1575 ¶ 1. His parents were loving and attentive, they disciplined "through the word, not the rod," and they "were not drinkers." Appx1448 ¶ 4; *see also* Appx1576 ¶ 7. Doyon was the oldest of four boys, as well as the oldest cousin in his tightknit extended family. Appx1575 ¶¶ 1-2.

As the oldest, Doyon sought to set a good example—and he succeeded. Appx1575 ¶¶ 1,3. He did not get into trouble at school or elsewhere, and he did not drink or use drugs. Appx1447-1450 ¶¶ 3-4, 9-15; Appx1568 ¶ 3. Instead, he invested in work, church, and school. Doyon had a paper route and other jobs, which he passed on to his younger brothers. Appx1575-1576 ¶ 4; Appx1449 ¶ 10. He was an avid participant in the Boy Scouts of America, advancing from Cub Scout, to Boy Scout, and then on to Explorer Scout in high school. Appx1575 ¶ 3; Appx1450 ¶¶ 11-13. Like his family, Doyon was a "devout Catholic," Appx1257, and he served as an altar boy in church, taking those "responsibilities seriously," Appx1450 ¶ 14. Although his grades in school were mediocre (he was a "B-C student"), he worked hard and was well-liked by his teachers, some of whom he remains in contact with today. Appx1576 ¶ 5; Appx1450 ¶ 15. He played soccer and other intramural

sports and was an "enthusiastic singer" in the high school choir. Appx1575 ¶ 3; Appx1568 ¶ 3. In short, Doyon had a happy and untroubled youth, and was actively engaged with family, work, church, Scouting, and school—all without incident.

Doyon was also physically and mentally healthy. He was never diagnosed with a personality disorder or any other mental health issue, nor did he behave in a way suggestive of such a disorder to those who knew him. Appx1451 ¶ 18 (Doyon's brother describing him as a "mild-mannered gentleman"); Appx1568-1569 ¶¶ 3-4 (Doyon's childhood friend describing him as a "regular guy" and stating that he "never observed (or heard about) anything unusual about" him); Appx1426-1429 (overview of Doyon's psychiatric, medical, and social history).

Beyond his parents, Doyon's strongest influence growing up was his father's twin brother, Gerard. Appx1576 ¶ 8. Doyon's father and uncle had served together in World War II and remained close throughout life. Appx1448 ¶ 6; Appx1449 ¶ 8; Appx1577 ¶ 11. While Doyon's father was an engineer, Uncle Gerard was an artist (and later an art professor), and Doyon took after his uncle in that respect. Appx1449 ¶ 9. When it came time for college, though, Doyon ultimately enrolled in the Pratt Institute's architecture program at the urging of his father, who wanted Doyon "as the older brother, to pursue some kind of technical profession." Appx1448 ¶ 7. After a year of struggling with technical classes, Doyon and his father agreed that architecture was not the right fit and that his "aptitudes were more like Uncle

Gerard's." Appx1449 ¶ 9. That would prove right decades later when Doyon earned his fine arts degree at the Ringling School of Art and Design. Appx1428.

B. Doyon's Service During The Vietnam War

1. Enlistment, Training, And First Deployment

In 1965, after a year in college, Doyon enlisted in the Navy Reserves, and the following year he enlisted in the Navy. Appx1237-1238. Given his admiration for his father and uncle and their service in World War II, Doyon "looked forward to service" in the military, which was "a great source of family pride." Appx1577. Doyon's father had misgivings about the Vietnam War, but ultimately encouraged his son to enlist, "serve with honor," and pursue the training opportunities provided by the Navy. Appx1656-1659. When Doyon enlisted, the Navy performed a medical examination and confirmed that he had no physical or mental conditions that would render him unfit to serve. *See* Appx1455-1456 (Report of Medical Examination from 1965, marking "normal" instead of "abnormal" for the psychiatric evaluation, which required "[s]pecify[ing] any personality deviation"); Appx1237-1238 (noting no medical conditions at time of enlistment in 1965 and 1966).

After completing boot camp, where Doyon was a "platoon leader," Appx1657, he advanced to the rank of Airman Apprentice and was assigned to an aircraft carrier, the *USS Intrepid*, Appx1239-1240. Doyon ultimately deployed three times to Vietnam aboard the *Intrepid* between June 1966 and October 1968.

Appx1254-1259. During those deployments, aircraft from the *Intrepid* bombed targets in Vietnam and shot down enemy planes. Appx1254-1259. Doyon served honorably throughout this time, earning multiple medals and commendations and, before the events causing his PTSD, was not subject to any disciplinary actions. Appx1242-1246; Appx1109-1110.

In October 1966, during Doyon's first deployment, a major fire broke out on another deployed aircraft carrier, the *USS Oriskany*, killing 44 men. Appx1254. It was around this time that Doyon started to feel conflicted about the Vietnam War, struggling to reconcile his moral conflict between his "Catholic Religion" and his "life's [f]oundation" of duty to country. Appx1254. Doyon nonetheless continued to serve honorably, staying out of trouble, receiving "adequate" marks on performance reviews, and earning the National Defense Service Medal. Appx1054; Appx1240.

2. Second Deployment: The *USS Forrestal* Fire, The "Intrepid Four" Desert, And Doyon's Shipmates Begin Harassing Him And Threatening His Life

In July 1967, Doyon was standing watch on the *USS Intrepid* when he witnessed a catastrophic fire and explosions on the nearby *USS Forrestal.* Appx1251-1252. The fire began when the *Forrestal* was preparing for an attack, and a rocket was accidentally launched across the ship into a parked Skyhawk jet, detonating explosives on the ship's deck and ultimately leaving 134 men dead and

161 injured—the worst loss of life on a U.S. Navy ship since World War II. Appx1926.[1] As helicopters carried the injured to the *Intrepid* for medical attention, the bodies of the dead sailors were ferried to the area in front of Doyon's duty station. Appx1251. The disaster went on for hours as sailors fought to control the fires. Appx1251-1252; Appx1254-1255. The horror of those images was seared into Doyon's mind, leaving him deeply distraught and traumatized, giving rise to his initial symptoms of PTSD. Appx1435-1436; Appx1255 (Doyon: "I still see it some 45 years later.").

After the *USS Forrestal* fire, four sailors from the *Intrepid* deserted. Appx1255. They fled to the Soviet Union, where the communist regime used them as propaganda against the United States. Appx1255. The incident was a major source of embarrassment for the command and crew of the *Intrepid*. Appx1255. Because Doyon had been friends with two of the "Intrepid Four," as they became known, his shipmates took out their anger on him in an unrelenting campaign of harassment and threats that lasted for the rest of his Navy career. Appx1255; Appx1425.

[1] *See Rocket Causes Deadly Fire on Aircraft Carrier*, History.com (updated July 27, 2020), https://www.history.com/this-day-in-history/rocket-causes-deadly-fire-on-aircraft-carrier.

Even though Doyon did not know about the Intrepid Four's desertion plans, *see* Appx1425, his shipmates blamed him for being a "Complicit [and] Unpatriotic Sympathizer to those Rats." Appx1255. Once it became known that Doyon also harbored reservations about the Vietnam War, the harassment and threats escalated. Appx1255-1256. His shipmates called him "N[-word] lover," "Pinko F**got Artiste," and more. Appx1255. They woke him from his sleep waving wrenches and threatening him. Appx1255-1256. They sexually harassed him in the showers. Appx1255. And they threatened to kill him. Appx1255-1256; Appx1425-1426. The threats and harassment continued "daily" for the rest of Doyon's service. Appx1256.

The threats of violence exacerbated Doyon's PTSD symptoms, causing him to "experience constant nightmares" and making him "fearful to the point of not being able to concentrate or sleep." Appx1406. He was in "constant fear of retribution at any time," especially when walking his night watch rounds. Appx1256. After his second deployment, Doyon briefly went absent without leave as he struggled with his undiagnosed PTSD, but he returned two days later after speaking with his father and parish priest. Appx1256; Appx1268-1269.

3. Third Deployment: A "Nervous Collapse" Followed By Separation For An Alleged Preexisting Personality Disorder

During Doyon's third deployment, his PTSD symptoms worsened to the point that he tried to kill himself. Appx1115. On August 15, 1968, Doyon's Naval records

state that he had a "nervous collapse" and was sent to the *Intrepid*'s sick bay. Appx1131; Appx1272. The record notes his "*recent* mental agitation and *deteriorating* work habits;" his connection to the "famous four deserters" and "inability to get along with his peers;" and a concern that he would hurt himself or others. Appx1272 (emphases added). During his intake session, the doctor noted that Doyon "on several instances flew into a rage on the verge of both crying and striking the bulkhead with his fist." Appx1272. The doctor concluded that the *Intrepid* should not "be saddled with the psychological problems and their consequences which *are developing* in this individual, whether this be a psychosis or not." Appx1272 (emphasis added). Doyon's condition deteriorated to a state where it became necessary to administer Thorazine—a drug used to sedate severely psychotic patients. Appx1571; Appx1115.

Doyon was then transferred to a Naval hospital, where he stayed for two weeks (August 16-30, 1968). Appx1274-1275. Throughout that time he experienced nightmares and mental distress. Appx1577-1578 ¶ 14; Appx1406; Appx1425. The doctor's notes state that Doyon "was aware he had started to function poorly [and] attempted to seek help." Appx1698. Doyon was diagnosed with "Passive Aggressive Personality," but the record does not explain that diagnosis. Appx1274-1275. Instead, it says that Doyon "appeared to gain some

insight while in the hospital," was "sufficiently motivated" to rejoin the *Intrepid*, and may be able to succeed "with some support aboard the ship." Appx1275.

When Doyon returned to the *Intrepid*, however, his shipmates harassed him even more. Appx1256. Several weeks later, Doyon witnessed one of his few friends killed in a plane crash on the *Intrepid*'s flight deck. Appx1256; Appx1426. Doyon was working as the video-tape operator when his friend, Bobby Lee Spencer, announced that he had just become a father. Appx1256-1257. Moments later, a plane crashed into the flight deck, severing Spencer's legs and dragging the remainder of his body into the sea. Appx1256. After Doyon witnessed the crash, he was required as the video-tape operator to replay the footage of Spencer's death to different superiors for 6-8 hours. Appx1256-1257. This incident further aggravated Doyon's PTSD, causing him to lose sleep, suffer from frequent graphic nightmares, become easily agitated, and struggle to focus. Appx1357; Appx1426.

A week later, Doyon's commanding officer submitted a recommendation to discharge Doyon on the basis that he had preexisting personality disorder from before enlistment. Appx1279-1280; *see also* Appx1282. Doyon was sent back to the United States, where he received his final mental evaluation. Appx1282. The Navy psychologist stated that Doyon was "agitated and hostile" and had "conflicts with the military." Appx1282. He stated that Doyon "has had similar conflicts with other organizations" years earlier because he "was about to be placed on academic

probation in an Architecture school in New York prior to entering the service." Appx1282. Based on that, the Navy psychologist concluded that Doyon "evidence[d] a longstanding characterological, attitudinal and behavioral pattern which existed prior to enlistment," and diagnosed him with the personality disorder of "Emotionally Unstable Personality." Appx1282. The report concludes by stating that Doyon "does not appear likely to respond to service rehabilitation," and should thus be discharged. Appx1282; *see also* Appx1284 (stating that Doyon's "personality [disorder]" was "acquired during the formative years" and "pre-existed his entry into the Naval Service").

On November 21, 1968, Doyon was discharged pursuant to Bureau of Naval Personnel Manual (BUPERSMAN) C-10310 Art. 265, *see* Appx1134, which permitted the involuntary separation of service members found "unsuitable" due to a "character disorder," also called a "personality disorder," Appx1055; Appx1834. Under the regulations in effect at the time, a personality disorder was "characterized by deeply ingrained maladaptive patterns of behavior that are perceptibly different in quality from psychotic and neurotic symptoms. Generally, these are life-long patterns, often recognizable by the time of adolescence or earlier." Appx1055 (citation omitted). To discharge a service member as unsuitable due to a personality disorder, the regulations required that "the disorder [be] of such severity as to render the member incapable of serving adequately." Appx1834.

Doyon's discharge information was recorded in his DD Form 214, which is a certificate of discharge that former service members use for many purposes, including obtaining benefits from the VA and other agencies and applying to jobs with veterans' preference. Appx1102. The form is titled "Report of Transfer or Discharge." Appx1102. The section addressing Doyon's "Discharge Data" includes a box providing the "Reason and Authority" for his discharge, and the separation code in that box is "BUPERS MANUAL ART. C-10310 265," which means "unsuitability, character disorder." Appx1102; Appx1073. That section also contains a box addressing the "Character of Service," and states "Honorable." Appx1102. A service member's character of service, often called "characterization of service," classifies the quality of the service he or she rendered while in the military.[2]

C. Life After The Vietnam War

1. Doyon Struggles With Undiagnosed PTSD

After discharge, Doyon struggled to reintegrate into civilian life. The second half of his Naval service had fundamentally changed him—a change his younger brother remembers well. *See* Appx1451 ¶¶ 21-22. In the earlier part of Doyon's

[2] The characterization of service for an administrative discharge can be "Honorable," "General (Under Honorable Conditions)" or "Under Other Than Honorable Conditions." *Wisotsky v. United States*, 69 Fed. Cl. 299, 310-11 (2006); *see also* 32 C.F.R. §§ 724.109, 724.111 (addressing administrative and punitive discharges).

service, the brothers had "corresponded frequently," sharing new music, thoughts, and reflections, "as close brothers will." Appx1451 ¶ 21. Doyon's brother recalls that "[a]t some point, his letters changed. They were not as light as they had been." Appx1451 ¶ 21. Doyon did not tell his younger brother all that he was enduring, but his brother knew something was wrong. Appx1451 ¶ 21. "Then the letters slowed, then stopped." Appx1451 ¶ 21. Doyon's brother recalls that "[w]hen Bob returned from the Navy it was clear that he had changed," he was "drinking," and "generally was a changed man." Appx1451 ¶ 22.

Doyon initially sought to follow in the footsteps of his uncle and pursue an art degree. In 1969, he enrolled at the University of Massachusetts, Amherst, but his undiagnosed PTSD proved too disruptive. Appx1262; Appx1286. Doyon found himself reeling in distress whenever he saw violence on TV or in the news. Appx1438. He self-medicated and suffered bouts of suicidal depression. Appx1261; Appx1438. That year, Doyon's best friend from the *Intrepid*, Bob Coakley, committed suicide. Appx1261-1262. After this and other triggers, Doyon walked out of class and did not return. Appx1262; Appx1453. He suffered from undiagnosed PTSD for years and lost the educational benefits of the GI Bill. Appx1262. It took 20 years for Doyon to finally return to complete his education, earning a fine arts degree in 1994. Appx1428; Appx1572.

Like other veterans suffering from PTSD, Doyon's life after the war has been a constant struggle. It has been marked by self-harm, suicidal thoughts, and self-medicating with drugs and alcohol. Appx1262, Appx1264; *see* Appx1112; Appx1124, Appx1438, Appx1572. In addition to his PTSD, Doyon's struggles were exacerbated by the separation code on his DD Form 214, which revealed to potential employers that he had been discharged due to a personality disorder. Appx1264; *see also Casey v. United States*, 8 Cl. Ct. 234, 241-43 (1985) (discussing how discharge records may stigmatize veterans, even when the characterization of service is honorable, because "military separation codes are known, understood and available to . . . prospective employers").

2. Doyon Is Diagnosed With PTSD

In 2013, Doyon stopped drinking and sought medical attention after waking up to a suicide note that he did not remember writing. Appx1264; Appx1374; Appx1404. A VA psychiatrist, Dr. Leonard, examined Doyon in 2014 and diagnosed him with service-connected PTSD, noting military stressors such as the *USS Forestall* fire, the harassment and threats Doyon endured, and the plane crash killing Spencer. Appx1112-1115. Dr. Leonard checked "yes" for every one of the 15 criteria and 7 symptoms of PTSD. Appx1117-1118. The VA assigned Doyon a 50% disability rating for his service-connect PTSD and alcohol use disorder (in early remission). Appx1136-1139.

The next year the VA increased Doyon's disability rating to 70% based on a subsequent evaluation by Dr. Gorman, a VA psychologist. Appx1406-1412; Appx1141-1144. Dr. Gorman likewise concluded that Doyon's condition satisfied every one of the 15 criteria and 7 symptoms of PTSD. Appx1410-1411.

In 2017, a civilian psychiatrist, Dr. Greenzang, evaluated and diagnosed Doyon. Appx1423-1445. Dr. Greenzang is a Diplomat and Lifetime Fellow of the American Board of Psychiatry and Neurology and has extensive experience diagnosing PTSD. Appx1423. Before issuing his findings, Dr. Greenzang evaluated Doyon and reviewed his medical records. Appx1424; Appx1430-1433. In addition to diagnosing Doyon with PTSD, Dr. Greenzang also concluded that Doyon was suffering from PTSD when he was discharged from the Navy in 1968. Appx1437. He also found that Doyon's "history is not consistent with a diagnosis of a personality disorder," and "[t]here is no medical evidence to support" the Navy's contrary conclusion in 1968. Appx1437; Appx1423. Finally, Dr. Greenzang concluded that, based on the Navy's 1968 definitions of "psychosis" and "psychoneurosis," Doyon's condition at the time of discharge fell within those definitions. Appx1424; Appx1438.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Boards for the Correction of Military/Naval Records

Following World War II, Congress enacted legislation to establish administrative boards to correct military records. It took that step in response to "a large number of private bills in congress for formerly discharged servicemen seeking to have the nature and character of their discharge corrected or upgraded." *Kalista v. Sec'y of the Navy*, 560 F. Supp. 608, 611 (D. Colo. 1983) (collecting cases). Under § 1552, each military branch "established a board for the correction of military records whose function is, on application by a serviceman, to review the military record and intervene where necessary to correct error or remove injustice." *Parisi v. Davidson*, 405 U.S. 34, 38 n.4 (1972) (citing 10 U.S.C. § 1552(a)). The correction board for the Navy and the U.S. Marine Corps is the BCNR.[3]

Congress designed the correction boards to serve as a flexible and pragmatic means for aggrieved military members to seek redress. *See Caddington v. United States*, 147 Ct. Cl. 629, 631-32 (1959) (Section 1552 "is remedial in nature," and "imposes on the Secretary the twofold duty to properly evaluate the nature of any error or injustice and, in addition, to take such corrective action as will appropriately

[3] Other correction boards under 10 U.S.C. § 1552 include the Army Board for Correction of Military Records (ABCMR); the Air Force Board for Correction of Military Records (AFBCMR); and the Coast Guard Board of Correction for Military Records (BCMR). *See* Appx1069. These boards are collectively called the Boards for Correction of Military/Naval Records (BCM/NR). *See* Appx1232.

and fully erase such error or compensate such injustice"). Because of that remedial purpose, courts have long held that § 1552 should "be liberally construed, rather than narrowly or technically." *Oleson v. United States*, 172 Ct. Cl. 9, 18 (1965).

Section 1552 authorizes the BCNR to provide a wide range of relief through the correction of records. Correction boards "may entertain any kind of application for correction, ranging from changing the terms of a discharge, to correction of error in citation of awards received, to amending the records" related to performance evaluations and promotion decisions. *Porter v. United States*, 163 F.3d 1304, 1311 (Fed. Cir. 1998) (citations omitted). Former service members may seek to change the "terms of their discharge" for various reasons, *id.*, including to constructively amend a service date, *see, e.g.*, *Prochazka v. United States*, 90 Fed. Cl. 481, 486-87, 497 (2009), to change their characterization of service, *see, e.g.*, *Lefrancois v. Mabus*, 910 F. Supp. 2d 12, 16-17 (D.D.C. 2012), to change their administrative separation to a disability retirement, *see, e.g.*, *Walden v. United States*, 22 Cl. Ct. 532, 536-38 (1991), to increase the rating of their disability retirement, *see, e.g.*, *Van Cleave v. United States*, 70 Fed. Cl. 674, 686 (2006), and more. Section 1552 further provides that the Board may award back pay "if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his . . . service." 10 U.S.C. § 1552(c)(1).

In 2017, Congress amended § 1552 to provide additional protections for former service members who raise claims related to PTSD. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 §§ 520, 522, 131 Stat. 1283, 1379, 1380 (2017). The amendment applies to all "former member[s] of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to post-traumatic stress disorder." 10 U.S.C. § 1552(h)(1). The BCNR must review such claims "with liberal consideration to the claimant that post-traumatic stress disorder . . . potentially contributed to the circumstances resulting in the discharge or dismissal" or potentially contributed to the "original characterization of the claimant's discharge or dismissal." *Id.* § 1552(h)(2)(B).

B. Agency Guidance

In 2014, Secretary of Defense Chuck Hagel issued guidance to the correction boards regarding claims related to PTSD. Appx1232-1235 (Hagel Memo). The Hagel Memo explained that there have been significant advances in the understanding of mental health since the Vietnam War, at which point the diagnosis of PTSD did not exist. Appx1232. As a result, PTSD diagnoses for such veterans often "were not made until decades after service was completed," and their records lack sufficient "substantive information" concerning PTSD. Appx1232. To address that problem, the Hagel Memo requires correction boards to give "[l]iberal

consideration" to "petitions for changes in characterization of service" when the former service member's records "document one or more symptoms" of PTSD. Appx1234.

In 2017, the Department of Defense expanded on the Hagel Memo's guidance in a new memorandum by Undersecretary of Defense Anthony Kurta. Appx1940-1945 (Kurta Memo). The Kurta Memo explained that its guidance applied to correction boards considering requests by veterans for "modification of their discharge due in whole or in part to mental health conditions," including PTSD. Appx1941. It clarified that liberal consideration principles are "not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to *any petition seeking discharge relief* including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations." Appx1943 (emphasis added). It also defined "discharge" to include "the characterization, narrative reason, separation code, and re-enlistment code." Appx1943.

The Kurta Memo also clarified how to apply "liberal consideration." Appx1941-1944. Although liberal consideration does not mandate relief in every case, it requires the correction boards to consider certain evidence and apply certain presumptions. Appx1943-1944. The Kurta Memo explained that relevant evidence may include "changes in behavior, . . . deterioration in work performance; inability

of the individual to conform their behavior to the expectations of the military environment; substance abuse; episodes of depression, panic attacks, or anxiety" and more. Appx1941. In addition, the "veteran's testimony alone" may establish the existence of PTSD, and a determination made by the VA should be considered "persuasive evidence" that PTSD existed during military service. Appx1942. Finally, the Kurta Memo explained that "liberal consideration" requires altering evidentiary burdens because "[i]t is unreasonable to expect the same level of proof for injustices committed years ago when" PTSD was "far less understood than [it is] today." Appx1943.

III. PROCEDURAL HISTORY

In 2017, Doyon applied to the BCNR to correct his discharge records. Appx1068-1070. He sought to correct his DD Form 214 to show that he was not discharged for "unsuitability" due to a personality disorder, but because he was "unfit" to serve due to psychosis or psychoneurosis (the closest diagnoses to PTSD in 1968) and was medically retired. Appx1094; Appx1055-1056; Appx1438; *see also* Appx1071-1095.

Under the regulations in effect when Doyon was discharged, a service member is "unfit because of physical disability when he is unable to perform the duties of his office, rank, grade, or rating in such a manner as to reasonably fulfill the purpose of his employment on active duty." Appx1164. The regulations also provided that

"'[p]hysical disability' includes mental disease"—including "psychoses" and "psychoneuroses"—but not "such inherent defects as behavior disorders, personality disorders, and primary mental deficiency." Appx1164; Appx1190. "Psychosis" was defined as "Recurrent psychotic episodes, or a single well-established psychotic episode with existing symptoms or residuals thereof sufficient to interfere with performance of duty or normal pursuits." Appx1190. "Psychoneurosis" was defined as "Severe symptoms, persistent or recurrent, requiring hospitalization or the need for continuing psychiatric support. (Incapacity because of neurosis must be distinguished from weakness of motivation or underlying personality disorder)." Appx1190.

In 2018, the BCNR denied Doyon's application. Appx1049-1051. The decision relied in part on two Advisory Opinions: one from the Senior Medical Advisor (SMA) for the Council of Review Boards (CORB), and one from the Director of CORB. Appx1052-1057. First, the BCNR concluded there was "insufficient evidence of unfitness for continued Naval service due to psychosis or psychoneurosis." Appx1050. It reached that conclusion on psychosis because there was "no evidence of . . . a single well-established psychotic episode" that interfered with Doyon's performance of duty. Appx1050. As for Doyon's "nervous collapse" and two-week hospital stay, *see supra* at 12-15, the Board (incorrectly) stated that Doyon had been "released back to duty the next day," and thus found it insufficient

to qualify as a "psychotic episode." Appx1050. The Board also rejected the diagnosis of psychoneurosis because there was no evidence that Doyon "received continuing treatment for psychosis after [his] discharge" and because Doyon had enrolled in a "major university." Appx1050.

Second, although the Board did not dispute Doyon's service-connected PTSD, it concluded that his diagnosis was "too distant in time from 1968 to be probative of [his] fitness for continued naval service in 1968." Appx1050. Instead, it found that the 1968 diagnosis was "more credible" because it was closer in time to the discharge. Appx1050. The Board also concluded that Doyon's concerns about the Vietnam War and "personal conflicts formed the basis for [his] actions in 1968 rather than the traumatic events that form the basis for [his] PTSD diagnosis." Appx1050.

Neither the BCNR decision nor the Advisory Opinions addressed Doyon's arguments about the application of "liberal consideration" to his petition. Appx1074-1075 (Doyon BCNR application); Appx1807-1811 (Doyon Response to Advisory Opinions). Nor did they address the harassment and threats that formed part of the basis of Doyon's PTSD diagnosis. Appx1080-1082 (Doyon BCNR application); Appx1806 (Doyon Response to Advisory Opinions).

In 2019, Doyon filed suit in the CFC, challenging the BCNR's denial of his application. Appx1001. The Government moved for judgment on the administrative record, and Doyon cross-moved. Appx34-35. Among other things, Doyon again

argued that the BCNR had failed to give the "liberal consideration" mandated by § 1552 and the Hagel and Kurta Memos.

In January 2021, the CFC granted the Government's motion for judgment on the administrative record and denied Doyon's cross-motion. Appx22-23. First, the court held that the BCNR did not err by failing to provide "liberal consideration" under the Hagel and Kurta Memos. Appx15-18. It concluded that the Hagel Memo is irrelevant because it applies only to applications seeking to upgrade the "characterization of discharge," and Doyon was not challenging his Honorable characterization. Appx16. The court acknowledged that the Kurta Memo applied to "any petition seeking discharge relief," but concluded that Doyon's petition was not seeking such relief but rather sought disability retirement. Appx17. The court noted that disability retirement determinations require a finding that the service member is not "fit" for duty, and concluded that the Hagel and Kurta Memos do not "apply to such unfitness or disability retirement determinations." Appx18. The CFC did not address Doyon's argument about liberal consideration under 10 U.S.C. § 1552(h).

Second, the court concluded that the BCNR's decision was supported by substantial evidence. Appx18-22. The court acknowledged that the records contains evidence that Doyon suffered from service-connected PTSD at the time of his discharge, and found it "notable that plaintiff's PTSD diagnosis is not in dispute,"

but ultimately concluded that the BCNR adequately considered the record and stated that it would not "substitute its judgment for that of the BCNR." Appx22.

Doyon moved for reconsideration, which the CFC denied on June 2, 2021, Appx25-32.

SUMMARY OF THE ARGUMENT

First, the BCNR erred by refusing to give "liberal consideration" to Doyon's application, and the CFC erred by upholding the Board's decision in that respect.

The Board's enabling statute requires it to give liberal consideration to applications like Doyon's that seek discharge relief related to service-connected PTSD. 10 U.S.C. § 1552(h). That requirement applies to any "former member of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to [PTSD] . . . as supporting rationale . . . and whose [PTSD] . . . is related to combat." *Id.* § 1552(h)(1). For such applications, the Board must "review the claim with liberal consideration to the claimant that [PTSD] . . . potentially contributed to the circumstances resulting in the discharge." *Id.* § 1552(h)(2)(B). Doyon's application falls squarely within the plain meaning of those provisions, and that plain meaning should control.

Applying § 1552(h) to Doyon's application also aligns with the structure, purpose, and legislative history of the statute. The structure of § 1552 makes clear that Congress knows how to target or restrict a subset of the BCNR's applications,

confirming that the broad language it chose for § 1552(h) should be read at face value. Congress's design of § 1552(h) also makes sense given the normal work of the Board, which regularly corrects the terms and conditions of discharge records, including corrections to grant or amend disability retirement. The legislative history, though sparse, confirms that Congress intended § 1552(h) to apply to applications for discharge relief involving disability retirement. Despite all this, the Government has yet to respond to Doyon's statutory argument for liberal consideration.

The Board and CFC also erred by concluding that the liberal consideration mandate in the Hagel and Kurta Memos is irrelevant to Doyon's application. The Kurta Memo, which expanded on the guidance in the Hagel Memo, repeatedly emphasized the breadth of its scope, requiring liberal consideration for "*any petition seeking discharge relief*." Appx1943 (emphasis added). The Government nonetheless claimed, and the CFC agreed, that the Kurta Memo is limited to discharge relief in the form of "characterization of service" upgrades. That limitation, though, is not in the Kurta Memo, which *rejects* the notion that its scope is limited to certain upgrades in characterization of service.

Had the Board properly applied the liberal consideration principles detailed in the Hagel and Kurta Memos, it would have granted Doyon's application. That is clear because the Board's rationale turned on inferences that are directly refuted by the Kurta Memo. As just one example, the Kurta Memo states that a PTSD diagnosis

from the VA must be considered "persuasive evidence" that PTSD existed during military service; however, the Board dismissed Doyon's VA diagnoses on the basis that they were conducted too long after Doyon's service. In sum, both the Board's enabling statute and mandatory agency guidance required it to give liberal consideration to Doyon's application, and its decision refusing to do so should be reversed.

Second, the Board's decision was also not supported by substantial evidence, and it should be reversed on that basis as well.

Contrary to the Board's conclusion, there is *no* evidence in the record supporting the Navy's decision to discharge Doyon based on a "personality disorder" that developed in his "formative years" before enlisting. The record is unambiguous on this issue: Doyon's youth was happy, healthy, and well-adjusted in every sense of the term. His Navy medical records also confirm that he had no mental health problems at the time of enlistment, and under the relevant regulations, that meant the Navy needed to prove by a preponderance of the evidence that Doyon's condition predated enlistment. The *only* purported evidence of this, though, is Doyon's academic probation during his freshman year of college while studying architecture—a fact that is readily explainable in the record and hardly evidence of a personality disorder, let alone a preponderance of the evidence.

The Board's refusal to correct Doyon's record to show a disability discharge also lacked substantial evidence. After setting aside the unfounded diagnosis of personality disorder, the record provides only one answer for why Doyon had a "nervous collapse" during his third deployment and became unable to perform his duties: His inability to continue serving was caused by the undisputed, thrice-diagnosed PTSD that he acquired after enduring a series of traumatic events during the Vietnam War. The Board's contrary conclusion turned on a critical factual mistake in its assessment of the record, as well as its failure to consider substantial parts of the record that support Doyon's claim. And contrary to the Government's suggestion, there is no difficulty determining whether Doyon's PTSD was significant enough to render him unfit for duty; the Navy already made that determination when it discharged him for an alleged personality disorder.

In sum, the Board's decision cannot stand, even absent liberal consideration, because it lacked substantial evidence, relied on factually incorrect premises, and ignored critical parts of the record.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] a decision of the Court of Federal Claims granting or denying a motion for judgment on the administrative record without deference." *Barnick v. United States*, 591 F.3d 1372, 1377 (Fed. Cir. 2010) (citing *Chambers*,

417 F.3d at 1227). The Court therefore applies "the same standard of review as the trial court," and will overturn the BCNR's decision if it is "arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Id.*

II. THE BCNR ERRED BY FAILING TO GIVE LIBERAL CONSIDERATION TO DOYON'S APPLICATION

A. Section 1552 Mandates Liberal Consideration

1. The BCNR's enabling statute, 10 U.S.C. § 1552, requires the Board to give liberal consideration to Doyon's application. As Doyon argued below—without receiving any response—the statute imposes a liberal consideration mandate independent of the Hagel and Kurta Memos. Section 1552(h) states in full:

> (h)(1) This subsection applies to a *former member of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to post-traumatic stress disorder* or traumatic brain injury as supporting rationale, or as justification for priority consideration, and whose post-traumatic stress disorder or traumatic brain injury is related to combat or military sexual trauma, as determined by the Secretary concerned.
>
> (2) In the case of a claimant described in paragraph (1), a board established under subsection (a)(1) shall—
>
> > (A) review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the claimant; and
> >
> > (B) *review the claim with liberal consideration to the claimant that post-traumatic stress disorder* or traumatic brain injury *potentially contributed to the circumstances resulting in the discharge* or dismissal or to the original characterization of the claimant's discharge or dismissal.

10 U.S.C. § 1552(h) (emphases added).

Doyon's application falls squarely within the plain meaning of subsection (h)(1). *See Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020) ("A court interpreting the statute 'presume[s] that Congress intended to give those words their plain and ordinary meanings.'" (alteration in original) (citation omitted)). Doyon is a "former member of the armed forces." 10 U.S.C. § 1552(h)(1). His application is a "claim under this section for review of a discharge," *id.*, because it asks the Board for "review," i.e., "[c]onsideration, inspection, or reexamination," of the terms and conditions of his discharge, *Review*, Black's Law Dictionary (11th ed. 2019). Doyon's application is "based in whole or in part on matters related to post-traumatic stress disorder," and it is undisputed that his PTSD is "related to combat." 10 U.S.C. § 1552(h)(1); *see* Appx22 (CFC stating "it is notable that plaintiff's PTSD diagnosis is not in dispute").

Subsection (h)(2) likewise makes clear that Doyon's application falls within the plain meaning of the provision: The BCNR must give "liberal consideration" to a former service member claiming that PTSD "potentially contributed to the circumstances resulting in the discharge." 10 U.S.C. § 1552(h)(2)(B). That is precisely what Doyon claims. He petitioned the Board to correct his DD Form 214—the report of discharge—because his service-connected PTSD "contributed to the

circumstances resulting in [his] discharge," *id.*, for unsuitability due to an alleged personality disorder. Appx1001-1003.

It also makes perfect sense to apply § 1552(h)'s liberal consideration mandate to applications like Doyon's, because the Board regularly reviews the terms of discharges to resolve disability retirement issues. In fact, if a service member is discharged without a finding of unfitness, he *must* "first . . . apply for a change in his military records to reflect that he was unfit and entitled to a disability discharge." *Burkins v. United States*, 112 F.3d 444, 447 (10th Cir. 1997); *see also Chambers*, 417 F.3d at 1225.

Thus the BCNR, like the other correction boards, has long corrected discharge records to grant or amend disability retirement. *See supra* at 21; *see also, e.g.*, *Walden v. United States*, 22 Cl. Ct. 532, 536-37 (1991) (correction board determined that finding of fitness at the time of plaintiff's discharge was improper and corrected discharge record to show "that plaintiff was unfit for duty on March 17, 1971, when he was relieved from active duty for physical disability at a rating of 30 percent").[4] Board decisions on disability retirement have also long been subject to judicial review. *See, e.g.*, *Hutter v. United States*, 170 Ct. Cl. 517, 524-25 (1965) (vacating

[4] *See, e.g.*, *Burkins*, 112 F.3d at 447-48; *Van Cleave*, 70 Fed. Cl. at 677 & n.5, 686; *Yagjian v. Marsh*, 571 F. Supp. 698, 707 (D.N.H. 1983); *Allin v. United States*, 147 Ct. Cl. 459, 484 (1959).

Board decision and ordering that plaintiff's record of discharge without disability be corrected to show disability retirement at 30%).[5] The correction of records related to benefits, like disability retirement, is such a critical aspect of the BCNR's role that § 1552 expressly authorizes back pay based on such corrections. 10 U.S.C. § 1552(c)(1) (permitting payment "if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service").

Finally, the legislative history, although sparse, aligns with the natural reading of the text and purpose of § 1552(h), showing that liberal consideration was understood to apply to discharge relief in the form of disability retirement. During a hearing before the National Defense Authorization Act for Fiscal Year 2018 (which enacted 10 U.S.C. § 1552(h)), the Deputy Assistant Secretary of the Army Review Boards was asked to explain how the Board applies "liberal consideration."

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[5] *See e.g.*, *Walters v. United States*, 175 Ct. Cl. 215, 227-28 (1966) (holding that the BCNR's decision that plaintiff was "fit" for duty at the time of his discharge was unsupported by substantial evidence and entering judgment for plaintiff for "disability retirement"); *Hoppock v. United States*, 176 Ct. Cl. 1147, 1192-93 (1966) (per curiam) (holding that the BCNR erred by denying plaintiff's application to correct his discharge record to show disability retirement based on psychoneurosis); *Jordan v. United States*, 205 Ct. Cl. 65, 125 (1974) (ordering board to correct plaintiff's records to show that he was not "fit" for duty at the time of discharge but rather permanently retired for disability); *Betts v. United States*, 145 Ct. Cl. 530, 536 (1959).

Appx2240-2241. The Deputy Secretary responded with an example where the Board applied liberal consideration to increase a 20% disability *separation* to a 60% disability *retirement*.[6] In other words, the former service member had already been found "unfit" for duty, but had been *separated* instead of *retired* because her disability rating was below 30%. *See* 10 U.S.C. § 1201(b)(3)(B) (providing retirement when, among other things, "the disability is at least 30 percent"). The Board applied "liberal consideration" to increase her disability rating so that she would qualify for disability retirement. That example further shows that there is no basis to deny liberal consideration to discharge relief in the form of disability retirement.

2. There was no response below to Doyon's argument that § 1552 mandates liberal consideration of PTSD-related applications. The Government and the CFC did claim, in the context of the Hagel and Kurta Memos, that liberal consideration applies to petitions seeking to correct the "characterization of service" in a discharge record, but not to petitions seeking to correct the "reason" for discharge, such that an administrative separation for "unsuitability" could be corrected to a disability

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[6] Deputy Secretary: "[We] could see that there was a downward spiral in behavior after this particular incident had happened. We saw the applicant had become indrawn, inwards, sullen. And so with that, we said there has to be a nexus. And so with that, we basically *took her from a 20 percent disability separation to a 60 percent disability retirement and paid her back pay to 2002*." Appx2240-2241 (emphasis added).

retirement for "unfitness." Appx17-19. As explained below, that argument is wrong about the Hagel and Kurta Memos, *see infra* at 39-45, but it is similarly baseless under § 1552(h).

Nothing in the text of § 1552(h) limits liberal consideration for PTSD-related claims to "characterization of service" upgrades or any other subset of discharge relief regularly provided by the BCNR. In fact, the statute makes clear that it is *not* limited to characterization upgrades by expressly listing characterization of service as an *additional* instance that warrants liberal consideration: The statute requires the BCNR to "review the claim with liberal consideration to the claimant that post-traumatic stress disorder or traumatic brain injury potentially contributed [1] to the circumstances resulting in the discharge or dismissal ***or*** [2] to the original characterization of the claimant's discharge or dismissal." 10 U.S.C. § 1552(h)(2)(B) (emphasis added).

If Congress had intended to limit liberal consideration to changes in characterization of service, it would not have included the preceding clause about the "circumstances resulting in the discharge." That clause would be rendered surplusage—an outcome that violates the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Gumpenberger*, 973 F.3d at 1382 (citation omitted); *see also, e.g.*,

Lowe v. SEC, 472 U.S. 181, 207 n.53 (1985); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012).

The broader structure of § 1552 also confirms that liberal consideration is not limited to "characterization of service" upgrades. Throughout § 1552, Congress makes clear that it knows how to carve out a subset of the BCNR's applications when it wants to do so. For example, the statute provides additional limitations on the BCNR when the Board's correction of records involve a court-martial. 10 U.S.C. § 1552(c)(4), (f). It also provides special procedures for when the BCNR denies a request to upgrade the characterization of a discharge or dismissal. *Id.* § 1552(a)(4)(B). And it permits the Secretary to bypass the Board entirely for certain corrections related to enlistment (or reenlistment) ineligibility, as well as certain promotions for enlisted service members. *Id.* § 1552(a)(2). Congress thus knows how to single out specific types of applications when it wants, but it did no such thing here.

Nothing in § 1552(h) limits liberal consideration to characterization of service or otherwise. Instead, the statute's plain meaning, purpose, and legislative history show that liberal consideration is required when former service members like Doyon seek review of the terms of their discharge on the basis of service-connected PTSD.

B. The Hagel and Kurta Memos Mandate Liberal Consideration

The BCNR also erred by failing to apply the liberal consideration mandated by the Hagel and Kurta Memos. Those Memos provide mandatory guidance that is binding on the Board. *See Fisher v. United States*, 402 F.3d 1167, 1177 (Fed. Cir. 2005) ("[T]he military is bound to follow its own procedural regulations should it choose to promulgate them."). The Hagel and Kurta Memos embody the commonsense notion that service members discharged before PTSD was recognized as a diagnosis should be held to a more flexible evidentiary standard when seeking to establish a correction to their discharge records based on PTSD. The initial guidance from the Hagel Memo focused in particular on Vietnam veterans, like Doyon, who have suffered acutely from the historical misunderstanding of their service-connected PTSD. Appx1232 (addressing "petitions of Vietnam veterans" and "those who served in the Vietnam theater"). The Kurta Memo expanded on that guidance, making clear that it is not limited to changes in "discharge characterizations" but applies to "any petition seeking discharge relief." Appx1943. The BCNR not only refused to apply that guidance to Doyon's application, but also based its denial on reasoning that is antithetical to the commonsense principles embodied in the Memos.

1. The BCNR did not respond to Doyon's arguments about the Hagel and Kurta Memos, but the Government claimed that the Memos are "limited to

upgrading discharge characterizations, which may include a change to the narrative reason for separation, separation code, or reenlistment code." Appx2212. The CFC agreed, concluding that Doyon was not "challenging the narrative reason for his honorable discharge," but his "fitness for duty in 1968," and therefore the Memos do not apply. Appx17. Those arguments are irreconcilable with the Kurta Memo.

The Kurta Memo is not limited to changes in characterization of service; it says so expressly and repeatedly. At the outset, the Kurta Memo states that it applies to correction boards "considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including [PTSD]." Appx1941. It then broadly defines the word "discharge": "Unless otherwise indicated, the term 'discharge' includes the characterization, narrative reason, separation code, and re-enlistment code." Appx1943. The Kurta Memo thus applies to "requests by veterans for modification of" their "characterization" of service; modification of their "narrative reason" for discharge; modification of their "separation code;" and modification of their "re-enlistment code." Appx1941; Appx1943. That is exactly what Doyon seeks: His application asks the BCNR to modify the narrative reason for his discharge—the separation code "BUPERSMAN Art. C-10310 265," which means "unsuitability, character disorder"—to show instead that he was unfit for service due to psychoses or psychoneuroses under

"BUPERSMAN Art. C-10305," which provides for separation due to disability. Appx1073; Appx 1094.

On top of that, the Kurta Memo *rejects* the notion that liberal consideration is limited to changes in characterization of service: "These guidance documents are *not* limited to Under Other Than Honorable Condition discharge characterizations but rather apply to *any petition seeking discharge relief* including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations." Appx1943 (emphases added). The contrary position by the Government and the CFC flouts this clear instruction.

At times, the Government and the CFC appeared to suggest that the problem with Doyon's application, in their view, is not what he seeks *to remove* from the narrative reason—unsuitability due to a personality disorder—but what he seeks *to replace* it with—unfitness due to disability. *See* Appx18 ("[A]s the government correctly observes, a determination regarding plaintiff's fitness for duty in 1968 is necessary to award the relief sought in this case. . . . [T]he Court does not read either the Hagel or Kurta Memoranda to apply to such unfitness or disability retirement determinations.").

That restriction on the forms of discharge relief is not in the Hagel or Kurta Memos. It seemingly comes out of whole cloth. The Kurta Memo states that it applies to veterans' requests "for *modification* of their discharges" and to "*any*

petition seeking discharge relief." Appx1941, Appx1943 (emphasis added). "Discharge" is defined to include modifications to the "narrative reason" and "separation code." Appx1943. Nowhere does the Kurta Memo suggest that liberal consideration applies to only a subset of petitions for discharge relief. It never suggests that liberal consideration applies to veterans' requests "for modification of their discharges due in whole or in part to [PTSD]," *unless* the modification would provide disability retirement due to PTSD. Such an exception for disability retirement is not only unsupported by the Kurta Memo, but also contrary to its insistently broad mandate.

Further along these lines, the Government claimed that Doyon was trying to "open a back-door route to transform his unsuitability discharge into a disability retirement." Appx2214. That argument could not be more wrong. For former service members like Doyon, an application to the BCNR to correct his discharge records—specifically, the narrative reason and separation code—is the *only* way to obtain disability retirement. *See Chambers*, 417 F.3d at 1225 ("[W]here the service member was released from service without a board hearing and subsequently files a claim for disability retirement before a military correction board . . . [t]he Correction Board proceeding 'becomes a *mandatory* remedy . . . .'") (citation omitted)); *Burkins*, 112 F.3d at 447. It is not a "back-door," it is the *only* door, and one that

the BCNR regularly uses. *See supra* at 34-35 & nn.4-5 (collecting disability retirement cases).

Since its inception, a central part of the BCNR's mission has been "changing the terms of a discharge" to correct an error or injustice. *Porter*, 163 F.3d at 1311; *Roth v. United States*, 378 F.3d 1371, 1382 (Fed. Cir. 2004) ("[A] correction board may entertain any kind of application for correction" including "changing the terms of a discharge"); *Wolfing v. United States*, 144 Fed. Cl. 516, 522 (2019) (same). Changing the "terms of a discharge" to grant disability retirement is a regular part of that work, and falls within the Kurta Memo's broad application to "any petition seeking discharge relief." Appx1943.

The Chief Judge of the Court of Federal Claims recently reached this conclusion in an analogous case. In *Hassay v. United States*, a former Navy Reservist alleged that he was harassed and sexually assaulted by other service members aboard the *USS Sides*. 150 Fed. Cl. 467, 470 (2020). He was later honorably discharged and found fit for duty at that time. *Id.* at 470, 472. The VA later diagnosed the veteran with PTSD related to incidents aboard the *USS Sides*, and he petitioned the BCNR to change his discharge status to reflect a disability retirement. *Id.* at 473-74. After the BCNR denied the application and refused to apply the Hagel and Kurta Memos, the Court of Federal Claims vacated and

remanded the decision with instructions for the Board to apply the liberal consideration required by the Memos. *Id.* at 483-85.

As *Hassay* explained, the "Kurta Memo . . . requires the BCNR to give '[l]iberal consideration . . . to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; [or] sexual assault.'" *Id*. at 483 (alterations in original) (quoting Kurta Memo ¶ 3). And "liberal consideration" requires altering the evidentiary standards and applying certain presumptions in favor of the applicant, all of which the BCNR did not do. *Id.* For example, the "Board's decision reflects no consideration of the principle that '[a] determination made by the [VA] that a veteran's mental health condition . . . is connected to military service . . . [and] is persuasive evidence that the condition existed'" during service. *Id.* at 484 (first and second alteration in original) (quoting Kurta Memo ¶ 14).[7]

[7] A different judge in the Court of Federal Claims reached a contrary conclusion in an unpublished decision, *Philippeaux v. United States*, 2020 WL 7042908, at *8-9 (Fed. Cl. Dec. 1, 2020). The court addressed the Hagel and Kurta Memos in two short paragraphs, and concluded that they apply *only* to changes in characterization of service. *Id.* at *9 ("Mr. Philippeaux received an honorable discharge from the Navy. Thus, there is no misconduct to mitigate and no service characterization to change. By its own terms, the Kurta Memo applies to petitions for changes in discharge characterizations, not to BCNR determinations with respect to disability benefits." (citation omitted)). As explained above, the Kurta Memo is expressly *not* limited to "changes in discharge characterizations;" it applies broadly to "any petition seeking discharge relief," which includes modifications to the "narrative

Notably, in *Hassay* the Government *conceded* that the Hagel and Kurta Memos applied to the plaintiff's application to change his discharge records to show that he had been retired due to disability. 150 Fed. Cl. at 483 ("The government conceded at oral argument that Mr. Hassay's request for a change in his discharge status related to his mental health status, PTSD, and military sexual trauma is covered by the terms of the guidance, and that the guidance was binding on the BCNR."); *see also* Oral Argument Tr. 16:21–17:8, *Hassay v. United States*, No. 19-cv-594, Dkt. No. 34 (Sept. 17, 2020) (Court: "[I]s [the guidance] applicable?" Government: "Yes. As DoD guidance, it would be applicable . . . ."). The Government has never explained why it conceded the applicability of the Hagel and Kurta Memos in *Hassay*, but resists that same conclusion in Doyon's analogous case.

2. The Hagel and Kurta Memos required the BCNR to give liberal consideration to Doyon's application; had the Board done so, it would have granted his application and corrected his discharge records. That is not only because the BCNR's denial of Doyon's application lacks substantial evidence, *see infra* at 48-60, but also because its rationale for denying the application turned on reasoning that is directly contradictory to principles of liberal consideration.

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reason" for discharge and "separation code." Appx1943. It nowhere suggests an exception to exclude discharge relief that would lead to disability retirement.

For example, the Kurta Memo states that a diagnosis of PTSD "rendered by a licensed psychiatrist or psychologist" is sufficient evidence to establish that PTSD existed during service and that it may warrant discharge relief "[a]bsent clear evidence to the contrary." Appx1942. It also states that the VA's determination that a veteran's PTSD is connected to military service should be considered "persuasive evidence that the condition existed . . . during military service." Appx1942. Here, the BCNR stated that it "was not persuaded by the VA ratings" or Dr. Greenzang's diagnosis because, while the Board did not dispute Doyon's PTSD, it concluded that these diagnoses "were made too distant in time from 1968 to be probative of [his] fitness for continued naval service in 1968." Appx1050.

The BCNR's dismissal of Doyon's PTSD diagnoses because they were "too distant in time" also contradicts the central rationale animating the Hagel and Kurta Memos. *See* Appx1232 (Hagel Memo: "PTSD was not recognized as a diagnosis at the time of service, and in many cases, diagnoses were not made until decades after service was completed."); Appx1944 (Kurta Memo: "Mental health conditions, including PTSD . . . are often undiagnosed or diagnosed years afterwards, and frequently are unreported.").

The Kurta Memo also states that "[e]vidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge." Appx1942. In

Doyon's case, the BCNR did the opposite: "While the Board does not contest that you have been diagnosed with PTSD . . . the Board felt there was more than enough evidence of behavior consistent with personality disorder to support the diagnosis made in 1968." Appx1050.

The BCNR also "substantially concurred" with the SMA's Advisory Opinion, Appx1050, which stated that "there [was] little objective evidence in the applicant's Service Treatment Record, other than the above-noted traumatic event exposure, suggesting a significant . . . PTSD-related stress reaction made a significant contribution to the circumstances resulting in the contested administrative separation," Appx1056. The Kurta Memo, however, states that a "veteran's testimony alone" may establish that his PTSD existed during service, Appx1942, and that it is "unreasonable to expect the same level of proof for injustices committed years ago" when conditions such as PTSD "were far less understood than they are today," Appx1943; *see also* Appx1944 ("Reviews involving diagnosed, undiagnosed, or misdiagnosed . . . mental health conditions, such as PTSD . . . should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.").

In sum, the BCNR erred by failing to give Doyon's application the liberal consideration mandated by statute and agency guidance. Rather than apply liberal consideration, and the commonsense principles it embodies, the Board took the

opposite approach and discounted Doyon's evidence for all the reasons rejected by the Hagel and Kurta Memos. That decision, and the CFC's decision upholding it, should be reversed.

III. THE BCNR'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The BCNR's decision is also not supported by substantial evidence. Even without "liberal consideration," the Board should have granted Doyon's application because (1) there is no evidence that he had a preexisting personality disorder; (2) it is undisputed that he has service-connected PTSD; and (3) there is no question that he was "unfit" to continue serving because the Navy involuntarily discharged him for being unable to adequately perform his duties. The BCNR's contrary conclusion overlooked crucial aspects of the record, including the campaign of harassment and death threats against Doyon, and it made a critical factual mistake when considering Doyon's "nervous collapse." The Board's decision should be reversed on this basis as well.

A. Doyon's Discharge For A Preexisting Personality Disorder Is Not Supported By Substantial Evidence

There is no evidence that Doyon suffered from a personality disorder before he enlisted in the Navy, and therefore the BCNR's refusal to correct Doyon's records on that account is not supported by substantial evidence. At the relevant time, personality disorder was defined as "deeply ingrained maladaptive patterns of

behavior" that generally involve "life-long patterns, often recognizable by the time of adolescence or earlier." Appx1055 (citation omitted). The last Navy psychologist to examine Doyon concluded that he "evidence[d] a long standing characterological, attitudinal and behavioral pattern which existed prior to enlistment," and on that basis diagnosed him with a personality disorder and recommended an unsuitability discharge. Appx1282; *see also* Appx1284 (stating that Doyon's personality disorder was "acquired during the formative years" and "pre-existed his entry into the Naval Service"). The BCNR agreed, finding "more than enough evidence of behavior consistent with a personality disorder to support the diagnosis made in 1968." Appx1050.

To begin, the Board failed to consider that Doyon's medical examinations at the time of *enlistment* found no mental health abnormalities, and under the regulations in effect at that time, the Navy had to presume that any subsequent mental condition was incurred in service. The regulations provided that a service member is "presumed to have been in sound physical and mental condition upon entering active service except as to physical disabilities noted and recorded at the time of entrance." Appx1155. Doyon's medical examination at the time of his enlistment stated that he had no physical or mental issue that would render him unfit to serve. *See* Appx1455-1456 (Report of Medical Examination from 1965, marking "normal" instead of "abnormal" for the psychiatric evaluation, which required

"[s]pecify[ing] any personality deviation"); *see also* Appx1237-1239 (noting no medical conditions at time of enlistment).

Because of that clean bill of health at the time of enlistment, "[a]ny disease or injury discovered after [Doyon] enter[ed] active service is presumed to have been incurred in the line of duty while entitled to receive basic pay." Appx1155 (DODD 1332.18 (1968)). Under the regulations, "[m]atters which are 'presumed' need no proof to support them, but a preponderance of evidence to the contrary will rebut a presumption." Appx1155. A "personal opinion, speculation, or conjecture" cannot rebut the presumption. Appx1156. If there is "reasonable doubt" concerning whether the condition predated enlistment, that "doubt will be resolved in favor of the member." Appx1156. Thus, for the BCNR to uphold the Navy's discharge of Doyon based on a personality disorder, it must conclude by a preponderance of the evidence that Doyon had a personality disorder before enlistment.

The *only* purported evidence that the Navy psychologist relied on to conclude that Doyon had a "longstanding characterological, attitudinal and behavioral pattern which existed prior to enlistment" was that Doyon "had similar conflicts with other organizations" because he "was about to be placed on academic probation in an Architecture school in New York." Appx1282. First, struggling academically during freshman year of college is neither a "conflict with an organization" nor a sign of a personality disorder. It is quite ordinary, especially for a major as difficult

as architecture. Second, there is no evidence that Doyon had any conflict with his professors or the administration during his freshman year. Appx1449. Third, the record before the BCNR explained why Doyon struggled, and it was unrelated to any personality disorder: It was simply because he inherited his Uncle Gerard's propensity toward art instead of his father's inclination to the sciences. Appx1448-1449. That single fact about Doyon's pre-enlistment history is not evidence of a preexisting personality disorder, let alone a preponderance of the evidence. The BCNR's contrary conclusion is unsupported by substantial evidence because it lacks "such relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Jennings v. Merit Sys. Prot. Bd.*, 59 F.3d 159, 160 (Fed. Cir. 1995).[8]

The BCNR's conclusion also lacks substantial evidence because it ignored critical aspects of the record. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (holding that agency action may be overturned when it "entirely fail[s] to consider an important aspect of the

[8] The Board also noted Doyon's "personal convictions" against the Vietnam War, and stated that those "personal conflicts formed the basis of [his] actions in 1968 rather than the traumatic events that form the basis for [his] PTSD diagnosis." Appx1050. It is unclear what "actions in 1968" the Board meant. Regardless, Doyon's faith-based struggle over the Vietnam War is not evidence of a "personality disorder." Appx1254. Nor did Doyon's views prevent him from receiving "adequate" marks in his performance reviews and earning multiple medals and commendations. Appx1054; Appx1240. Finally, the record shows that those views did not predate enlistment. Appx1254.

problem" (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)); *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983) ("Under the substantial evidence rule, *all* of the competent evidence must be considered, whether original or supplemental, and whether or not it supports the challenged conclusion." (emphasis in original)).

The BCNR failed to address the overwhelming record evidence showing that Doyon never had a personality disorder. The record showed that, far from having a pattern of conflicts with organizations, Doyon was drawn to and thrived in institutions before the traumatic events causing his PTSD. Before enlisting in the Navy, Doyon was an avid Scout, sticking with the program from Cub Scouts, to Boy Scouts, and then on to Explorer Scouts in high school. Appx1575; Appx1450. He was a "devout Catholic," Appx1257, and altar boy who took those "responsibilities seriously" and was never "reprimanded" and "always got along with the other altar boys and the priests," Appx1450. He did not get in trouble in school or anywhere else. Appx1447-1460; Appx1568. Nor was he ever diagnosed with any mental health problems, and those who knew him described him as "mild-mannered" and a "regular guy." Appx1451; Appx1568-1569. The BCNR mentioned none of this evidence.

The Board also ignored the evidence that, unlike the life-long pattern of a personality disorder, Doyon's symptoms began after the traumatic events on his

second deployment. After Doyon's "nervous collapse," his Naval records note his "*recent* mental agitation and *deteriorating* work habits." Appx1272 (emphases added). The doctor noted that Doyon's "psychological problems . . . are *developing*." Appx1272 (emphasis added). Later during Doyon's two-week hospitalization, the doctor's notes state that Doyon "was aware *he had started functioning poorly*." Appx1698 (emphasis added). Doyon's brother recounts the same transformation, recalling that the tone of Doyon's correspondence "changed," his "letters slowed, then stopped," and when he returned home "it was clear that he had changed." Appx1451 ¶¶ 21-22. The onset of Doyon's symptoms later in life, after the traumatic events of his second deployment, is inconsistent with the diagnosis of personality disorder. The Board did not address this countervailing evidence.

In sum, the BCNR's conclusion that Doyon had a preexisting personality disorder amounts to "little more than surmise" based on "the questionable inference that he probably had the disease prior to entering the service." *Yagjian*, 571 F. Supp. at 705; *see also Wollman v. United States*, 116 Fed. Cl. 419, 430 (2014) (dismissing finding that "has no medical merit and does not constitute an accepted medical principle"). That is not substantial evidence and cannot justify denying Doyon's request to correct his discharge record by removing reference to his purported personality disorder.

B. The Refusal To Correct Doyon's Records To Show That He Was Medically Retired Is Not Supported By Substantial Evidence

The BCNR's refusal to correct Doyon's record to show a disability discharge also lacks substantial evidence. As explained above, the current narrative reason for Doyon's discharge—unsuitability due to a personality disorder—has no support in the record. The question that follows is what the correct narrative reason should be, i.e., *why* was Doyon involuntarily separated for being unable to perform his duties? The answer is clear: Doyon's undisputed service-connected PTSD. *See* Appx22 (CFC stating "it is notable that plaintiff's PTSD diagnosis is not in dispute").

In his application, Doyon asked the BCNR to correct his discharge records "to show that he was found unfit and medically retired for psychoses or psychoneuroses," Appx1094, which were the closest diagnoses to PTSD in 1968, Appx1055-1056.[9] The Board concluded that Doyon did not meet the criteria of "psychosis," but it reached that conclusion based on a clearly erroneous reading of the record: It stated that Doyon was "released back to duty the next day" after his

[9] The BCNR's mandate is to correct instances of "error" or "injustice" in military records. 10 U.S.C. § 1552(a)(1). Doyon's request to correct his records can be granted under either prong of that mandate. Because Doyon's symptoms in 1968 satisfy the definitions of "psychoses" and "psychoneuroses," the BCNR should have corrected the Navy's "error" of not discharging him on those bases. Even if Doyon did not meet the diagnostic criteria for psychosis or psychoneurosis, however, the BCNR should have still made that correction to remove an "injustice," because it is undisputed that Doyon suffered service-connected PTSD and that psychosis and psychoneurosis are the closest equivalents to that diagnosis.

"nervous collapse," and therefore the record contained "no evidence of . . . a single well-established psychotic episode." Appx1050. But Doyon was *not* released back to duty the next day. He was required to stay in the hospital for two weeks following his nervous collapse, an incident that reached such a fever pitch that he was sedated with Thorazine, an antipsychotic drug. Appx1115; Appx1274-1275; Appx1406; Appx1425; Appx1577-1578.

The doctor who first treated Doyon's "nervous collapse" noted that he suffered from "agitation," was unable to carry on "an entire conversation," "flew into a rage on the verge of both crying and striking the bulkhead with his fist," and seemed "about to do something violent either to himself or to someone else unless he received help." Appx1272. The doctor concluded that "psychological problems and their consequences . . . are developing in this individual." Appx1272. The doctor who last evaluated Doyon made similar observations. Appx1282 (noting that Doyon "tends to react with excitability and ineffectiveness when confronted with stress," and "[h]e is continuously beset with fluctuating emotional attitudes"); *see also* Appx1423-1445.

As a whole, the record contains compelling evidence of a "well-established psychotic episode" (first addressed with an anti-psychotic drug, followed by a two-week hospitalization); and, without the BCNR's factual mistake about Doyon's nervous collapse, it should have reached that conclusion as well. *See Heisig*, 719

F.2d at 1157 ("Under the substantial evidence rule, *all* of the competent evidence must be considered . . . .").

Doyon's symptoms also met the criteria of psychoneurosis. Appx1055 ("Severe symptoms, persistent or recurrent, require hospitalization or the need for continuing psychiatric support."). The Board rejected that diagnosis because there was no evidence that Doyon "received continuing treatment for psychosis after [his] discharge" and because Doyon had enrolled in a "major university." Appx1050. But those observations are no reason to reject the diagnosis. Doyon quickly dropped out of the university because he was unable to cope with his PTSD, Appx1262, Appx1286, and the fact that Doyon did not *receive* continuing treatment post-discharge does not mean that his condition did not *require* such treatment. The decades he spent struggling with anxiety, alcohol abuse, and suicidal depression make that clear. Doyon's records while in service also make clear that he required ongoing treatment: After his two-week hospitalization, he was returned to full duty, only to be discharged soon after because he was still unable to perform his duties. *See* Appx1279-1280.

In addition, each of the doctors who evaluated Doyon after his service—a VA psychiatrist, a VA psychologist, and a civilian psychiatrist—independently determined that he had PTSD from his experiences aboard the *Intrepid*. Both VA doctors checked "yes" for Doyon having each of the 15 criteria and seven symptoms

of PTSD. Appx1116-1118; Appx1410-1411. The civilian psychiatrist, Dr. Greenzang, evaluated Doyon and reviewed his medical records, and then detailed his conclusions in an 17-page report explaining Doyon's PTSD diagnosis and why there was no medical evidence of a personality disorder. Appx1423-1439. Dr. Greenzang also concluded that Doyon's PTSD prompted the behavior that caused his administrative discharge, and stated that Doyon's "incapacity" "was such that he should have been found to be 'unfit' pursuant to C-10305 due to a prominent psychoneurosis at the time of the incident in question, which by today's nomenclature would be classified as a PTSD." Appx1438.

All three doctors discussed the harassment and death threats Doyon endured, and two of them listed that as one of the traumatic experiences causing his PTSD. Appx1112-1115; Appx1406-1412; Appx1423-1445. Despite the prominent role this played in Doyon's diagnosis, the BCNR and Advisory Opinions never mention it. They discuss only the *Forrestal* fire and the plane crash that killed Doyon's friend. Appx1049-1057. Again, because the Board "entirely failed to consider an important aspect of the problem," its decision is not supported by substantial evidence. *State Farm*, 463 U.S. at 43; *see also Heisig*, 719 F.2d at 1157.

Finally, the BCNR and the Government argued that even though Doyon has service-connected PTSD, they cannot be sure that his PTSD rendered him unfit for duty in 1968. Appx1050. That argument may have some purchase in other cases,

where a service member incurs a disability while in service, continues in service until a voluntary discharge, and then brings a claim arguing that he should have been retired for disability. *See, e.g.*, *Joslyn v. United States*, 110 Fed. Cl. 372, 396-97 (2013) (denying such a claim); *Walters v. United States*, 175 Ct. Cl. 215, 227-28 (1966) (granting such a claim); *see also Unterberg v. United States*, 188 Ct. Cl. 994, 1001-02 (1969) ("[T]he fact that a plaintiff's condition may have deteriorated subsequent to his release from service is not of itself determinative of the issue as to his fitness at the time of his release.").

None of those fitness difficulties applies here, however, because the Navy already determined that Doyon was unable to perform his duties by involuntarily separating him for unsuitability due to an alleged personality disorder. To discharge a service member due to a personality disorder, the regulations at the time required that "the disorder [be] of such severity as to render the member incapable of serving adequately." Appx1834. That is the functional equivalent of an unfitness determination, which states that a service member is "unfit because of a physical disability when he is unable to perform the duties of his office, rank, grade, or rating in such a manner as to reasonably fulfill the purpose of his employment on active duty." Appx1164. Because the Navy determined that Doyon was "incapable of serving adequately," there is no question that it found him "unable to perform" his duties in 1968.

What's more, the proper disability rating for Doyon is straightforward under the relevant regulations at the time of his discharge. The Department of Defense regulations mandated that all disabilities rendering a service member unfit be rated under the Veterans Administration Schedule for Rating Disabilities (VASRD). DoDD 1332.18, IV.B; Appx1152. Under the VASRD, if a mental disorder incurred during wartime "is sufficiently severe to warrant discharge from service, a minimum [disability] rating of 50 percent will be assigned with an examination to be scheduled within 6 months from discharge." Appx1796 (38 C.F.R. § 4.131 (1968)). Thus, Doyon should have received a disability rating of 50% at the time of his discharge, and the Navy's opportunity to schedule a six-month follow-up examination has long passed. Accordingly, if Doyon is now found unfit for service due to his PTSD, the Navy must permanently retire him with the 50% disability rating that he should have been awarded at discharge. *See Cook v. United States*, 123 Fed. Cl. 277, 307-09 (2015) (holding that 38 C.F.R. § 4.129, a VASRD provision that mirrors the language found in 1968 version of 38 C.F.R. § 4.131, prevents a veteran's DoD disability rating from being constructively reduced from 50% if the veteran did not receive the benefit of an examination six months after discharge).

In sum, because of the overwhelming (and largely undisputed) evidence showing that Doyon incurred PTSD while aboard the *Intrepid* and that this PTSD caused his unfitness, the BCNR should have corrected Doyon's records to reflect

that he was medically retired with a 50% disability rating on account of either psychosis or psychoneurosis. There is no substantial evidence supporting a contrary conclusion, particularly when the record is properly viewed as whole.

IV. THE COURT SHOULD ENSURE TIMELY RELIEF

After serving honorably in the Navy during the Vietnam War, Doyon struggled for most of his life—approximately 45 years—with the fallout from his undiagnosed PTSD. In 2013, he began the long process of collecting his military records. In 2017, he filed his application with the BCNR to correct his military records. It is now 2021 and Doyon is 74 years old. Given those circumstances, especially Doyon's age, the timeliness of any relief takes on greater import. For that reason, Doyon respectfully requests that if the Court should rule in his favor, it reverse the CFC's decision and remand with instructions to grant Doyon's cross-motion for judgment on the administrative record. *See, e.g.*, *Wade v. United States*, 716 F. App'x 943, 948 (Fed. Cir. 2017) (reversing the trial court's judgment and granting defendant's motion for judgment on the administrative record).

Should the Court decide that a remand to the Board is warranted, Doyon respectfully requests that the Court include specific instructions for the CFC to give the Board to ensure prompt consideration and relief. *See, e.g.*, *Hassay*, 150 Fed. Cl. at 484 (remanding for the BCNR to address specific questions, consider new evidence, and requiring completion of remand proceedings within six months).

The BCNR was "created to remedy wrongs[,] not to confound them." *Duhon v. United States*, 461 F.2d 1278, 1282 (Ct. Cl. 1972). The opposite happened in Doyon's case. Now, years later, any meaningful remedy must ensure timely relief.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Federal Claims, which granted the Government's motion for judgment on the administrative record and denied Doyon's cross-motion.

Respectfully submitted,

/s/ Michael Clemente

August 24, 2021

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CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Federal Circuit Rule 32(b)(3) and Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(e) and Federal Circuit Rule 32(b)(1) because it contains 13,979 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because this brief was prepared using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Michael Clemente
Michael Clemente

ADDENDUM

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ADDENDUM
PURSUANT TO CIRCUIT RULE 28(a)(11)

In the United States Court of Federal Claims

No. 19-1964C
Filed: January 13, 2021
NOT FOR PUBLICATION

ROBERT L. DOYON, Plaintiff, v. THE UNITED STATES, Defendant.	RCFC 12(b)(1); Subject-Matter Jurisdiction; RCFC 12(b)(6); Failure To State A Claim; Military Pay Act; 10 U.S.C. § 204; Military Disability Retirement Pay Act; 10 U.S.C. § 1201.

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MEMORANDUM OPINION AND ORDER

GRIGGSBY, Judge

I. INTRODUCTION

Plaintiff, Robert L. Doyon, brings this military pay action challenging the Board for Correction of Naval Records' ("BCNR") decision to deny his application for the correction of his military records to reflect that he was unfit for duty and medically retired for psychosis or psychoneuroses associated with post-traumatic stress disorder ("PTSD"). *See generally* Compl. As relief, plaintiff seeks, among other things, an order that his military records be corrected, military disability retirement pay and other pay. *Id.* at Prayer for Relief.

The government has moved to dismiss this matter for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Rules 12(b)(1) and (6) of the Rules of the United States Court of Federal Claims ("RCFC"). *See generally* Def. Mot. The parties have also filed cross-motions for judgment upon the administrative record, pursuant to RCFC 52.1. *See generally id.*; Pl. Mot. In addition, plaintiff has moved to

supplement the administrative record. Pl. Mot. to Supp. For the reasons set forth below, the Court: (1) **GRANTS-in-PART** the government's motion to dismiss; (2) **DENIES** plaintiff's motion to supplement the administrative record; (3) **GRANTS** the government's motion for judgment upon the administrative record; and (4) **DENIES** plaintiff's cross-motion for judgment upon the administrative record.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Factual Background

Plaintiff, Robert L. Doyon, is a former service member in the United States Navy ("Navy"). Compl. at ¶ 2. In this military pay action, plaintiff challenges the BCNR's decision to deny his application for the correction of his military records to reflect that he was unfit for duty and medically retired for psychosis or psychoneuroses associated with PTSD. *Id.* at ¶ 6.

Specifically, plaintiff asserts three counts against the government in the complaint. First, plaintiff alleges in Count I of the complaint that the BCNR's alleged refusal to apply applicable Department of Defense guidance in considering his application for the correction of his military records was arbitrary, capricious, an abuse of discretion and contrary to law. *Id.* at ¶¶ 70-75. Second, plaintiff alleges in Count II of the complaint that the BCNR's rejection of his application for the correction of his military records was arbitrary, capricious, unsupported by substantial evidence and contrary to law. *Id.* at ¶¶ 76-78. Lastly, plaintiff alleges in Count III of the complaint that the BCNR failed to afford him procedural due process in violation of the Due Process Clause of the Fifth Amendment to the Constitution. *Id.* at ¶¶ 79-89. As relief, plaintiff seeks, among other things, an order that his military records be corrected, military disability retirement pay and other pay. *Id.* at Prayer for Relief.

[1] The facts recited in this Memorandum Opinion and Order are taken from the complaint ("Compl."); the administrative record ("AR"); the government's motion to dismiss and motion for judgment upon the administrative record ("Def. Mot."); plaintiff's response and opposition to the government's motion to dismiss and cross-motion for judgment upon the administrative record ("Pl. Mot."); plaintiff's motion to supplement the administrative record ("Pl. Mot. to Supp."); the government's response and opposition to plaintiff's cross-motion for judgment upon the administrative record and plaintiff's motion to supplement the administrative record and reply in support of its motion to dismiss and motion for judgment upon the administrative record ("Def. Resp."); and plaintiff's reply in support of his cross-motion for judgment upon the administrative record and motion to supplement the administrative record ("Pl. Reply"). Except where otherwise noted, all facts recited herein are undisputed.

1. Plaintiff's Military Service And Discharge

As background, plaintiff is a Vietnam War veteran who served in the Navy from March 17, 1966, to November 21, 1968. *Id.* at ¶¶ 2, 17; AR 0054. During his military service, plaintiff was assigned to the U.S.S. *Intrepid* and he advanced to the rank of Airman. Compl. at ¶¶ 18-19. Plaintiff received several medals and commendations—including the Vietnam Service Medal (Bronze Star), the Vietnam Campaign Medal, and the National Defense Service Medal—during his service in the Navy. *Id.* at ¶ 20.

On July 29, 1967, a missile on an airplane located on the U.S.S. *Forrestal* accidently detonated causing an explosion and fire that eventually resulted in more than 130 deaths and 160 injuries. *Id.* at ¶¶ 2, 23. Plaintiff witnessed the immediate aftermath of the explosion and fire. *Id.*

On October 23, 1967, four members of the U.S.S. *Intrepid* went Absent without Leave ("AWOL"). *Id.* at ¶ 24. Because plaintiff was friendly with two of the deserters, he was harassed and threatened by his shipmates. *Id.* In April 1968, plaintiff's parents wrote to Senator Edward Kennedy, to express concerns about his mental health. *Id.* at ¶ 25.

In May 1968, plaintiff went on unauthorized absence for two days. *Id.* at ¶ 26. Upon his return to the *Intrepid*, plaintiff was referred to the ship's sick bay because of his "inability to get along with his peers, his recent mental agitation and deteriorating work habits, and his expression of admiration for several of 1967's famous four deserters." *Id.* at ¶ 28 After being admitted to sick bay, plaintiff was sedated with Thorazine. *Id.*

On August 16, 1968, plaintiff was transferred to Naval Base Subic Bay for further evaluation. *Id.* at ¶ 29. Plaintiff returned to duty aboard the *Intrepid* on August 31, 1968. *Id.* at ¶ 32. A medical evaluation performed at Subic Bay in August 1968 diagnosed plaintiff with "passive aggressive personality disorder." *Id.* at ¶ 30. Thereafter, on September 23, 1968, plaintiff witnessed a fatal plane crash while on duty. *Id.* at ¶ 36.

On September 26, 1968, plaintiff's commanding officer recommended that the Navy separate him from military service for unsuitability citing his diagnosis of passive aggressive personality disorder. AR0231-32. A subsequent psychiatric evaluation conducted on October 28, 1968, changed plaintiff's diagnosis to "Emotionally Unstable Personality #3210, with noted

paranoid trait in his personality." Compl. at ¶ 38. And so, plaintiff was discharged with an honorable characterization of service for unsuitability effective on November 21, 1968. AR0054.

2. Plaintiff's VA Benefits Claim

In December 2013, plaintiff filed an application for disability compensation with the Department of Veterans Affairs ("VA") for PTSD. AR0356. In connection with this application, a VA psychiatrist diagnosed plaintiff with PTSD in June 2014. AR0064. The VA psychiatrist opined that plaintiff had experienced stressors in service, including witnessing a fatal plane crash and a sinking ship incident that resulted in multiple casualties. AR0067, AR0072. And so, on September 16, 2014, the VA granted plaintiff's application for disability compensation for PTSD, assigning a 50 percent disability rating effective December 9, 2013. AR0088-091. On November 18, 2015, the VA granted plaintiff's claim for an increased rating for his service-connected PTSD, assigning a 70 percent disability rating effective August 27, 2015. AR0093-096.

3. The Hagel And Kurta Memoranda

On September 3, 2014, former Secretary of Defense Charles Hagel issued a memorandum entitled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder" (the "Hagel Memorandum"). AR0184-187. The Hagel Memorandum recognizes the attention that "has been focused upon the petitions of Vietnam veterans to Military Department Boards for Correction of Military/Naval Records (BCM/NR) for the purposes of upgrading their discharges based on claims of previously unrecognized Post Traumatic Stress Disorder (PTSD)." AR0184. The Hagel Memorandum also states that its purpose is to "help ensure consistency across the Services," by providing supplemental policy guidance for military correction boards on such applications. *Id*.

In this regard, the Hagel Memorandum requires that military boards give liberal consideration to petitions submitted by veterans who assert that PTSD or PTSD-related conditions "might have mitigated the misconduct that caused [their] under other than honorable conditions characterization of service." AR0186. The Hagel Memorandum also directs the military correction boards to timely consider these petitions and to liberally waive any time

limits that may have prevented their review. *Id.* In 2016, this "liberal consideration" standard was codified into law and military review boards must review with liberal consideration a veteran's claim "that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal." 10 U.S.C. § 1552(h)(2)(B); 10 U.S.C. § 1553(d)(3)(A)(ii).

On August 25, 2017, Undersecretary of Defense Anthony Kurta issued a memorandum (the "Kurta Memorandum") which provides additional guidance clarifying and expanding upon the Hagel Memorandum, to include veterans' mental health as well as victimization by sexual assault and sexual harassment as potential mitigation for misconduct. AR0892-897. Specifically, the Kurta Memoranda provides that "[l]iberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment." AR0893. The Kurta Memorandum also states that "[u]nless otherwise indicated, the term 'discharge' includes the characterization, narrative reason, separation code, and re-enlistment code." AR0895. In addition, the Kurta Memorandum makes clear that "[t]hese guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations." *Id.*

4. The BCNR's Decision

On September 14, 2017, plaintiff applied for the correction of his military records with the BCNR.[2] AR0020-21. In the brief supporting his application, plaintiff requested that the

[2] Under 10 U.S.C. § 1552, the Secretary of a military department may 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). Former members of the Armed Forces may bring a claim for review of a discharge or dismissal based upon matters relating to post-traumatic stress disorder or traumatic brain injury under Section 1552. 10 U.S.C. § 1552(h). In such cases, a military board must review the medical evidence that is presented by the claimant and review with liberal consideration the veteran's claim that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal, or to the original characterization of the claimant's discharge or dismissal. 10 U.S.C. § 1552(h)(2)(B); *see also* 10 U.S.C. § 1553(d)(3)(A)(ii).

BCNR correct his military records to reflect that he was unfit and medically retired with at least a 30% disability rating for psychosis or psychoneurosis. AR0045-047.

To support his petition, plaintiff submitted a psychiatric evaluation report authored by his psychiatrist, Dr. Ted R. Greenzang. AR0375-391. In this report, Dr. Greenzang opines that plaintiff was experiencing manifestations of PTSD at the time of his discharge from the military. AR0389. Dr. Greenzang also opines that plaintiff's medical history was not consistent with a diagnosis of a personality disorder. *Id.* And so, Dr. Greenzang concludes in his report that plaintiff's separation from the Navy for unsuitability was "not an appropriate disposition." AR0390-391.

The BCNR also considered two advisory opinions that were prepared for its consideration: (1) a September 20, 2018, advisory opinion prepared by the Senior Medical (Psychiatric) Advisor ("SMA") and (2) a September 24, 2018, advisory opinion prepared by the Director of the Secretary of the Navy, Council of Review Boards. AR0002; AR004-009.

In the September 20, 2018, advisory opinion, the SMA considered several documents, including plaintiff's military medical records, an April 1967 correspondence from plaintiff's commanding officer denying plaintiff's request for advanced schooling, a September 1968 discharge recommendation, an October 1968 psychiatric clinical note, and the VA's rating decisions regarding plaintiff's VA benefits claims. AR0004-0008. Based upon this evidence, the SMA recommended the denial of plaintiff's petition, because: (1) plaintiff's PTSD diagnosis was not part of the then-existing American Psychiatric Association Diagnostic and Statistical Manual ("DSM") II (1968) and the PTSD diagnosis was not officially recognized until the publication of the DSM III (1980) twelve years later and (2) the diagnoses most closely resembling PTSD in the DSM II compensable by Department of Defense Physical Evaluation Board action were known as "Psychoses and Psychoneuroses," neither of which were applied to plaintiff's clinical presentation in 1968. AR0008.

The SMA also determined that there was no indication that plaintiff had ever complained of symptoms directly related to in-service stressors. AR0007. Rather, the SMA found that plaintiff had "demonstrated problems adjusting to the Navy prior to either of th[o]se tragic events." *Id.* In addition, the SMA observed that "[r]etrospective subjective accounts occurring remote from an applicant's active service are of significantly less probative value with respect to

determining fitness contemporary with a given period of active duty." AR0008. And so, the SMA recommended the denial of plaintiff's petition. *Id.*

The September 24, 2018, advisory opinion prepared by the Director of the Secretary of the Navy, Council of Review Boards reached a similar conclusion. Specifically, the September 24, 2018, advisory opinion states that plaintiff's military record contains:

> [a] preponderance of objective evidence supporting the existence of significant adjustment difficulties beginning prior to the applicant's enlistment and evolving into attitudinal and behavioral issues in conflict with the requirements of military service prior to the two exposures to psychological trauma which later occurred.

AR0009.

The BCNR also considered a memorandum prepared by Dr. Greenzang in response to the SMA's advisory opinion. AR0766-772. In that memorandum, Dr. Greenzang opines that the advisory opinion "failed in multiple regards to provide an adequate evaluation of Mr. Doyon's condition, . . . [and it] led [Dr. Greenzang] to conclude that [Mr. Doyon] suffers from PTSD, which existed during and stems from his experiences in the Navy." AR0767.

The BCNR issued a decision denying plaintiff's petition on November 20, 2018. AR0001-003. In its denial decision, the BCNR waived the statute of limitations under 10 U.S.C. § 1552(b) and resolved plaintiff's disability retirement claim on the merits without conducting an in-person hearing. AR0001-002. In doing so, the BCNR "substantially concurred" with the September 20, 2018, and September 24, 2018, advisory opinions. AR0002.

Specifically, the BCNR concluded that insufficient evidence of unfitness for continued Naval service due to psychosis or psychoneurosis existed in the evidentiary record. *Id.* In this regard, the BCNR found that, among other things, "there was no evidence of recurrent psychotic episodes, or a single well-established psychotic episode with existing symptoms or residuals sufficient to interfere with performance of duty." *Id.*

The BCNR also declined to afford substantial weight to the VA's disability ratings, or to Dr. Greenzang's medical opinion. *Id.* In this regard, the BCNR determined that the more recent diagnoses of PTSD, although uncontested by the BCNR, "were made too distant in time from 1968 to be probative of [plaintiff's] fitness for continued Naval service in 1968." *Id.* The BCNR

also observed that there was "more than enough evidence [in plaintiff's military record] of behavior consistent with a personality disorder to support the diagnosis made in 1968." *Id.* And so, the BCNR concluded that "insufficient evidence of error or injustice exists to warrant a change to [plaintiff's military] record." *Id.*

Plaintiff commenced this action challenging the BCNR's decision on December 27, 2019. *See generally* Compl.

C. Procedural Background

Plaintiff filed the complaint in this military pay matter on December 27, 2019. *Id.* On May 27, 2020, the government filed a motion to dismiss this matter for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted and a motion for judgment upon the administrative record, pursuant to RCFC 12(b)(1) and (6), and RCFC 52.1. *See generally* Def. Mot.

On June 24, 2020, plaintiff filed a response and opposition to the government's motion to dismiss and a cross-motion for judgment upon the administrative record. *See generally* Pl. Mot. On June 24, 2020, plaintiff also filed a motion to supplement the administrative record. *See generally* Pl. Mot. to Supp.

On July 15, 2020, the government filed a reply in support of its motion to dismiss and motion for judgment upon the administrative record, and a response and opposition to plaintiff's cross-motion for judgment upon the administrative record and motion to supplement the administrative record. *See generally* Def. Resp. On August 5, 2020, plaintiff filed a reply in support of his motions. *See generally* Pl. Reply.

These matters having been fully briefed, the Court resolves the pending motions.

III. LEGAL STANDARDS

A. RCFC 12(b)(1) And Military Pay Cases

When deciding a motion to dismiss upon the ground that the Court does not possess subject-matter jurisdiction pursuant to RCFC 12(b)(1), this Court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); RCFC 12(b)(1). But, plaintiff bears the burden of establishing subject-matter jurisdiction and he must do so by a

preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). Should the Court determine that "it lacks jurisdiction over the subject matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006).

In this regard, the United States Court of Federal Claims is a court of limited jurisdiction and "possess[es] only that power authorized by Constitution and statute . . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Specifically, the Tucker Act grants the Court jurisdiction over:

> [A]ny claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

The Tucker Act is, however, "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. . . . [T]he Act merely confers jurisdiction upon [the United States Court of Federal Claims] whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976) (citation omitted). And so, to pursue a substantive right against the United States under the Tucker Act, a plaintiff must identify and plead a money-mandating constitutional provision, statute, or regulation; an express or implied contract with the United States; or an illegal exaction of money by the United States. *Cabral v. United States*, 317 F. App'x 979, 981 (Fed. Cir. 2008) (citing *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005)); *see also Martinez v. United States*, 333 F.3d 1295, 1302-03 (Fed. Cir. 2003). "[A] statute or regulation is money-mandating for jurisdictional purposes if it 'can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties [it] impose[s].'" *Fisher*, 402 F.3d at 1173 (quoting *United States v. Mitchell*, 463 U.S. 206, 217 (1983)) (brackets existing).

The Military Pay Act and the Military Disability Retirement Pay Act are such money-mandating sources of law. 37 U.S.C. § 204; 10 U.S.C. § 1201; *see also Bias v. United States*, 131 Fed. Cl. 350, 354 (2017), *aff'd in part and rev'd in part*, 722 F. App'x 1009 (Fed. Cir. 2018) ("[T]he Military Pay Act, 37 U.S.C. § 204, is a money-mandating source of law that provides the [C]ourt with jurisdiction."); *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005) (holding that 10 U.S.C. § 1201 is a money-mandating statute). Under the Military Pay Act,

members of a uniformed service are entitled to the basic pay of the pay grade to which they are assigned, or distributed, in accordance with their years of service. 37 U.S.C. § 204(a). And so, the United States Court of Appeals for the Federal Circuit has recognized that the Military Pay Act "provides for suit in [this Court] when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay." *Antonellis v. United States*, 723 F.3d 1328, 1331 (Fed. Cir. 2013) (quoting *Dysart v. United States*, 369 F.3d 1303, 1315 (Fed. Cir. 2004)). The Military Disability Retirement Pay Act governs military retirement for disability. 10 U.S.C. § 1201; *see also Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005). The Act provides that "upon the Secretary's determination that a service member is 'unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay,' the service member may retire for disability." *Chambers*, 417 F.3d at 1223; 10 U.S.C. § 1201(a).

This Court has also held that a claim must be justiciable to survive a motion to dismiss. *See Houghtling v. United States*, 114 Fed. Cl. 149, 156–57 (2013). In this regard, the United States Supreme Court has held that justiciability depends upon "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198 (1962); *see also Murphy v. United States*, 993 F.2d 871, 872 (Fed. Cir. 1993). And so, a controversy is justiciable only if "it is 'one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence.'" *Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988) (quoting *Greene v. McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958)); *see also Antonellis*, 723 F.3d at 1334; *Adkins v. United States*, 68 F.3d 1317, 1322 (Fed. Cir. 1995).

The question of justiciability is frequently at issue when courts review military activities, and courts have often held that decisions made by the military are "beyond the institutional competence of courts to review." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("Because 'decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments,' . . . the substance of such decisions, like many other judgments committed to the discretion of government officials, is frequently beyond the institutional competence of courts to review.") (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("[J]udges are not given the task of

running the Army."); *see also Murphy*, 993 F.2d at 872; *Voge*, 844 F.2d at 780. But, even when the merits of a military personnel decision are nonjusticiable, the process by which the decision has been made may be subject to judicial review. *Adkins*, 68 F.3d at 1323 ("[A] challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy.") (emphasis original); *Murphy*, 993 F.2d at 873. And so, if the military chooses to introduce its own procedural regulations, the Court may review any violations of such regulations even if the underlying decision is nonjusticiable. *Murphy*, 993 F.2d at 873. In such circumstances, the Court "merely determines whether the procedures were followed by applying the facts to the statutory or regulatory standard." *Id.*

B. RCFC 12(b)(6)

When deciding a motion to dismiss based upon failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6), this Court similarly assumes that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *See Call Henry, Inc. v. United States*, 855 F.3d 1348, 1354 (Fed. Cir. 2017) (citing *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014)). And so, to survive a motion to dismiss pursuant to RCFC 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

When the complaint fails to "state a claim to relief that is plausible on its face," the Court must dismiss the complaint. *Iqbal*, 556 U.S. at 678 (citation omitted). On the other hand, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity," and determine whether it is plausible, based upon these facts, to find against the defendant. *Id.* at 678-79 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

C. RCFC 52.1

Unlike a summary judgment motion under RCFC 56, the existence of a genuine issue of material fact does not preclude a grant of judgment upon the administrative record under RCFC 52.1. *Tech. Sys., Inc. v. United States*, 98 Fed. Cl. 228, 242 (2011). Rather, the Court's inquiry is whether, "given all the disputed and undisputed facts, a party has met its burden of proof based

on the evidence in the record." *A&D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 131 (2006); *see also Bannum v. United States*, 404 F.3d 1346, 1355-56 (Fed. Cir. 2005).

In this regard, judicial review in military pay cases is generally limited to the administrative record that was before a military board. *Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006). The Court will not disturb the decisions of military boards unless the decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *Porter v. United States*, 163 F.3d 1304, 1312 (Fed. Cir. 1998); *Koretsky v. United States*, 57 Fed. Cl. 154, 158 (2003). Given this, the Court does not reweigh the evidence in reviewing board decisions. *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983). Rather, the Court considers whether the conclusions of the board are supported by substantial evidence. *Id.* And so, the Court does not substitute its judgment for that of the board when reasonable minds could reach different conclusions based upon the same evidence. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986).

D. Supplementing The Administrative Record

Lastly, the Federal Circuit held in *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009), that the "parties' ability to supplement the administrative record is limited" and that the administrative record should only be supplemented "if the existing record is insufficient to permit meaningful review consistent with the APA." *Axiom Res. Mgmt., Inc.*, 564 F.3d at 1379-81; *see also Caddell Constr. Co. v. United States*, 111 Fed. Cl. 49, 93 (2013). The Federal Circuit has also recognized that the Supreme Court held in *Camp v. Pitts* that "'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Axiom Res. Mgmt., Inc.*, 564 F.3d at 1379 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). This focus is maintained to prevent courts from using new evidence to "convert the arbitrary and capricious standard into effectively de novo review." *L-3 Commc'ns EOTech, Inc. v. United States*, 87 Fed. Cl. 656, 671 (2009) (internal quotation marks omitted); *see also Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000). And so, this Court has interpreted the Federal Circuit's directive in *Axiom* to mean that supplementation of the administrative record is permitted to correct mistakes and fill gaps, but is not permitted when the documents proffered are unnecessary for an effective review of the government's decision. *L-3 Commc'ns EOTech, Inc.*, 87 Fed. Cl. at 672.

IV. LEGAL ANALYSIS

The government has moved to dismiss this matter for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(1) and (6), upon the grounds that the Court does not possess jurisdiction to consider plaintiff's due process claim and that the remaining claims in the complaint should be dismissed because plaintiff is not entitled to the requested relief. Def. Mot. at 12-16.

The parties have also filed cross-motions for judgment upon the administrative record, pursuant to RCFC 52.1. *See generally id*.; Pl. Mot. The government argues in its motion for judgment upon the administrative record that the BCNR's decision to deny plaintiff's application to correct his military records was reasonable and supported by substantial evidence, because the BCNR applied the appropriate legal standards and adequately considered plaintiff's evidence and claims. *Id.* at 16-26. Plaintiff counters in his cross-motion for judgment upon the administrative record that he has alleged plausible claims in the complaint, and he argues that the record evidence in this case shows that the BCNR's decision to deny his application was arbitrary, capricious, not supported by substantial evidence and contrary to law. Pl. Mot. at 22-50. In addition, plaintiff has moved to supplement the administrative record with several documents about the drug Thorazine. *See generally* Pl. Mot. to Supp.

For the reasons set forth below, a careful review of the complaint and the administrative record shows that the Court does not possess subject-matter jurisdiction to consider plaintiff's due process claim. Plaintiff also has not shown that supplementing the administrative record is warranted in this military pay case. In addition, the administrative record also makes clear that the BCNR complied with applicable law in considering plaintiff's application to correct his military records and that the BCNR's decision to deny plaintiff's application was reasonable and supported by substantial evidence. And so, the Court: (1) **GRANTS-in-PART** the government's motion to dismiss; (2) **DENIES** plaintiff's motion to supplement the administrative record; (3) **GRANTS** the government's motion for judgment upon the administrative record; and (4) **DENIES** plaintiff's cross-motion for judgment upon the administrative record.

A. The Court Grants-In-Part The Government's Motion To Dismiss

As a preliminary matter, the government persuasively argues that the Court should dismiss plaintiff's due process claim for lack of subject-matter jurisdiction. It is well-established that this Court does not possess subject-matter jurisdiction to consider claims based upon the due process clauses of the Fifth or Fourteenth Amendments, because these constitutional provisions are not money-mandating. *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed Cir. 1995) (finding that the due process and equal protection clauses of the Fourteenth Amendment do not constitute "a sufficient basis for jurisdiction because they do not mandate payment of money by the government"); *see also Quailes v. United States*, 25 Cl. Ct. 659, 664, *aff'd*, 979 F.2d 216 (Fed. Cir. 1992) (quoting *Mullenberg v. United States*, 857 F.2d 770, 772-73 (Fed. Cir. 1988)) ("This court does not have jurisdiction ... because neither the due process or equal protection clauses of the Constitution 'obligate the United States to pay money damages.'"); *McCullough v. United States*, 76 Fed. Cl. 1, 4 (2006) ("[T]he Fifth Amendment is not a source that mandates the payment of money to plaintiff."); *James v. Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998). In this case, plaintiff alleges in Count III of the complaint that the BCNR failed to afford him procedural due process in violation of the Due Process Clause of the Fifth Amendment. Compl. at ¶ 83-85. The Court may not consider plaintiff's constitutional law claim because it is not based upon a money-mandating source of law. *LeBlanc*, 50 F.3d at 1028. And so, the Court must dismiss this claim for lack of subject-matter jurisdiction. RCFC 12(b)(1).

The government's argument that the Court should also dismiss the remaining claims in this case for failure to state a claim upon which relief can be granted is less persuasive. The government argues that the Court should dismiss Counts I and II of the complaint, because plaintiff is not entitled to the relief that he seeks in those claims—namely, a 30% disability rating, disability retirement pay and placement on the permanent disability retirement list. Def. Mot. at 14-16; Def. Resp. at 3-4. In this regard, the government contends that plaintiff would not be entitled to such relief—even if the Navy were to change his medical diagnosis to psychoneurosis—because such a diagnosis would not necessarily mean that plaintiff was unfit for duty. Def. Mot. at 16.

The government's argument is, at bottom, an argument about the nature of the relief that the Court may award to plaintiff should the Court determine that the BCNR erred in denying

plaintiff's application to correct his military records. Because this issue is more appropriately addressed within the context of the parties' cross-motions for judgment upon the administrative record, and the complaint contains well-pleaded factual allegations to support plaintiff's claims in Counts I and II of the complaint, the Court declines to dismiss these claims for failure to state a claim upon which relief can be granted. RCFC 12(b)(6).

B. Supplementing The Administrative Record Is Not Warranted

The Court also declines to supplement the existing administrative record in this military pay case with information about the drug Thorazine. Plaintiff seeks to supplement the administrative record with: (1) a National Center for Biotechnology Institute study describing the use and effects of Thorazine (Chlorpromazine); (2) two Thorazine advertisements; and (3) a June 2, 2013, scientific article by the Science History Institute describing the impact of Thorazine on the treatment of mental illness. *See generally* Pl. Mot. to Supp. The Federal Circuit has long recognized that judicial review in military pay cases is generally limited to the administrative record that was before a military board. *Metz v. United States*, 466 F.3d 991, 998-99 (Fed. Cir. 2006). As the government correctly observes in its opposition to plaintiff's motion to supplement, the existing administrative record contains all of the documents that provided the factual, procedural and legal predicate for the BCNR's decision to deny plaintiff's application to correct his military records. Def. Resp. at 12-13; *see generally* AR. Given this, supplementation of the administrative record with the aforementioned documents is not warranted and the Court **DENIES** plaintiff's motion.[3]

C. The BCNR's Decision Was In Accordance With Law And Supported By Substantial Evidence

Turning to the merits of plaintiff's claims, the administrative record shows that the BCNR complied with applicable law in considering plaintiff's application to correct his military records and that the BCNR's denial decision is supported by substantial evidence. And so, for the reasons that follow, the Court **GRANTS** the government's motion for judgment upon the

[3] The Court may exercise its discretion to take judicial notice of the certain incontrovertible facts contained in these documents about the uses and effects of Thorazine, consistent with Federal Rule of Evidence 201. *See* Fed. R. Evid. 201.

administrative record and **DENIES** plaintiff's cross-motion for judgment upon the administrative record.

1. The BCNR Did Not Violate Department Of Defense Guidance

As an initial matter, the record evidence shows that the BCNR did not err by declining to apply the Hagel Memorandum and Kurta Memorandum to plaintiff's application. Plaintiff argues in his cross-motion for judgment upon the administrative record that the BCNR erred by failing to apply the guidance and standards set forth in the Hagel and Kurta Memoranda to give liberal consideration to his application, because it is undisputed that plaintiff has been diagnosed with PTSD. Pl. Mot. at 25, 30-31. A careful review of these memoranda shows, however, that the BCNR appropriately declined to apply this guidance in this case.

The Hagel and Kurta Memoranda require that military correction boards give liberal consideration to veterans' applications petitioning for discharge relief, when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD. Def. Mot. at 19; Pl. Mot. at 23; *see also* AR0186; AR0893. While plaintiff correctly observes that his claims are related to his PTSD diagnosis, the Court agrees with the government that the Hagel Memorandum does not apply to the application at issue in this case because plaintiff is not challenging the characterization of his discharge from the Navy.

The Hagel Memorandum is entitled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder." AR0184. As the title of this memorandum suggests, the Hagel Memorandum applies to petitions containing discharge characterization upgrade requests. AR0186. In this case, it is undisputed that plaintiff is not seeking to challenge the honorable characterization of his discharge from the Navy. Def. Mot. at 19-20; Pl. Mot. at 32-35 (showing that plaintiff does not challenge his honorable discharge characterization). Rather, the complaint makes clear that plaintiff seeks to challenge the Navy's decision to separate him from the military for unsuitability, rather than for unfitness. Compl. at ¶¶ 39-40. Because the Court does not read the Hagel Memorandum to apply to unfitness determinations, particularly when they are unrelated to the characterization of discharge, the Court agrees with the government that the BCNR did not err by declining to apply the guidance in the Hagel Memorandum to plaintiff's application.

Plaintiff's argument that the Kurta Memorandum applies to his case, because he is challenging the narrative reason for his honorable discharge from the Navy presents a closer question. The Kurta Memorandum provides that "[l]iberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD," and that "[u]nless otherwise indicated, the term "discharge" includes the characterization, *narrative reason*, separation code, and re-enlistment code." AR0893; AR0895 (emphasis supplied.). The Kurta Memorandum also makes clear that its guidance is "not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations." AR0895. And so, plaintiff correctly argues that the Kurta Memorandum requires that the BCNR give "liberal consideration" to applications seeking discharge relief that challenge the narrative reason for a military discharge. Pl. Mot. at 34; AR0895.

But, plaintiff's contention that he is challenging the narrative reason for his honorable discharge from the Navy in this case is belied by a plain reading of the complaint and plaintiff's application to correct his military records. The complaint and plaintiff's application before the BCNR make clear that plaintiff seeks to have his military records corrected to show that he was medically retired due to PTSD, with a disability rating of no less than 30% and was thus, *unfit* for duty in 1968. AR0019-0021; Compl. at Prayer for Relief. Notably, plaintiff's application before the BCNR states that he seeks to correct his military records to "show that he was found *unfit* and medically retired for psychosis and psychoneuroses." AR0019 (emphasis supplied); *see also* AR0025 (plaintiff seeks "to correct an error made in 1968 when Airman Doyon should have been granted a military retirement for the mental health impacts of trauma he experienced while in service."). Because plaintiff seeks a determination regarding his fitness for duty in 1968, the Court is not persuaded that the claim that plaintiff asserts in this case can be properly characterized as a challenge to the narrative reason for his discharge.

Indeed, as the government correctly observes, a determination regarding plaintiff's fitness for duty in 1968 is necessary to award the relief sought in this case.[4] Def. Resp. at 6; *see also* AR0002 (showing that the BCNR concluded that there is "insufficient evidence of unfitness for continued naval service due to psychosis or psychoneurosis."). As discussed above, the Court does not read either the Hagel or Kurta Memoranda to apply to such unfitness or disability retirement determinations. AR0184-0187; AR0892-0897. And so, the Court concludes that the BCNR did not err by declining to apply those memoranda to plaintiff's claims.

2. The BCNR's Decision Is Supported By Substantial Evidence

The record evidence also shows that the BCNR's decision to deny plaintiff's application was reasonable and supported by substantial evidence. It is well-established that the Court will not disturb the decision of the BCNR unless the board's decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *Porter v. United States*, 163 F.3d 1304, 1312 (Fed. Cir. 1998); *Koretsky v. United States*, 57 Fed. Cl. 154, 158 (2003). Plaintiff has not made such a showing here for several reasons.

First, the record evidence shows that the BCNR reasonably considered the medical opinion of plaintiff's psychiatrist, Dr. Greenzang, and the VA's disability ratings for plaintiff's service-related PTSD, in reviewing plaintiff's application. Plaintiff argues in his cross-motion that the BCNR erred, because it should not have dismissed the determinations made by Dr. Greenzang and the VA that he suffers from service-related PTSD. Pl. Mot. at 43-44. But, a review of the record evidence makes clear that the BCNR appropriately considered this evidence in reaching the decision to deny plaintiff's application. In this regard, the BCNR acknowledges in its decision that plaintiff was "rated by the Department of Veterans Affairs (VA) for Post-Traumatic Stress Disorder (PTSD) in 2013 and assigned a 50% disability rating . . . [and that plaintiff's disability rating] was later increased to 70% by the VA." AR0002. The BCNR also acknowledges in the decision that plaintiff has been diagnosed with PTSD. *Id.*

The record evidence also shows that the BCNR reasonably determined that Dr. Greenzang's 2017 PTSD diagnosis and the VA's 2014 and 2015 disability ratings occurred "too

[4] The government argues that a determination of whether plaintiff was fit for duty is not a judicial province. Def. Mot. at 16; *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983).

distant in time" from the date of plaintiff's discharge from the Navy to be probative of whether plaintiff was fit for duty in 1968. In this regard, the BCNR states in its decision that "these opinions were reached "too distant in time" from 1968 and therefore, were less credible than plaintiff's October 28, 1968, diagnosis of "Emotional Unstable Personality #3210, with noted paranoid trait in his personality." AR0002; AR0234. The substantial evidence supports the BCNR's determination.

The administrative record makes clear that the VA examined plaintiff for PTSD symptoms more than 40 years after plaintiff was discharged from the Navy. AR0087-0091 (VA rating decision, Sept. 16, 2014); AR0092-0096 (VA rating decision, Nov. 18, 2015); AR0064-0081 (VA PTSD examination report, June 11, 2014); AR0511-517 (VA PTSD examination report, Oct. 21, 2015). The record evidence also shows that Dr. Greenzang's medical opinion diagnosing plaintiff with PTSD was issued in 2017, again, more than four decades after plaintiff was discharged. AR0375-0391 (Dr. Greenzang's opinion, Sept. 13, 2017).

The record evidence also shows that the Navy medical professionals who diagnosed plaintiff with a personality disorder in 1968 personally observed plaintiff at that time. AR0226-229; AR0234 (showing that two Navy mental health specialists personally observed plaintiff before changing his diagnosis to "Emotional Unstable Personality #3210, with noted paranoid trait in his personality."). Given the evidence in the administrative record showing the considerable passage of time between plaintiff's discharge from the Navy and his PTSD diagnosis, the substantial evidence supports the BCNR's determination that plaintiff's PTSD diagnosis and VA disability ratings were too remote to be probative of plaintiff's fitness for duty.

The BCNR's finding that plaintiff was properly separated from the Navy for unsuitability due to a preexisting personality disorder is also supported by substantial evidence. Plaintiff argues that the BCNR's finding lacks evidentiary support, because he was not found to have a personality disorder upon entry to the military and his service record shows adequate performance during the first 12 months of his enlistment. Pl. Mot. at 38-39. But, again, there is substantial evidence in the record to support the BCNR's findings.

The record evidence shows that plaintiff went on unauthorized absence from the Navy in May 1968, because he was "suffering from significant emotional torment." AR0006; Compl. at ¶ 26. The record evidence also shows that, after plaintiff returned to duty, he was transferred to

Naval Base Subic Bay on August 16, 1968, because he was "expressing fears of possibly doing harm to himself and also expressing admiration for sailors who [had] deserted from his ship." AR0006; AR0226.

Plaintiff's hospital records from this time period also note that plaintiff felt "isolated and different from his shipmates," and that he was "definitely afraid of forming close relationships with his peer groups." *Id.* Plaintiff's medical records similarly show that a medical officer concluded in 1968 that plaintiff suffered from a passive aggressive personality disorder and recommended that he be returned to full duty. AR0229. As discussed above, this diagnosis was subsequently changed on October 28, 1968, to Emotionally Unstable Personality #3210, with noted paranoid traits in his personality. AR0234.

While plaintiff maintains that his medical and service records show that he suffered from service-related PTSD at the time of his discharge from the Navy, the BCNR reasonably determined that this evidence supports a finding that plaintiff had a personality disorder at that time. Given this evidence, the BCNR's conclusion that "there was more than enough evidence of behavior consistent with a personality disorder to support the diagnosis made in 1968" is supported by substantial evidence. AR0002.

The record evidence also shows that the BCNR appropriately weighed and considered the advisory opinions provided by the SMA and the Director of the Secretary of the Navy, Council of Review Boards in reviewing plaintiff's application. AR0002; AR0004-0009. Plaintiff argues that the BCNR's reliance upon these two advisory opinions is misplaced, because the opinions are "inconsistent with the factual record." Pl. Reply at 12-13. But, the record evidence shows that the BCNR properly considered and weighed the probative value of these advisory opinions in reviewing plaintiff's application.

In this regard, the record evidence shows that the BCNR "substantially concurred" with the findings in the SMA's September 20, 2018, advisory opinion and the Director of the Secretary of the Navy, Council of Review Boards' September 24, 2018, advisory opinion to support its determination that "there was no evidence of recurrent psychotic episodes, or a single well-established psychotic episode with existing symptoms or residuals sufficient to interfere with performance of duty in [plaintiff's] case." AR0002; AR0007-0008. These advisory opinions both find that there is little objective evidence in plaintiff's service treatment record

suggesting that a PTSD-related stress reaction made a significant contribution to the circumstances resulting in his administrative separation from the Navy. AR0008; AR0009. Again, there is substantial evidence in the record to support this finding.

A review of the record evidence shows that the medical record for plaintiff's August 1968 hospitalization at Subic Bay is devoid of any indication that plaintiff was suffering from psychoses or psychoneuroses. AR0226-0227. The record evidence also shows that plaintiff returned to duty after this hospitalization on August 30, 1968. AR0227; AR0229.

The evidentiary record also shows that, during a subsequent October 28, 1968, mental health examination, plaintiff was determined to be "clearly sane and responsible, not amenable to psychiatric treatment within the service," and that he "[did] not warrant hospitalization." AR0234. In addition, the administrative record shows that plaintiff enrolled in a major university after being discharged from the Navy and that he did not suffer from any documented psychotic episodes for 40 years. AR0008-0009. And so, the record evidence shows that the BCNR's determination that there was no objective evidence that plaintiff suffered from recurrent psychotic episodes is supported by substantial evidence.

The Court is also not persuaded by plaintiff's argument that the BCNR erred by giving too much weight to his Naval performance evaluations and to a letter sent to Senator Kennedy by his parents. Pl. Reply at 14; AR0220-0222; AR0583; AR0603-0606. Plaintiff correctly observes that these documents do not state that he had a personality disorder. *See id.* But, the performance evaluations and letter do provide contemporaneous support for the BCNR's determination that plaintiff was "deeply bothered by [his] service in the Navy." AR0002.

Notably, plaintiff's performance evaluations state that plaintiff "found it difficult to adjust to Navy life," "[he] has not made a genuine effort to advance on his own," and that plaintiff "seldom displays initiative or interest in his work." AR0603; AR0606. The letter sent to Senator Kennedy also states that plaintiff was in a "deeply depressed mood" and that his parents feared that plaintiff would "attempt to jump ship or commit some desperate act for which he will not be responsible in his present state of mind." AR0222; AR0876. In its decision, the BCNR states that it relied upon the letter sent to Senator Kennedy to find that plaintiff was "deeply bothered" by his service in the Navy due to his personal convictions against the Vietnam War. AR0002. And so, the BCNR reasonably concluded that plaintiff's personal convictions,

rather than the traumatic incidents that plaintiff witnessed during his military service, were the basis for the conduct which led to plaintiff's discharge due to unsuitability. *Id.*

The Court also observes that plaintiff correctly argues that there is some evidence in the administrative record to support his claim that he suffered from service-related PTSD at the time of his discharge from the Navy. Pl. Mot. at 41-44; AR0203-0204; AR0206-0209; AR0222; AR0224; AR0375-0390; AR0068-0070; AR0362-0363. In this regard, it is notable that plaintiff's PTSD diagnosis is not in dispute. Def. Mot. at 3; Def. Resp. at 8; AR0002 ("the Board does not contest that [plaintiff has] been diagnosed with PTSD"). But, the administrative record in this military pay case shows that the BCNR fully considered this evidence and that the board's decision to deny plaintiff's application to correct his military records is supported by substantial evidence. Given this, the Court will not substitute its judgment for that of the BCNR when reasonable minds could reach different conclusions about plaintiff's mental health in 1968 based upon the same evidence. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986). And so, the Court **GRANTS** the government's motion for judgment upon the administrative record and **DENIES** plaintiff's cross-motion for judgment upon the administrative record.

V. CONCLUSION

In sum, a careful review of the complaint and the administrative record shows that the Court does not possess subject-matter jurisdiction to consider plaintiff's constitutional law claim. The administrative record also shows that the BCNR complied with applicable law in considering plaintiff's application to correct his military records and that the BCNR's decision to deny plaintiff's application was reasonable and supported by substantial evidence.

And so, for the foregoing reasons, the Court:

1. **GRANTS-in-PART** the government's motion to dismiss;
2. **DENIES** plaintiff's motion to supplement the administrative record;
3. **GRANTS** the government's motion for judgment upon the administrative record; and

4. **DENIES** plaintiff's cross-motion for judgment upon the administrative record.

The Clerk shall enter judgment accordingly.

Each party shall bear its own costs.

IT IS SO ORDERED.

s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
Judge

In the United States Court of Federal Claims

No. 19-1964C
(Filed: January 14, 2021)

ROBERT L. DOYON

Plaintiff

v **JUDGMENT**

THE UNITED STATES

Defendant

Pursuant to the court's Memorandum Opinion And Order, filed January 13, 2021, granting defendant's motion for judgment on the administrative record and denying plaintiff's cross-motion for judgment on the administrative record,

IT IS AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant. Each party shall bear its own costs.

Lisa L. Reyes
Clerk of Court

By: s/Anthony Curry

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.

In the United States Court of Federal Claims

No. 19-1964C
Filed: June 2, 2021
NOT FOR PUBLICATION

ROBERT L. DOYON, Plaintiff, v. THE UNITED STATES, Defendant.	RCFC 59(a); Motion For Reconsideration; RCFC 60(b); Relief From Judgment.

Remington Lamons, Counsel of Record, Latham & Watkins, Costa Mesa, CA, for plaintiff.

Jana Moses, Trial Attorney, *Steven J. Gillingham*, Assistant Director, *Robert E. Kirschman, Jr.*, Director, *Ethan P. Davis*, Acting Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC; *Lt. Clayton McCarl*, Litigation Attorney, United States Navy, JAG Corps, for defendant.

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION AND RELIEF FROM JUDGMENT

GRIGGSBY, Judge

I. INTRODUCTION

Pursuant to Rules 59 and 60(b) of the Rules of the United States Court of Federal Claims ("RCFC"), plaintiff, Robert L. Doyon, seeks reconsideration of, and relief from, the Court's January 13, 2021, Memorandum Opinion and Order (the "January 13, 2021, Decision") that, among other things, granted the government's motion for judgment upon the administrative record and denied plaintiff's cross-motion for judgment upon the administrative record on the issue of whether the Board for the Correction of Naval Records ("BCNR") complied with applicable law in considering plaintiff's application to correct his military records. *See generally* Pl. Mot. For the reasons set forth below, the Court **DENIES** plaintiff's motion for reconsideration and relief from judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

In this military pay action, plaintiff challenged the BCNR's decision to deny his application for the correction of his military records to reflect that he was unfit for duty and medically retired for psychosis or psychoneuroses associated with post-traumatic stress disorder ("PTSD"). *See generally* Compl. Specifically, plaintiff argued that the BCNR's decision not to apply memoranda regarding discharge upgrade requests issued by former Secretary of Defense Charles Hagel (the "Hagel Memorandum"), and former Undersecretary of Defense Anthony Kurta (the "Kurta Memorandum") was arbitrary, capricious, an abuse of discretion and contrary to law. *See* Pl. Mot. for Judgment Upon the Administrative Record at 22-35.

In this regard, plaintiff argued that the Hagel and Kurta Memoranda apply to his claims, because he is challenging the narrative reason for his honorable discharge from the Navy. *Id.* at 32-34, 50. And so, plaintiff further argued that the board's decision to deny his application contained "a fundamental error of law," because the BCNR did not apply the guidance and standards set forth in the Hagel and Kurta Memoranda in this case. *Id.* at 22.

After the parties fully briefed this and several other issues, the Court issued a Memorandum Opinion and Order on January 13, 2021, that: (1) granted-in-part the government's motion to dismiss this matter; (2) denied plaintiff's motion to supplement the administrative record; (3) granted the government's motion for judgment upon the administrative record; and (4) denied plaintiff's cross-motion for judgment upon the administrative record. *See generally Doyon v. United States*, No. 19-1964C, 2021 WL 120923, at *14 (Fed. Cl. Jan. 13, 2021). In the January 13, 2021, Decision, the Court held, among other things, that the BCNR did not err by declining to apply the Hagel and Kurta Memoranda to plaintiff's application, because a plain reading of the complaint and plaintiff's application showed that plaintiff is not challenging the narrative reason for his honorable discharge from the Navy in this case. *Id.* at *9-11.

Specifically, the Court held that the complaint makes clear that plaintiff seeks to challenge the Navy's decision to separate him from the military for unsuitability, rather than for unfitness in this case. *Id.* at *10; *see also* Compl. at ¶¶ 39-40. In this regard, the Court observed that the complaint and application before the BCNR make clear that plaintiff seeks to have his

military records corrected to show that he was medically retired and unfit for duty. *Doyon*, 2021 WL 120923, at *10; *see* AR0019 (stating that plaintiff seeks to correct his military records to "show that he was found unfit and medically retired for psychosis and psychoneuroses."); Compl. at Prayer for Relief. The Court also recognized that the Kurta Memorandum requires that the BCNR give "liberal consideration" to applications challenging the narrative reason for a military discharge. *Id.* But, the Court concluded that plaintiff does not seek such relief here. *Id.*

Given this, the Court concluded that the Hagel and Kurta Memoranda do not apply to plaintiff's medical retirement and unfitness claims in this case. *Id.* at *11. And so, the Court granted the government's motion for judgment upon the administrative record and denied plaintiff's cross-motion for judgment upon the administrative record on this issue.[1] *Id.* Plaintiff seeks reconsideration of the Court's decision.

B. Procedural Background

On February 11, 2021, plaintiff filed a motion for reconsideration of, and relief from, the Court's January 13, 2021, Decision. *See generally* Pl. Mot. On March 24, 2021, the government filed a response and opposition to plaintiff's motion. *See generally* Def. Resp. On April 7, 2021, plaintiff filed a reply in support of his motion. *See generally* Pl. Reply.

This matter having been fully briefed, the Court resolves the pending motion for reconsideration and relief from judgment.

[1] The Court granted-in-part the government's motion to dismiss the complaint, because the Court did not possess subject-matter jurisdiction to consider plaintiff's due process claim. *Doyon*, 2021 WL 120923, at *8-9. The Court also denied plaintiff's motion to supplement the administrative record. *Id.* at *9. In addition, the Court granted the government's motion for judgment upon the administrative record and denied plaintiff's cross-motion for judgment upon the administrative record on the issue of whether the BCNR's decision was supported by substantial evidence, because the record evidence showed that the BCNR appropriately weighed and considered plaintiff's medical and service records and that the board's decision to deny plaintiff's application was reasonable. *Id.* at *11-13.

III. LEGAL STANDARDS

A. RCFC 59(a)

Motions for reconsideration are governed by RCFC 59, which provides, in relevant part, that:

> **(1)** ***Grounds for New Trial or Reconsideration*****.** The court may, on motion, grant a new trial or a motion for reconsideration on all or some of the issues—and to any party—as follows:
>
> (A) for any reason for which a new trial has heretofore been granted in an action at law in federal court;
>
> (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or
>
> (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

RCFC 59(a)(1). This Court has held that "[t]o prevail on a motion for reconsideration under RCFC 59, the movant must identify a 'manifest error of law, or mistake of fact.'" *Langan v. United States*, No. 18-1603C, 2019 WL 4643746, at *2 (Fed. Cl. Sept. 24, 2019) (quoting *Shapiro v. Sec'y of Health & Human Servs.*, 105 Fed. Cl. 353, 361 (2012), *aff'd*, 503 F. App'x 952 (Fed. Cir. 2013)). And so, the Court will grant a motion for reconsideration upon a showing of either: "(i) an intervening change in controlling law; (ii) the availability of previously unavailable evidence; or (iii) the necessity of granting the motion to prevent manifest injustice." *Id.*; *see also Johnson v. United States*, 126 Fed. Cl. 558, 560 (2016).

Granting relief based upon a motion for reconsideration also requires "'a showing of extraordinary circumstances.'" *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting *Fru-Con Constr. Corp.*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 762 (Fed. Cir. 2000)). Given this, plaintiff cannot prevail upon a motion for reconsideration upon the ground of manifest injustice, unless he can show that any injustice is "apparent to the point of being almost indisputable." *Ogunniyi v. United States*, 124 Fed. Cl. 668, 672 (2016) (internal quotation marks omitted) (quoting *Griffin v. United States*, 96 Fed. Cl. 1, 7 (2010)). In addition, motions "for reconsideration may not be used simply as an opportunity for a party to take a second bite at the apple by rearguing positions that have been rejected." *Johnson*, 126 Fed. Cl. at 560 (citations omitted) (internal quotation marks omitted). And so, "[t]he decision whether to grant

reconsideration lies largely within the discretion of the [trial court]." *Kornafel v. United States*, 55 F. App'x 551, 552 (Fed. Cir. 2003) (internal quotation marks omitted) (quoting *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990)).

B. RCFC 60(b)

RCFC 60(b) sets forth the grounds for obtaining relief from a final judgment. Specifically, this rule provides that:

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

RCFC 60(b). In addition, the United States Court of Appeals for the Federal Circuit has recognized that subparagraph (b)(6) of Rule 60 is a "grand reservoir of equitable power to do justice in a particular case," although not a "bottomless" one. *Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc.*, 714 F.3d 1289, 1295 (Fed. Cir. 2013) (citation omitted). To that end, relief under RCFC 60(b)(6) may be granted "only for exceptional or extraordinary circumstances." *Louisville Bedding Co. v. Pillowtex Corp.*, 455 F.3d 1377, 1380 (Fed. Cir. 2006) (internal citations omitted); *see also Perry v. United States*, 558 F. App'x 1004, 1006 (Fed. Cir. 2014); *Kennedy v. Sec'y of Health & Human Servs.*, 99 Fed. Cl. 535, 548, *aff'd*, 485 F. App'x 435 (Fed. Cir. 2012) (holding that a strict interpretation of the broad text of RCFC 60(b)(6) is necessary to preserve the "finality of judgments," and RCFC 60(b)(6) cannot serve as the grounds to relieve a party from a "free, calculated, and deliberate choice"). Such exceptional or extraordinary circumstances exist when, absent relief, a "grave miscarriage of justice" would

result, and the "substantial rights" of the party would be harmed. *Kennedy*, 99 Fed. Cl. at 548; *see also Dynacs Eng'g Co. v. United States*, 48 Fed. Cl. 240, 242 (2000).

IV. LEGAL ANALYSIS

Plaintiff seeks reconsideration of, and relief from, the Court's January 13, 2021, Decision to "correct mistakes of both fact and of law in the Court's reasoning to avoid manifest injustice." Pl. Mot. at 2. Specifically, plaintiff argues that this extraordinary relief is warranted, because the Court erred by concluding that his request for a medical retirement is not a challenge to the narrative reason for his discharge from the Navy. *Id.* at 2-4. And so, plaintiff maintains that the Court should grant his request to have his Naval records corrected to show that he was unfit for duty and medically retired in 1968. *Id.* at 6.

The government counters that plaintiff has not shown that reconsideration of, or relief from, the Court's January 13, 2021, Decision is warranted in this case, because plaintiff seeks to re-litigate an issue that has already been resolved by the Court—whether the claims in this case constitute a challenge to the narrative reason for plaintiff's discharge from the Navy. Def. Resp. at 1, 4, 6-7. And so, the government requests that the Court deny plaintiff's motion for reconsideration and relief from judgment. *Id.* at 7.

For the reasons discussed below, the Court agrees with the government that plaintiff has not shown that reconsideration of the Court's January 13, 2021, Decision under RCFC 59, or relief from judgment under RCFC 60(b), is warranted in this case. And so, the Court **DENIES** plaintiff's motion.

A. Plaintiff Has Not Shown That Reconsideration Is Warranted

As an initial matter, plaintiff has not met his burden to show that reconsideration of the Court's January 13, 2021, Decision is warranted in this case. To prevail on his motion for reconsideration, plaintiff must identify a "manifest error of law, or mistake of fact" with regards to the Court's January 13, 2021, Decision. *Langan v. United States*, No. 18-1603C, 2019 WL 4643746, at *2 (Fed. Cl. Sept. 24, 2019) (quoting *Shapiro v. Sec'y of Health & Human Servs.*, 105 Fed. Cl. 353, 361 (2012), *aff'd*, 503 F. App'x 952 (Fed. Cir. 2013)). But, a careful review of plaintiff's motion for reconsideration and relief from judgment shows that plaintiff neither demonstrates the existence of an intervening change in controlling law, the availability of

previously unavailable evidence, nor the necessity of granting his motion to prevent manifest injustice, to warrant reconsideration of the January 13, 2021, Decision. Pl. Mot at 2-6; Pl. Reply at 1-5; *see also Johnson v. United States*, 126 Fed. Cl. 558, 560 (2016).

Plaintiff's argument that reconsideration is warranted—because the January 13, 2021, Decision contains a "mistake of fact" with regards to the Court's determination that his request for a medical retirement is not a challenge to the narrative reason for his honorable discharge from the Navy—is also unpersuasive. Pl. Mot. at 2-4. Plaintiff relies upon a 2019 decision of the BCNR in which the board granted an application to correct the Naval records of a veteran to place him on the disability retirement list to support his request for reconsideration. *Id.*; Pl. Ex. A. But, as the government correctly observes in its response and opposition to plaintiff's motion, the BCNR decision cited by plaintiff does not indicate that the board applied the liberal consideration standard set forth in the Hagel and Kurta Memoranda to the claims in that case.[2] Def. Resp. at 5.

In addition, and as the Court explained in the January 13, 2021, Decision, a plain reading of the complaint and plaintiff's application before the BCNR in this case show that plaintiff seeks to have his military records corrected to show that he was medically retired due to PTSD, with a disability rating of no less than 30%, and that he was unfit for duty in 1968. *Doyon*, 2021 WL 120923, at *10; AR0019-0021; Compl. at Prayer for Relief. Such relief extends well beyond a challenge to the narrative reason for plaintiff's honorable discharge. And so, as the Court previously concluded in the January 13, 2021, Decision, the BCNR did not err by declining to apply the liberal consideration standard set forth in the Hagel and Kurta Memoranda to plaintiff's unfitness and medical retirement claims. *Doyon*, 2021 WL 120923, at *11.

While plaintiff now seeks to re-visit this issue with a citation to a case that he could have addressed during the briefing of the parties' cross-motions, this Court has long recognized that

[2] Specifically, the government argues that the 2019 BCNR decision upon which plaintiff relies makes two references to Title 10, United States Code, Section 1552, because Section 1552 authorizes the BCNR to correct military records. Def. Resp. at 5. While plaintiff attempts to stretch the board's reliance on Section 1552 to include the liberal consideration standard codified in Section 1552(h)(2)(B), the government correctly observes that the 2019 BCNR decision does not mention the applicability of the liberal consideration standard, the guidance set forth in the Hagel or Kurta Memoranda or any related legal authority. *Id.* And so, the government argues that the 2019 BCNR decision neither contradicts nor undermines the Court's January 13, 2021, Decision. *Id.*

motions for reconsideration may not be used as "an opportunity for a party to take a second bite at the apple by rearguing positions that have been rejected." *Johnson*, 126 Fed. Cl. at 560. Because plaintiff seeks to do precisely that here, he has not shown that reconsideration of the Court's January 13, 2021, Decision is warranted. *Langan*, 2019 WL 4643746, at *2. And so, the Court denies plaintiff's request for reconsideration. RCFC 59.

B. Plaintiff Has Not Shown That He Is Entitled To Relief From Judgment

Plaintiff has similarly failed to show that he is entitled to relief from the judgment entered in this case under RCFC 60(b). Pursuant to RCFC 60(b), the Court may relieve a party from a final judgment due to, among other things, a mistake, or any other reason that justifies this extraordinary relief. RCFC 60(b)(1) and (6). Plaintiff argues that relief from the final judgment in this case "is necessary to rectify the mistake of fact that resulted in an erroneous legal conclusion and manifest injustice." Pl. Reply at 5. But, plaintiff neither articulates nor demonstrates a mistake of fact in the January 13, 2021, Decision. *See* Pl. Mot. at 2-6; Pl. Reply at 1-5. Rather, as discussed above, plaintiff makes clear in his motion that he disagrees with the Court's conclusion that his claims do not constitute a challenge to the narrative reason for his honorable discharge.

Plaintiff also fails to explain why a manifest injustice would occur absent the relief that he seeks. Pl. Reply at 2-3. Given this, the Court must also deny plaintiff's request for relief from judgment pursuant to RCFC 60(b). RCFC 60(b); *JGB Enters.*, 71 Fed. Cl. at 472 (holding that RCFC 60(b) should not be used to re-litigate claims.).

V. CONCLUSION

Because plaintiff has not met his heavy burden to show that he is entitled to reconsideration of the Court's January 13, 2021, Decision under RCFC 59, or to relief from judgment under RCFC 60, the Court **DENIES** plaintiff's motion for reconsideration.

IT IS SO ORDERED.

s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
Judge

ADDENDUM
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 28(f)

10 U.S.C. § 1201

§ 1201. Regulars and members on active duty for more than 30 days: retirement

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

(b) REQUIRED DETERMINATIONS OF DISABILITY.—Determinations referred to in subsection (a) are determinations by the Secretary that—

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either—

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either—

(i) the disability was not noted at the time of the member’s entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member’s entrance on active duty and was not aggravated by active military service);

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after September 14, 1978.

(c) ELIGIBLE MEMBERS.—This section and sections 1202 and 1203 of this title apply to the following members:

(1) A member of a regular component of the armed forces entitled to basic pay.

(2) Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 10148(a) of this title) for a period of more than 30 days.

(3) Any other member of the armed forces who is on active duty but is not entitled to basic pay by reason of section 502(b) of title 37 due to authorized absence (A) to participate in an educational program, or (B) for an emergency purpose, as determined by the Secretary concerned.

10 U.S.C. § 1552

§ 1552. Correction of military records: claims incident thereto

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3)(A) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(B) If a board makes a preliminary determination that a claim under this section lacks sufficient information or documents to support the claim, the board shall notify the claimant, in writing, indicating the specific information or documents necessary to make the claim complete and reviewable by the board.

(C) If a claimant is unable to provide military personnel or medical records applicable to a claim under this section, the board shall make reasonable efforts to obtain the records. A claimant shall provide the board with documentary evidence of the efforts of the claimant to obtain such records. The board shall inform the claimant of the results of the board's efforts, and shall provide the claimant copies of any records so obtained upon request of the claimant.

(D) Any request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination.

(4)(A) Subject to subparagraph (B), a correction under this section is final and conclusive on all officers of the United States except when procured by fraud.

(B) If a board established under this section does not grant a request for an upgrade to the characterization of a discharge or dismissal, that declination may be considered under section 1553a of this title.

(5) Each final decision of a board under this subsection shall be made available to the public in electronic form on a centralized Internet website. In any decision so made available to the public there shall be redacted all personally identifiable information.

(b) No correction may be made under subsection (a)(1) unless the claimant (or the claimant's heir or legal representative) or the Secretary concerned files a request for the correction within three years after discovering the error or injustice. The Secretary concerned may file a request for correction of a military record only if the request is made on behalf of a group of members or former members of the armed forces who were similarly harmed by the same error or injustice. A board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c)(1) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee.

(2) If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(A) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(B) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(C) as otherwise prescribed by the law applicable to that kind of payment.

(3) A claimant’s acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(4) If the correction of military records under this section involves setting aside a conviction by court-martial, the payment of a claim under this subsection in connection with the correction of the records shall include interest at a rate to be determined by the Secretary concerned, unless the Secretary determines that the payment of interest is inappropriate under the circumstances. If the payment of the claim is to include interest, the interest shall be calculated on an annual basis, and compounded, using the amount of the lost pay, allowances, compensation,

emoluments, or other pecuniary benefits involved, and the amount of any fine or forfeiture paid, beginning from the date of the conviction through the date on which the payment is made.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(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.

(g)(1) Any medical advisory opinion issued to a board established under subsection (a)(1) with respect to a member or former member of the armed forces who was diagnosed while serving in the armed forces as experiencing a mental health disorder shall include the opinion of a clinical psychologist or psychiatrist if the request for correction of records concerned relates to a mental health disorder.

(2) If a board established under subsection (a)(1) is reviewing a claim described in subsection (h), the board shall seek advice and counsel in the review from a psychiatrist, psychologist, or social worker with training on mental health issues associated with post-traumatic stress disorder or traumatic brain injury or other trauma as specified in the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

(3) If a board established under subsection (a)(1) is reviewing a claim in which sexual trauma, intimate partner violence, or spousal abuse is claimed, the board shall

seek advice and counsel in the review from an expert in trauma specific to sexual assault, intimate partner violence, or spousal abuse, as applicable.

(h)(1) This subsection applies to a former member of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale, or as justification for priority consideration, and whose post-traumatic stress disorder or traumatic brain injury is related to combat or military sexual trauma, as determined by the Secretary concerned.

(2) In the case of a claimant described in paragraph (1), a board established under subsection (a)(1) shall—

(A) review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the claimant; and

(B) review the claim with liberal consideration to the claimant that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal.

(i) Each board established under this section shall make available to the public each calendar quarter, on an Internet website of the military department concerned or the Department of Homeland Security, as applicable, that is available to the public the following:

(1) The number of claims considered by such board during the calendar quarter preceding the calendar quarter in which such information is made available, including cases in which a mental health condition of the former member, including post-traumatic stress disorder or traumatic brain injury, is alleged to have contributed, whether in whole or part, to the original characterization of the discharge or release of the former member.

(2) The number of claims submitted during the calendar quarter preceding the calendar quarter in which such information is made available that relate to service by a former member during a war or contingency operation, catalogued by each war or contingency operation.

(3) The number of military records corrected pursuant to the consideration described in paragraph (1) to upgrade the characterization of discharge or release of former members.

(3) The number and disposition of claims decided during the calendar quarter preceding the calendar quarter in which such information is made available in which sexual assault is alleged to have contributed, whether in

whole or in part, to the original characterization of the discharge or release of the former member.

(j) In this section, the term "military record" means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person. Such term does not include records pertaining to civilian employment matters (such as matters covered by title 5 and chapters 81, 83, 87, 108, 747, 855, 857, 871, and 947 of this title).