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

REPLY BRIEF OF APPELLANT

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March 18, 2022

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: March 18, 2022 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Government's response brief does not answer any of the core questions in this appeal. On the law, it provides no plausible justification for the BCNR's failure to apply liberal consideration to Doyon's PTSD-related claim. On the facts, the Government remains unable to identify any evidence that Doyon had a personality disorder before enlisting in the Navy. Nor can it show how Doyon's "nervous collapse" and inability to perform his duties during his third deployment is explainable by anything other than his *undisputed* diagnosis of service-connected PTSD. There is no good defense for the decision below. This Court should reverse.

The BCNR's enabling statute, 10 U.S.C. § 1552, expressly required the Board to apply liberal consideration to Doyon's petition to correct his discharge records. The plain language is unambiguous and dispositive: The BCNR must provide "liberal consideration" to any PTSD-related "claim under this section for review of a discharge." *Id.* § 1552(h)(1), (h)(2)(B). Doyon's petition is just such a claim. Indeed, the Government concedes that the *only* way for a veteran like Doyon to obtain relief is by submitting a claim under § 1552 asking the Board to correct the terms of his discharge and grant disability retirement.

The Government argues against this straightforward outcome by attempting to narrow the statutory language. Even though § 1552(h) requires liberal consideration for any PTSD-related "claim under this section for review of a

discharge," the Government contends that the provision really applies only to the subset of discharge claims that seek to upgrade a veteran's "characterization of service." But the statute does not say that. In fact, the statute plainly contemplates application *beyond* characterization of service because it requires liberal consideration for PTSD-related claims affecting *either* "the original characterization of the claimant's discharge" "*or*" "the circumstances resulting in the discharge." *Id.* § 1552(h)(2)(B) (emphasis added). The Government's proposed limitation is arbitrary and has no basis in the statute.

Lacking support in § 1552(h), the Government attempts to shift the inquiry in two ways. First, it focuses on the legislative history of a *different* statute (§ 1553) that was enacted at a *different* time addressing a *different* military board with a *different* congressional mandate and *different* remedial powers. That discussion is both unpersuasive and irrelevant. Second, the Government seeks to avoid a ruling on the meaning of § 1552(h), arguing that Doyon did not raise this issue before the BCNR and thus failed to preserve it for appeal. But the Government's preservation argument is itself waived. It is also wrong on the merits—and, in any event, would amount to a profoundly inequitable application of forfeiture principles.

The Government's treatment of the Hagel and Kurta Memoranda—which independently require liberal consideration—is equally unpersuasive. Like its misguided focus on the wrong statute, the Government devotes much of its argument

to the Hagel Memo, even though that guidance was later *expanded* by the Kurta Memo. As to the Kurta Memo, the Government again provides no textual basis for its limited interpretation of "discharge relief" as encompassing only changes in "characterization of service." The most support it can muster is an inference from the Kurta Memo's examples of how liberal consideration applies to claims involving misconduct. But those examples are wholly consistent with Doyon's reading, and they cannot override the Kurta Memo's express language applying liberal consideration beyond characterization of service.

On the facts, the Government repeats the BCNR's error by simply ignoring substantial portions of the record: It fails to address the overwhelming evidence from Doyon's life before enlistment, which shows no hint of a personality disorder or any conflict with authority figures or institutions. It does not address Doyon's psychological exams at the time of enlistment that gave him a clean bill of health. It does not address the evidence showing that Doyon's decline in performance occurred only after he experienced traumatic events during his second deployment. It does not address the sustained campaign of harassment that Doyon endured, which is central to his PTSD diagnosis. The list goes on. When the Government does address the record, it largely repeats the BCNR's conclusory assertions without responding to Doyon's critiques.

The Government is unable to identify any evidence that Doyon had a personality disorder before or after his service in the Navy. Without that flawed diagnosis, the record supports only one answer for why Doyon had a "nervous collapse" and became unable to perform his duties: His undisputed diagnosis of service-connected PTSD. The Government offers no way around that conclusion. Given the BCNR's clear legal errors, and the complete lack of evidence supporting its decision, this Court should reverse the decision below and order that judgment be entered for Doyon.

ARGUMENT

I. THE BCNR WAS REQUIRED TO GIVE LIBERAL CONSIDERATION

A. Section 1552 Requires Liberal Consideration

The plain language of 10 U.S.C. § 1552(h) makes clear that the BCNR was required to give liberal consideration to Doyon's claim for review of his discharge. The Government's various efforts to avoid that clear-cut result are unavailing.

1. The Government's Interpretation Cannot Be Reconciled With The Text And Structure Of The Statute

Section 1552(h) requires the BCNR to give "liberal consideration" 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 [PTSD]." 10 U.S.C. § 1552(h)(1), (h)(2)(B) (emphasis added). Doyon brought just such a

claim. As the Government acknowledges (at 20), the *only* way for Doyon to have obtained relief here—correcting his discharge to show that he was "unfit" due to PTSD, not "unsuitable" due to a personality disorder—was by bringing a claim under § 1552 to the BCNR. The BCNR regularly corrects veterans' terms of discharge to provide various forms of relief, including disability retirement. *See* Doyon Br. 21, 34-35 (collecting cases). Thus, the Government acknowledges that Doyon *must* have brought his claim under § 1552 for review of his discharge, but nonetheless insists that Doyon's claim somehow does *not* qualify as a "claim under [§ 1552] for review of [his] discharge." 10 U.S.C. § 1552(h)(1). The Government arrives at that head-spinning conclusion by arguing for a severely limited and idiosyncratic interpretation of the word "discharge."

According to the Government, when § 1552(h) states that the BCNR must give liberal consideration to any "claim under this section for review of a *discharge*," that really means "only to upgrades to *discharge characterization*." Gov't Br. 23 (emphasis added). Under that view, liberal consideration is relevant only to the narrow subset of discharge claims under § 1552 that seek to improve a veteran's "characterization of service," *e.g.*, by changing "Under Other Than Honorable Conditions" to "Honorable." But the Government is unable to root that interpretation anywhere in the text or structure of the statute.

The Government's statutory argument consists of two steps. First, it claims that neither "'discharge' nor 'dismissal' has a single plain, ordinary meaning." *Id.* at 21. It then draws on *Black's Law Dictionary* to define "discharge," claiming that all of the definitions "address whether a service member left in a status of honor." *Id.* at 22. Immediately after that, however, it invokes the Department of Defense's broad definition of "discharge," which is simply "[c]omplete severance from all military status gained through enlistment or induction." *Id.* (quoting DOD Directive 1332.14 at 54 (Jan. 27, 2014; rev. Sept. 1, 2021). For the definition of "dismissal," the Government draws on the Rules for Court Martial, defining the word as a "'punitive separation' that applies to commissioned officers." *Id.* (quoting Manual for Courts-Martial R. 1003(b)(8) (2019)). In a second step, the Government invokes the associated-words canon—*noscitur a sociis*—and claims that "discharge" and "dismissal" must be interpreted together; thus, it is "evident that 'discharge' means a less-than-honorable discharge." *Id.* That argument is fatally flawed at both steps.

First, the word "discharge" *does* have a plain meaning. The Department of Defense defines the term simply as a complete severance from the military. DOD Directive 1332.14 at 54.[1] In the context of § 1552, which establishes the Boards for

[1] The Government's sidelining of DOD's definition in favor of *Black's Law Dictionary* (11th ed. 2019) is odd, but odder still is its assertion (at 22) that *Black's* defines "discharge" to address whether a service member left in a status of honor.

Correction of Military/Naval *Records* (BCM/NR), the "review of a discharge" "under this section" simply means a review of a service member's discharge *records*—the records related to the member's "complete severance from the military." That plain meaning is reflected throughout this Court's cases. *See* Doyon Br. 21, 34-35 & n.5 (collecting cases). Here, the discharge record at issue is Doyon's DD Form 214, which is his certificate of discharge titled "Report of Transfer or Discharge." Appx1102. In short, the Government's argument fails out of the gate by trying to create ambiguity in the meaning of "discharge" when none exists.

Second, the Government's invocation of *noscitur a sociis* is both unnecessary and unsound. That canon provides that associated words bear on one another's meaning, "especially" for "'words grouped in a list.'" Antonin Scalia & Bryan A. Garner, *Reading Law* 195 (2012) (citation omitted). For example, if a statute listed the words "blue, red, and orange," and the parties were debating between two ordinary definitions of "blue"—"a color" or "being sad"—*noscitur a sociis* would counsel in favor of the "color" definition because the word is listed with other colors.

Here, there is no debate between competing ordinary definitions of the term "discharge." *Noscitur a sociis* could have a role to play if, for instance, the dispute were over whether "discharge" meant "to separate from the military" or "to fire a

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That is backwards: *Black's* defines "discharge" as an umbrella term that includes any separation from the military *regardless* whether the member left in honor.

gun." But the canon has no role here because the Government has not identified, nor is counsel aware of, *any* source that defines "discharge" as "characterization of service." As the Government notes, "characterization of service" is a "term of art," Gov't Br. 4, and one that Congress knows well. That makes it even clearer that Congress did *not* mean "characterization of service" when using the different, broader word "discharge."

Nor can the Government leverage *noscitur a sociis* to *create* ambiguity where none existed, *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923), or to artificially limit Congress's decision to legislate broadly, *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). The Government's evident discomfort with the breadth of Congress's language provides no grounds to adopt an interpretation that "arbitrarily limit[s]" and denies the "full and fair scope" of the language. Scalia & Garner, *Reading Law* 101.

Finally, the Government fails to address that § 1552(h) expressly includes *both* characterization of service claims *and* discharge claims. *See* Doyon Br. 37. The statute requires the BCNR to review PTSD-related petitions "with liberal consideration to the claimant that post-traumatic stress disorder . . . 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). Those phrases "are connected by the conjunction

'or,'" and that word's "ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'" *United States v. Woods*, 134 S. Ct. 557, 567 (2013) (citation omitted). Congress plainly understood the difference in scope between the BCNR's general review of a "discharge" under § 1552, on the one hand, and its more limited correction of "characterization of service," on the other. Congress chose to require liberal consideration for PTSD-related claims under the broader scope of the BCNR's "discharge" review, and that choice controls.

2. The Government's Reliance On A Different Statute Is Unavailing

Finding little support in § 1552, the Government focuses extensively on a different statute, 10 U.S.C. § 1553, which authorizes the establishment of the Discharge Review Boards (DRBs). Gov't Br. 23-29. Section 1553 also uses the phrase "discharge or dismissal," and the Government claims that DRBs have long interpreted that phrase to be limited to changes in characterization of service and to exclude requests for disability retirement. *Id.* at 24. But the Government never cites any source actually supporting that claim—or even a source interpreting the meaning of "discharge or dismissal" in § 1553. *See id.* Instead, the Government's sources show only that the DRBs' authority has been narrowly circumscribed by regulation. Unlike the broad remedial powers afforded to the civilian-led BCNR, the Navy has expressly limited the military-led DRBs' remedial power to little beyond changes in characterization of service—and to exclude disability retirement. *See* 32 C.F.R.

§ 724.205(a) (listing limitations on DRB authority, including lack of authority to "[c]hange the reason for discharge from or to a physical disability"); *see also* Gov't Br. 5 (acknowledging DRBs' limited remedial authority). Those regulatory limitations on DRBs say nothing about what constitutes "review of a discharge" under § 1552, where the BCNR is under no similar constraint. 10 U.S.C. § 1552(h)(1).

The Government then goes even further afield, turning to the legislative history of § 1553 and arguing that it shows Congress intended the DRBs to apply liberal consideration only to changes in characterization of service. Gov't Br. 24-28. Even if that were true, though, it would hardly be surprising for Congress to anticipate that DRBs would apply liberal consideration only to the type of applications they are authorized to address—which, as just explained, is mostly limited to changes in characterization of service. This says nothing about the BCNR.

More fundamentally, the Government cannot override the plain meaning of § 1552 based on the legislative history of a different statute. Generally, a statute's plain language is "conclusive" without reference to legislative history. *Gilead Scis., Inc. v. Lee*, 778 F.3d 1341, 1347 (Fed. Cir. 2015) (citation omitted). To override the plain meaning, "the party challenging it by reference to legislative history must establish that the legislative history embodies 'an "*extraordinary showing* of contrary intentions."'" *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009)

(citation omitted). To make that "extraordinary showing," the plain meaning must produce a result that is not just "harsh," *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982), "curious," *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172 (1978), or even "stark and troubling," *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483 (1992), but "so bizarre that Congress 'could not have intended' it," *Demarest v. Manspeaker*, 498 U.S. 184, 186, 190-91 (1991) (citation omitted).

The Government has come nowhere close to making that "extraordinary showing." For one, its legislative history comes from a different statute addressing a different military board with different remedial powers. That alone should end the inquiry. But even if the Government's legislative history applied to § 1552(h), it does not show that following the plain language of the statute would be "so bizarre that Congress 'could not have intended' it." *Demarest*, 498 U.S. at 186, 190-91 (citation omitted). Requiring the BCNR to give liberal consideration to PTSD-related claims for review of a discharge, including a claim that could result in disability retirement, makes perfect sense given the normal work of the BCNR and its remedial purpose. Doyon Br. 28-29. It is not surprising in the least that Congress would want to extend that more generous standard to veterans, like Doyon, who served honorably, sustained combat-related PTSD, and then were discharged under the mistaken view that their PTSD symptoms reflected a "personality disorder."

3. The Government's Preservation Argument Is Unsound

Finally, the Government seeks to avoid the plain language of § 1552(h) by pressing a forfeiture argument, claiming that Doyon did not raise the statutory argument for "liberal consideration" before the BCNR and thus failed to preserve it for appeal. Gov't Br. 18-20. That argument fails every which way: The Government waived its forfeiture argument; Doyon was not required to exhaust the issue before the BCNR; even if he were required to raise it, he did so sufficiently for preservation purposes; and, in any event, any forfeiture should be excused.

First, the Government waived its preservation argument by failing to raise it below. Before the trial court, Doyon *repeatedly* argued that § 1552(h) required the BCNR to review his claim with liberal consideration. *See* Doyon Br. 26-27, 29 (citing examples); *see also* Appx2134-2135; Appx2304-2305; Appx2326 & n.1. The Government did not respond to this argument, let alone argue that Doyon had not preserved it before the BCNR. That repeated failure amounts to clear waiver, or at minimum forfeiture, of the Government's preservation argument. *In re Google Tech. Holdings LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020) (explaining the waiver/forfeiture distinction).

The Supreme Court and the courts of appeals have not hesitated to enforce this waiver principle against the Government under similar circumstances. In *EPA v. EME Homer City Generation, L.P.*, for example, the Government argued to the

Supreme Court that the challengers had "failed to state their objections" to the agency with "the 'specificity' required for preservation." 572 U.S. 489, 512 (2014) (citation omitted). The Supreme Court rejected that preservation argument, however, because the Government "did not press the argument unequivocally" before the appellate court below. *Id.* The courts of appeals likewise routinely enforce the waiver of preservation arguments against both private parties and the Government alike. *See, e.g.*, *Solomon v. Vilsack*, 763 F.3d 1, 13 (D.C. Cir. 2014) ("By failing to argue forfeiture or a failure to properly plead the claims before the district court, the Secretary has—in a word—forfeited his forfeiture argument here.").[2] This Court should do the same here and reject the Government's preservation argument, which it raises for the first time on appeal.

Second, Doyon was not required to press the § 1552(h) argument before the BCNR in order to raise it in this subsequent lawsuit. The Government's argument raises a question of issue exhaustion, and the "requirements of administrative issue exhaustion are largely creatures of statute." *Sims v. Apfel*, 530 U.S. 103, 107 (2000). Although some statutes expressly limit judicial review to the arguments raised

[2] *See also, e.g.*, *Atkins v. New York City*, 143 F.3d 100, 103 (2d Cir. 1998); *Korsunskiy v. Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006); *United States v. Rhodes*, 253 F.3d 800, 804 (5th Cir. 2001); *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994); *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013).

before the agency, *see, e.g.*, *id.* at 107-08, the statutes authorizing judicial review here do not, *see* 10 U.S.C. §§ 1552, 1201; 28 U.S.C. § 1491.

Absent such a statutory requirement, the "basis for a judicially imposed issue-exhaustion requirement is an analogy" to general appellate preservation principles—and the propriety of imposing such a requirement "depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims*, 530 U.S. at 108-09. The principal factor for assessing whether the analogy to "'normal adversarial litigation'" holds is whether the administrative proceeding is *adversarial*: If it is, "the rationale for requiring issue exhaustion is at its greatest;" if not, "the reasons for a court to require issue exhaustion are much weaker." *Id.* at 110 (citation omitted). Applying this analysis, the Supreme Court in *Sims* refused to impose an issue-exhaustion requirement on Social Security proceedings, given their nonadversarial nature. *Id.* at 110-12.

Imposing an issue-exhaustion requirement on Doyon's § 1552(h) argument would run afoul of *Sims*. Like Social Security proceedings, the BCNR's proceedings are nonadversarial. The Board's "function does not involve conducting adversary proceedings," *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974), but rather a review that is entirely "remedial in nature," *Caddington v. United States*, 147 Ct. Cl. 629, 631-32 (1959). Given the fundamental difference between BCNR proceedings

and "normal adversarial litigation," *Sims*, 530 U.S. at 109, it would be improper to impose an issue-exhaustion requirement here.

It would be particularly inappropriate to impose such a requirement here because "the error [the] party seeks to challenge before the Court was committed by the *Board itself*, rather than an error committed by the agency whose action the Board is reviewing." *Hassay v. United States*, 150 Fed. Cl. 467, 483 & n.15 (2020) (emphasis added) (rejecting the contention that plaintiff waived the argument for liberal consideration under the Hagel and Kurta Memos by failing to raise it to the BCNR). Put differently, there was no § 1552(h) error to preserve until after the BCNR issued its decision. Doyon was not required to anticipate that the BCNR would add this new legal error on top of his inaccurate discharge. Rather, he was entitled to "expect that an administrative body charged with determining the fitness of a service member knows the legal standard to be applied." *Kelly v. United States*, 157 Fed. Cl. 114, 129 (2021). On this basis, the Court of Federal Claims recently rejected the Government's preservation argument where the BCNR failed to apply a "directly relevant, binding Navy instruction simply because a service member did not specifically identify the paragraphs and sub-paragraphs applicable to his case." *Id.* That principle applies even more forcefully here, where the legal standard comes from the BCNR's enabling statute.

Third, even if there were a requirement to raise the argument before the BCNR, Doyon did sufficiently raise it for purposes of preservation. Before the Board, Doyon pressed two independent arguments for liberal consideration—one argument under the Hagel and Kurta Memoranda, Appx1807-1809 (Part I.C), and the other under the statute itself, Appx1809-1811 (Part I.D, arguing for a "liberal construction of 10 U.S.C. § 1552"). Although Doyon's argument for liberal consideration under § 1552 did not specifically cite subsection (h), he was not required to make the "precise statutory argument in the proceedings below" provided that he "*did* raise his general argument." *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 873 (9th Cir. 2008) (citation omitted). Even if the § 1552(h) argument was not presented to the Board "as ardently and cogently" as it was raised before the trial court, there is no basis to find waiver where, as here, the agency clearly rejected the premise that liberal consideration applies to Doyon's claim. *Lane Hollow Coal Co. v. Dir., Office of Workers' Comp. Programs*, 137 F.3d 799, 806 (4th Cir. 1998).

Finally, and in any event, even if Doyon forfeited the § 1552(h) argument, the forfeiture should be excused. This Court has "consistently held that waiver is a matter of discretion" and "not . . . an inflexible rule." *Apple Inc. v. Qualcomm Inc.*, 992 F.3d 1378, 1382 (Fed. Cir. 2021) (collecting cases). "While there is no general rule" for when this Court will excuse a waiver or forfeiture, it has exercised its discretion to do so when, for example, the issue is "fully briefed," no party will be

prejudiced, and the issue is relevant to other pending cases. *Id.* (citation omitted) (excusing waiver for these three reasons). Also relevant is whether the issue is "a purely legal question." *Bozeman Fin. LLC v. Fed. Rsrv. Bank of Atlanta*, 955 F.3d 971, 974 (Fed. Cir. 2020). Ultimately, this Court exercises its discretion to excuse a waiver or forfeiture when "circumstances indicate that it would result in basically unfair procedure." *Apple*, 992 F.3d at 1382 (citation omitted).

Those factors all weigh in favor of excusing any forfeiture here. The § 1552(h) issue is purely legal and has been fully briefed; no party would be prejudiced by a ruling on the meaning of the statute; and a ruling could affect other currently pending cases. *See, e.g.*, Order, *Hassay v. United States*, No. 19-cv-594, (Fed. Cl. Feb. 14, 2022), Dkt. No. 59 (staying litigation pending outcome of this appeal). It would also be inequitable to enforce any forfeiture under these circumstances. Doyon argued at length to the BCNR that it was required to give liberal consideration under the Hagel and Kurta Memoranda and under § 1552 more generally. The BCNR did not respond to this argument at all—neither on the Memoranda nor on the statute. There is no reason to think that would have changed if Doyon had cited subsection (h) of § 1552. What's more, the Government failed to respond to Doyon's repeated arguments on § 1552(h) before the trial court. It would be unfair to allow the Government to ignore the issue for so long and then

assert an issue-exhaustion requirement for the first time on appeal. The Court should reject the Government's preservation argument and rule on the merits of § 1552(h).[3]

B. The Hagel And Kurta Memoranda Require Liberal Consideration

The Hagel and Kurta Memoranda provide an additional, independent reason why the BCNR was required to apply liberal consideration to Doyon's claim. Taken together, the Memos make clear that the BCNR must give liberal consideration to "*any* petition seeking discharge relief," not merely to petitions seeking to change "discharge characterizations." Appx1943 (emphasis added). Despite this broad mandate, the Government presses a narrow, atextual argument that the Memos are limited to changes in characterization of service. *See* Gov't Br. 29-38. It emphasizes the limited scope of the Hagel Memo and criticizes Doyon for not devoting more attention to it. *Id.* at 30. But the original Hagel Memo alone is not controlling today,

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[3] The Government observes in a single sentence that Doyon failed to address the "retroactive application" of the statute. Gov't Br. 20. The Government advances no argument on this front and thus any such argument is waived: "A skeletal argument, really nothing more than an assertion, does not preserve a claim." *Arunachalam v. Int'l Bus. Machs. Corp.*, 989 F.3d 988, 999 (Fed. Cir. 2021) (citation omitted). Any such argument is also wrong on the merits because applying § 1552(h) to Doyon's claim is not a "retroactive" application. To determine whether a "statute should be applied to a case that originated before the statute was passed"—that is, whether applying the statute would have "retroactive effect"—the question is "'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Rodriguez v. Peake*, 511 F.3d 1147, 1152-53 (Fed. Cir. 2008) (citation omitted). Section 1552(h) did not attach "new legal consequences" to any such completed event in Doyon's case. Rather, it imposed a new liberal-consideration requirement on the BCNR's review of Doyon's PTSD-related claim, which was ongoing when the statute was enacted.

nor was it when Doyon filed his application; then, as now, the Hagel Memo is operative *as "clarified"* by the Kurta Memo. Appx1943. And the Kurta Memo dramatically expanded the scope of the Hagel Memo, as the Government ultimately acknowledges. *See* Gov't Br. 31-32.

The Kurta Memo not only clarified *how* to apply the liberal consideration standard, but also expanded *to whom* the standard applies. Whereas the Hagel Memo was limited to PTSD-related claims, Appx1232, the Kurta Memo expanded the guidance to include claims related to "Traumatic Brain Injury (TBI); sexual assault; or sexual harassment," Appx1941. Whereas the Hagel Memo was specifically addressed to applicants before the BCM/NRs, Appx1232, the Kurta Memo expanded liberal consideration to applicants before the DRBs, Appx1943. And whereas the Hagel Memo focused on upgrades to "characterization of service," Appx1232, the Kurta Memo expressly rejected the limitation of "Under Other Than Honorable Condition discharge characterizations" and expanded its application 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).

Despite all this, the Government insists that "nothing . . . indicates that Kurta intended to expand the Hagel memo's clear limitation to apply only to the characterization of discharge and discharge upgrade requests." Gov't Br. 32. And

it claims that Doyon failed to explain otherwise, *id.*, despite Doyon's step-by-step explanation in his opening brief, *see* Doyon Br. 39-42. To recap: The Kurta Memo applies not only to "upgrades" in the "characterization of service," but also 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. Doyon's BCNR application falls squarely within that language because it sought to "modify" the "narrative reason" and "separation code" for his "discharge" to show that he was discharged due to "unfitness" for duty instead of "unsuitability, character disorder." *See* Appx1073; Appx1094.

Instead of this straightforward approach, the Government again insists that "'discharge' in the context of the military review boards has a settled meaning" that includes "characterization of service" but excludes "medical retirement." Gov't Br. 32-33. As before, the Government provides *no* authority to support this claim. And even if there were such a "settled meaning," the Kurta Memo provides its own definition of "discharge," Appx1943, which is inconsistent with the definition that the Government now asserts.

The Government also contends that the "misconduct-related language" in the Kurta Memo shows that it was intended to address only changes in characterization of service. Gov't Br. 33-34. The Kurta Memo does reference misconduct while

explaining different applications of liberal consideration, but those references are neither surprising nor inconsistent with the Memo's broad definition of discharge relief. The basic principle underlying the Hagel and Kurta Memos is that, due to advances in our understanding of mental health, we now know that some veterans were discharged in inaccurate or unjust ways based on a misunderstanding of their "invisible wounds"—whether PTSD, TBI, or sexual assault. Appx1035, Appx1038. The symptoms of those invisible wounds include "changes in behavior," "deterioration in work performance," "substance abuse," "episodes of depression," and "panic attacks," among others. Appx1036. Given those symptoms, it comes as no surprise that the Kurta Memo references misconduct, because application of "liberal consideration" will often involve reviewing symptomatic behavior that led to misconduct.

Critically, though, the Memo nowhere limits itself to cases involving misconduct. That makes sense because, although many such cases *may* involve misconduct, the concerns animating the Kurta Memo are equally implicated when a misunderstanding of a service member's "invisible wounds" and symptoms resulted in other discharge errors—like discharging a service member as unsuitable for a supposed personality disorder when he really had PTSD. Similar to a less-than-honorable discharge, a discharge for "unsuitability" stigmatizes veterans and negatively impacts their employment opportunities. *See* Doyon Br. 18. And because

"[a] 'stigma' may attach to a service member's discharge *either* from the characterization of a discharge, *or* from the [narrative or] coded reasons recorded for the discharge," both trigger due process protections. *Rogers v. United States*, 24 Cl. Ct. 676, 683-84, 690 (1991) (alterations in original) (emphasis added), *aff'd*, 996 F.2d 317 (Fed. Cir. 1993). Nothing in the text or purpose of the Kurta Memo limits liberal consideration to veterans seeking PTSD-related discharge relief related to one form of improper stigma but not another.

That plain reading is likely why the Government agreed with this position in *Hassay*, 150 Fed. Cl. at 470, though it now claims that any "concession was in error" and does "not control here." Gov't Br. 36. Regardless whether it is technically "controlling," the Government's position in *Hassay* is further evidence that the Kurta Memo is naturally read to apply to *any* petition for discharge relief, which includes petitions related to disability retirement.

* * *

Had the BCNR properly applied liberal consideration it would have granted Doyon's application. That outcome is clear because, as previously explained, the BCNR's central reasons for denying Doyon's claim were directly at odds with the principles of liberal consideration. *See* Doyon Br. 45-48. The Board overvalued the Navy's 1968 diagnosis, which was made before PTSD was known; it undervalued Doyon's PTSD diagnoses as "too distant in time from 1968"; it discounted or

ignored Doyon's testimony; and it improperly conditioned relief on contemporaneous evidence that is unlikely to exist for a veteran in Doyon's position. *Id.* (citation omitted) (collecting more examples).

The Government does not dispute any of these example or explain how Doyon could be denied relief under the liberal consideration standard. Gov't Br. 37-38. Instead, it merely points to the BCNR's application of liberal consideration on remand in *Hassay*—where the BCNR denied relief—to argue that Doyon might not necessarily receive relief either. *Id.* But that only shows, at most, that the liberal consideration standard does not automatically guarantee any particular outcome. Under the facts of Doyon's case, however, applying liberal consideration would plainly result in granting relief, and the Government does not seriously claim otherwise.

II. THE BCNR'S DECISION LACKS SUBSTANTIAL EVIDENCE

Even without liberal consideration, the BCNR's decision cannot be sustained because it lacks substantial evidence. The Government's response brief does nothing to remediate the Board's factual oversights and unsound inferences; instead, it repeats the Board's practice of simply ignoring Doyon's arguments. The substantial evidence standard may be deferential, but it is not toothless, and here it requires rejecting the Board's decision.

A. The Refusal To Correct Doyon's Unsuitability Discharge Lacks Substantial Evidence

The Government remains unable to identify any evidence to support the Navy's 1968 diagnosis and discharge of Doyon based on a personality disorder. The Government does not dispute the relevant definition of personality disorder: "deeply ingrained maladaptive patterns of behavior" that usually involve "life-long patterns, often recognizable by the time of adolescence or earlier." Appx1055 (citation omitted). Nor does it dispute that, because Doyon's psychological exams at the time of enlistment show that he had no mental health conditions, the Navy was required to *presume* that his mental health condition was incurred in service, unless a preponderance of evidence established otherwise. Doyon Br. 49-50.

Given those diagnostic criteria for a personality disorder, and the operative presumption based on the Navy's regulations, the most natural starting place is to review the record for evidence that Doyon had "deeply ingrained maladaptive patterns of behavior" by his "adolescence." Appx1055 (citation omitted). But the Government, like the BCNR, entirely ignores this inquiry and the overwhelming evidence that Doyon's profile was essentially the opposite of the diagnostic criteria for a personality disorder: The record shows that he was close to and connected with his family, he stayed out of trouble, and he thrived in institutions—whether church, school, or Boy Scouts. Doyon Br. 7-8, 52. The onset of Doyon's symptoms did not occur until much later in life, after the traumatic events he endured during

his second deployment. *Id.* at 52-53. Nor is there any evidence that Doyon was diagnosed with a personality disorder after discharge, which would be expected given the disorder's "life-long patterns" of behavior. Appx1055. Like the BCNR, the Government never responds to any of this.[4]

When the Government does address the record, it largely re-asserts the BCNR's conclusions without responding to Doyon's arguments. It repeats the assertion from the Senior Medical Advisor (SMA) that Doyon had a "'longstanding'" behavioral pattern from "'prior to enlistment'" as shown by his "conflicts with other organizations"—specifically, the fact that he was "almost placed on academic probation while attending an architecture school." Gov't Br. 41 (quoting Appx1282). But it never responds to Doyon's explanation, grounded in the record, showing that he had no dispute with teachers or the institution; he had simply picked the wrong major during his freshman year of college. Doyon Br. 50-51. The Government also notes (at 40-41) that the SMA believed Doyon "[n]ever complained of symptoms" while in the Navy, but Doyon *did* raise these issues to a

[4] The Government oddly states that "Doyon fails to explain how even assuming he had developed a personality disorder while in the service, it would require the board to conclude that he was unfit for duty in 1968." Gov't Br. 45. It is unclear what this sentence means. Neither Doyon nor the Government has ever claimed that Doyon "developed a personality disorder while in the service." That notion is also inconsistent with one of the key diagnostic criteria of personality disorders, which is adolescent onset. *Supra* at 24.

chaplain and doctor shortly before his nervous collapse, Appx1008; Appx1817-1818.[5]

The Government's main argument seems to be that, regardless of how much evidence supports Doyon's claim, the BCNR was entitled to find the Navy's 1968 diagnosis "more credible" because it was closer in time to the discharge. Gov't Br. 39 (discounting Doyon's three diagnoses of service-connected PTSD because they were "made too distant in time from 1968" (quoting Appx1050)). That cannot be right. The 1968 diagnosis still must satisfy the diagnostic criteria by a preponderance of the evidence to overcome the presumption that Doyon enlisted with no psychological abnormalities. *Supra* at 24. A vague reference to "a long standing characterological, attitudinal and behavioral pattern . . . exist[ing] prior to enlistment," with the only example being "almost academic probation," does not suffice. Appx1282. It is particularly misguided to give such weight to the 1968 diagnosis because PTSD was not a known disorder at that time. The Hagel and Kurta Memos were issued to account for that fact, and their logic holds regardless whether they formally apply. Taking the record as a whole, substantial evidence does not support the BCNR's refusal to correct Doyon's unsuitability discharge.

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[5] The Government (at 45-46) cites Doyon's single unauthorized absence, but the Navy's manual expressly states that even "*[f]requent* unauthorized absence[s]" are "not medical[] problems" that can establish a personality disorder. Appx1834 (emphasis added).

B. The Denial Of Disability Retirement Lacks Substantial Evidence

After recognizing that there is no evidence to support the Navy's 1968 diagnosis of personality disorder, the next inquiry is what actually caused Doyon's mental health struggles that rendered him unable to perform his duties. The record plainly shows that the cause was Doyon's undisputed PTSD. *See* Doyon Br. 54-60. The Government's effort to avoid that conclusion suffers from the same flaws that infect the rest of its response.

To start, the Government follows the BCNR's approach and simply ignores one of the key factors cited by all three doctors who diagnosed Doyon with service-connected PTSD—the sustained campaign of bullying and harassment that he endured after the desertion of the "Intrepid Four." *See id.* at 10-12, 57. Because the BCNR "entirely failed to consider [that] important aspect of the problem," its decision is not supported by substantial evidence. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). The Government offers no defense for this oversight.

The Government is also unable to rehabilitate the BCNR's critical factual error that caused it to reject the claim that Doyon suffered from "psychosis," one of the diagnoses most similar to PTSD in 1968. *See* Doyon Br. 54-55. The BCNR stated that Doyon's "nervous collapse" was insufficient to show "a single well-established psychotic episode," and thus failed to establish psychosis, because

Doyon was "released [from the hospital] back to duty the next day." *Id.* (quoting Appx1050). The Government concedes this was an error—Doyon was hospitalized for *two weeks* after being sedated with Thorazine, an antipsychotic drug—but the Government claims the error was "harmless" because Doyon returned to duty "shortly" after his hospitalization. Gov't Br. 47-48. When the question is what counts as "a single well-established psychotic episode," there is a substantial difference between an overnight in the hospital and a two-week hospitalization following sedation with Thorazine. The Government's post hoc characterization of a two-week hospitalization as "short[]" cannot substitute for the Board's error on this important issue. *See Verbeck v. United States*, 97 Fed. Cl. 443, 460 n.25 (2011).

The Government also repeats the assertion from below that Doyon's enrollment in a "major university" and lack of post-discharge mental health care somehow weigh against his claim. Again, the Government does not respond to Doyon's explanation that his PTSD rendered him *unable* to continue at the university, causing him to quickly drop out. Nor does it address the common-sense point that failing to *receive* treatment does not show that such treatment was not *needed*. *See* Doyon Br. 56-58. Doyon's psychiatric and medical history make clear that he desperately needed such professional assistance. *See* Appx1426-1429.

Finally, the Government disputes how a determination of unfitness would apply here, arguing that an "unsuitability" determination is not the "functional

equivalent[]" of an "unfitness" determination. *See* Gov't Br. 51-52. That is of course true as a general matter. In 1968, a service member could be discharged as unsuitable for a variety of reasons that do not speak to eligibility for disability retirement, such as "[f]inancial [i]rresponsibility" or "[h]omosexual . . . tendencies." Appx1834. Doyon's unsuitability discharge is different, however, because it necessarily means that the Navy found Doyon's mental health condition to be so severe that he was "incapable of serving adequately." *See* Appx1834. While the Navy was wrong about the *source* of Doyon's mental health struggles—he suffered from PTSD, not a personality disorder—its assessment of how those struggles affected Doyon's job performance naturally carries over to the unfitness inquiry, which asks whether the service member incurred a disability that rendered him "unable to perform the duties of his office." Appx1164.

In short, the Navy already concluded that Doyon was unable to perform his duties, even though it misunderstood why. As a result, the BCNR should have corrected Doyon's discharge records to show that his PTSD rendered him unfit for continued service and that he was medically retired with the 50% disability rating required by regulation. *See* Doyon Br. 59-60.[6]

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[6] The Government incorrectly claims that Doyon cited only the first half of the regulation for disability ratings but "neglect[ed] to include the rest of the sentence, which states 'with an examination to be scheduled within six months of discharge.'"

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's decision and remand with instructions to grant Doyon's cross-motion for judgment on the administrative record.

Respectfully submitted,

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Gov't Br. 53 (quoting Appx1796) (emphasis omitted). Doyon not only cited the full sentence but further explained why the Government's opportunity for a six-month follow-up interview has long since passed. Doyon Br. 59.

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 reply 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 no more than 6,975 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.

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