No. 2021-2095

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

CORRECTED BRIEF OF DEFENDANT-APPELLEE, THE UNITED STATES

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INTRODUCTION

The Board of Naval Corrections (BCNR or board) applied the correct standard when it evaluated Robert Doyon's petition for correction of his military records. Pursuant to the applicable Department of Defense (DoD) guidance, and 10 U.S.C. § 1552(h), the "liberal consideration" standard does not apply when a former service member requests correction of his records to reflect a medical separation. Thus, the decision does not contain an error of law. Further, the board and the Court of Federal Claims (trial court) carefully considered the record

evidence and substantial evidence supports the board's decision. Accordingly, the Court should sustain the judgment.

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, appellee's counsel states that she is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUE

Whether the trial court correctly concluded that the board's decision denying Mr. Doyon's petition for a disability retirement is supported by substantial evidence and in accordance with law.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

This is an appeal by Robert L. Doyon challenging various aspects of the judgment of the Court of Federal Claims in a military pay case, *Doyon v. United States*, Fed. Cl. No. 19-01964 (Final Judgment) (Appx1-24).

II. Statement Of Facts And Course Of Proceedings

A. Relevant Statutes, Regulations, And Guidance

1. Separation From The Military

Military retirement for disability is governed by 10 U.S.C. § 1201. *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005). "Section 1201 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." *Id.* (quoting 10 U.S.C. § 1201(a)); *Russell v. United States*, 102 Fed. Cl. 9, 14 (2011); *see also* DoD Instruction 1332.18. But the diagnosis of a permanent medical condition does not necessarily mean the condition renders the service member unfit for duty. *O'Hare v. United States*, 155 Fed. Cl. 364, 369 (2021); Appx1841.

There are two types of separations for enlisted service members: administrative separations and punitive discharges. DoD Instruction 1332.14 at Enclosure 3 (describing reasons for administrative separations). A punitive discharge occurs after a judicial conviction at a court-martial, but an administrative separation, which can be involuntary, occurs through an administrative (non-

judicial) process. *Id.* at Enclosures 3-5. An administrative separation can be based on several grounds, including unsuitability. *Id.* at Enclosure 3; Appx1834.

Administrative discharge due to unsuitability is not a discharge for disability. Appx1834; *see also* Appx1190-1191 (distinguishing between an administrative discharge for unsuitability for a personality disorder and a discharge for a physical disability). Unsuitability, as it existed in 1968, included subcategories for inaptitude, apathy, alcoholism, financial irresponsibility, and character and behavior disorders. Appx1834. Separation for a character or behavior disorder required both a diagnosis by a medical authority and demonstrated inadequate adjustment despite a reasonable attempt by the command to assist in correcting deficiencies. *Id.*

Administrative separations are also given a characterization or description. Characterization of service is a term of art that appears on military discharge paperwork, and, as far as administrative discharges go, may be "other than honorable," "general (under honorable conditions)," or "honorable," depending on the circumstances. Appx1969; *Wisotsky v. United States*, 69 Fed. Cl. 299, 310-11 (2006); DoD Instruction 1332.14 at Enclosure 4, ¶ 3(b)(2).

The characterization of the discharge is important because it affects a separated former service member's entitlement to a variety of benefits, including health care by the Veterans Administration (VA) for service-incurred or service-

aggravated disabilities, education under the G.I. Bill, or eligibility for a VA home loan. *E.g.*, 38 U.S.C. § 3.12(a); 38 C.F.R. § 3.12; *Garvey v. Wilkie*, 972 F.3d 1333, 1336-37 (Fed. Cir. 2020) (citing 38 U.S.C. § 3.12(d)(4) and explaining the relationship between the characterization of a discharge and eligibility for benefits).

2. The Review Boards

Congress created a statutory framework of administrative boards to adjudicate petitions by current or former military members. 10 U.S.C. §§ 1552, 1553, 1554, 1554a. Relevant to the claims on appeal, are two boards: the Boards for Correction of Military/Naval Records (BCM/NRs) (10 U.S.C. § 1552) and the Discharge Review Boards (DRBs) (10 U.S.C. § 1553).

Congress has authorized military Secretaries, acting through a civilian board, to "correct any military record" when "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Section 1553 directs military Secretaries to establish DRBs "to review the discharge or dismissal [] of any former member of any member of the armed force" that are made within 15 years of the dismissal for the purpose of changing such discharge or dismissal. 10 U.S.C. § 1553(a). Although the corrections boards may review claims requesting medical disability ratings or pay, the DRBs "ha[ve] no jurisdiction to review claims requesting medical disability ratings or pay." *Gay v. United States*, 93 Fed. Cl. 681, 687

(2010); 10 U.S.C. § 1553(b) (indicating that the board may "change a discharge or dismissal, or issue a new discharge, to reflect its findings").

3. The Hagel And Kurta Memoranda

On September 3, 2014, then-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." Appx1232-1235 (Hagel memo). The cover letter explained that difficulties had arisen in reviewing petitions from former service members requesting discharge upgrades because Post-Traumatic Stress Disorder (PTSD) was not a recognized condition at their time of service. Appx1232. Thus, it was difficult to evaluate whether a "nexus" existed "between PTSD and the misconduct underlying the Service member's discharge." *Id.* Under this guidance, BCM/NRs are required to give liberal consideration for petitions submitted by veterans who asserted that PTSD or PTSD-related conditions "might have mitigated the misconduct that caused the under other than honorable conditions characterization of service." Appx1234. The Hagel memo also directed the BCM/NRs to consider such petitions in a timely manner and to consider liberally waiving any time limits that may have prevented their review. Appx1235.

On August 25, 2017, Undersecretary of Defense Anthony Kurta issued a memorandum entitled "Clarifying Guidance to Military Discharge Review Boards

and Boards for Correction Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment," that provided additional clarifications to the Hagel memo in order to ensure consistent standards of review for veterans across the military boards. Appx1940-1944 (Kurta memo). As the title of the memo indicates, the Kurta memo was written to clarify the Hagel memo. Appx1940-1941. It expanded upon the Hagel memo to include veterans' mental health, and victimization by sexual assault and sexual harassment as potential mitigation for misconduct. Appx1943. It also provided additional questions to consider when applying the "liberal consideration" standard and considering whether PTSD or another enumerated condition would "excuse or mitigate" the misconduct resulting in the discharge. Appx1941.

4. Benefits From The Department Of Veterans Affairs

Distinct from the BCNR or DRB process, once separated or retired (whether for disability or other reasons) from the military, veterans may seek compensation from the VA for any injuries or illnesses incurred in the line of duty. 38 U.S.C. §§ 1110, 1131. The VA uses the VA Schedule for Rating Disabilities to rate service-connected disabilities. 38 U.S.C. § 1155. If a veteran's service-connected condition should worsen over time, he may petition the VA to adjust a VA rating

awarded prior to the condition's deterioration. *Pomory v. United States*, 39 Fed. Cl. 213, 219 (1997).

The VA's compensation authorities under Title 38 of the United States Code differ from those of the military services under Title 10. Specifically, the military services rate disabilities only after the Secretary (or designee) had determined that the specific disability renders the member unfit for the performance of military duties, but the VA will rate any condition deemed to impair earning capacity in the civil sector. *Bosch v. United States*, 27 Fed. Cl. 250, 265 (1992) (citing 38 C.F.R. § 4.1). Thus, if a military member has a service-connected condition that did not affect his fitness for duty, he may receive a rating for it from the VA even though it was not rated by his military service. The military's disability ratings apply only to those conditions that the military has deemed unfitting, and they determine whether the member will be separated with severance pay or, alternatively, a disability retirement annuity.

B. Background And Board Decision

Mr. Doyon is a veteran of the Vietnam Era. In March 1966, Mr. Doyon enlisted in the Navy. Appx1102. He was assigned to the USS Intrepid. *Id.* In September 1968, Mr. Doyon's commanding officer recommended that the Navy separate Mr. Doyon from military service for unsuitability associated with a diagnosis of passive aggressive personality. Appx1279-1280. In November 1968,

Mr. Doyon was administratively discharged with an honorable characterization of service for unsuitability. Appx1102. Mr. Doyon's DD Form 214 (DD-214), Certificate of Release or Discharge from Active Duty, reflects that he was honorably discharged from the Navy by authority of Article C-10310 of the Bureau of Naval Personnel Manual (BUPERSMAN) (such authority pertains to administrative discharges based on unsuitability). Appx1102, Appx1969.

In December 2013, Mr. Doyon filed an application for disability compensation with the Department of Veterans Affairs for PTSD. Appx1404. In connection with his application, a VA psychiatrist diagnosed Mr. Doyon with PTSD in June 2014. Appx1112. The VA psychiatrist opined that Mr. Doyon's PTSD was at least as likely as not incurred in or caused by an in-service injury, event or illness. Appx1120. The VA psychiatrist noted that, relevant to Mr. Doyon's diagnosis meeting the criteria for PTSD, Mr. Doyon had experienced stressors in service, including witnessing a fatal plane crash and a sinking ship incident that resulted in multiple casualties (*i.e.*, the USS Forestall fire in July 1967 and a plane crash on the flight deck of the USS Intrepid in 1968). Appx1115, Appx1120. In September 2014, the VA granted Mr. Doyon's application for disability compensation for PTSD, assigning a 50 percent disability rating effective December 9, 2013. Appx1136-1139. And in 2015, the VA granted Mr. Doyon's

claim for an increased rating for his service-connected PTSD, assigning a 70 percent disability rating effective August 27, 2015. Appx1141-1144.

Mr. Doyon then applied for correction of his military record in November 2017, requesting that his record reflect that he was found unfit for duty and medically retired for psychosis or psychoneurosis. Appx1068. He also submitted a psychiatric evaluation report prepared by private psychiatrist Ted R. Greenzag. Appx1423-1439.

Dr. Greenzag opined that, based on the history Mr. Doyon provided and VA medical reports, Mr. Doyon was experiencing manifestations of PTSD at the time of his discharge from the military in 1968. Appx1437. Dr. Greenzag further opined that Mr. Doyon's history was not consistent with a diagnosis of a personality disorder. *Id.* Dr. Greenzag concluded that Mr. Doyon's separation pursuant to C-10310 was "not an appropriate disposition." Appx1438.

Two advisory opinions were prepared for the board's consideration, a September 20, 2018 advisory opinion prepared by the Senior Medical (Psychiatric) Advisor (SMA), and a September 24, 2018 advisory opinion prepared by the Director, Secretary of Navy, Council of Review Boards. Appx1050, Appx1052-1057. The SMA considered numerous documents, including Mr. Doyon's military medical records, April 1967 correspondence from Mr. Doyon's commanding

officer, the September 1968 discharge recommendation, an October 1968 psychiatric clinical note, and the VA's rating decisions. Appx1052-1056. The SMA recommended denial of the petition. Appx1056. The SMA observed that Mr. Doyon's PTSD diagnosis was not part of the then-existing American Psychiatric Association Diagnostic and Statistical Manual (DSM) II (1968) and did not become official until publication of the DSM III (1980) 12 years later. *Id.* Also, the diagnoses in the DSM II compensable by DoD Physical Evaluation Board action were known as "Psychoses and Psychoneuroses," neither of which applied to Mr. Doyon's clinical presentation in 1968. *Id.* The SMA determined that there was no indication that Mr. Doyon had ever complained of symptoms directly related to his claimed in-service stressors (for example, the USS Forestall fire in July 1967 and a plane crash on the flight deck of the USS Intrepid in 1968). Appx1055. Instead, he concluded that Mr. Doyon had "demonstrated problems adjusting to the Navy prior to either of th[o]se tragic events." *Id.* The SMA further noted, "Retrospective 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." Appx1056.

The September 24, 2018 advisory opinion concurred with the SMA's recommendation, noting the "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." Appx1057. At the request of Mr. Doyon's counsel, Dr. Greenzag prepared a memorandum in response to the SMA's advisory opinion. Appx1815-1820.

In its November 2018 decision, the board waived the three-year statute of limitations (10 U.S.C. § 1552) and denied Mr. Doyon's PTSD-based disability retirement claim on the merits without conducting an in-person hearing. Appx1049-1051. In its decision, the board "substantially concurred" with the advisory opinions and provided additional explanations of its decision. Appx1050.

First, the board concluded that insufficient evidence of unfitness for continued naval service due to psychosis or psychoneurosis existed in the evidentiary record. *Id.* Among other factors, the board found 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." *Id.*

Nor was the board persuaded by the VA disability ratings issued for Mr. Doyon's PTSD condition or the 2017 private medical opinion he provided. *Id.* Acknowledging the more recent diagnoses of PTSD, the board concluded that they, "were made too distant in time from 1968 to be probative" of Mr. Doyon's fitness

for continued naval service in 1968. *Id.* The board also observed that there was "more than enough evidence of behavior consistent with a personality disorder to support the diagnosis made in 1968." *Id.* Based on those findings, among others, the board concluded that "insufficient evidence of error or injustice exists to warrant a change to [Mr. Doyon's military] record." *Id.* Following the board's decision, Mr. Doyon filed a complaint at the trial court on December 27, 2019.

C. The Court Of Federal Claims Proceedings And Decision

In his complaint, Mr. Doyon alleged that in its decision, the board failed to apply the guidance contained in the Hagel and Kurta memoranda, violated 10 U.S.C. § 1201 and his right to due process, and that the board's decision was otherwise unsupported by substantial evidence. Appx1022-1024. The complaint did not allege that the board erred in failing to properly apply the "liberal consideration" standard contained in 10 U.S.C. § 1552(h), which was also never raised before the board. *Id.*

On January 13, 2021, the trial court entered an opinion and order granting the Government's motion to dismiss in part, and granting the Government's motion for judgment on the agency record for the remaining counts. First, the court concluded that neither the Hagel nor the Kurta memoranda required the board to apply "liberal consideration" to Mr. Doyon's claim. *Doyon v. United States*, No. 19-1964, 2021 WL 120923, at *9-11.

Next, the trial court concluded that the board's decision was supported by substantial evidence. *Id.* at *11-13. The trial court agreed that, in evaluating whether Mr. Doyon was fit for duty in 1968, the board appropriately gave greater weight to the record evidence from 1968, and less weight to psychiatric evaluations that occurred nearly four decades later. *Id.* at *11-12. The trial court also agreed that that substantial evidence supported that Mr. Doyon was "properly separated from the Navy for unsuitability due to a preexisting personality disorder[.]" *Id.* at *12. Also, the trial court found that substantial evidence supported that the record from 1968 did not support that Mr. Doyon suffered from psychoses or psychoneuroses because he returned to duty after being hospitalized in August of 1968 and was subsequently found "'clearly sane and responsible[.]'" *Id.* at *13 (citing Appx1282). And the trial court cited evidence indicating that Mr. Doyon enrolled in a major university after being discharged from the Navy and did not suffer from any psychotic episodes for nearly 40 years. *Doyon*, 2021 WL 120923, at *13 (citing Appx1056-1057).

Finally, the trial court rejected Mr. Doyon's argument that the board erred in placing too much weight on Mr. Doyon's performance evaluations and a letter that his parents sent to Senator Kennedy. *Doyon*, 2021 WL 120923, at *13 (citing Appx1268-1270, Appx1631, and Appx1651-1654). The trial court explained that the documents further supported that Mr. Doyon's "personal convictions" and not

the witnessing of traumatic events while in service led to his discharge. *Doyon*, 2021 WL 120923, at *13 (citing Appx1050).

Following the trial court's entry of judgment in the Government's favor, Mr. Doyon filed a timely appeal to this court.

SUMMARY OF THE ARGUMENT

The board's conclusion that Mr. Doyon was "properly administratively separated for [his] diagnosed personality disorder and did not warrant disability benefits upon [his] release from the Navy" is supported by substantial evidence and in accordance with law. Appx1050. Contrary to Mr. Doyon's assertions, the board did not err in failing to apply the "liberal consideration" standard when analyzing his petition. During proceedings before the board, Mr. Doyon never raised whether 10 U.S.C. § 1552(h)(2) obligated the board to apply the liberal consideration standard. Thus, the argument was not preserved for appeal.

Regardless, neither the statute, nor the Hagel and Kurta memoranda required the board to analyze his petition with "liberal consideration." Both memoranda and the statute are concerned with countering the negative effects of "bad paper" discharges, *i.e.*, other-than-honorable discharges that a service member received based upon misconduct but whose behavior may have been caused by a psychiatric condition or brain damage. These "bad paper" discharges make the service member ineligible for a variety of VA benefits, including medical services,

disability compensation and education benefits—benefits that Mr. Doyon is currently receiving because he received an honorable discharge. Obtaining a disability retirement, however, is not a form "discharge" relief, which is a term that has a settled and longstanding meaning before the military corrections boards. Thus, the statute and guidance are inapplicable to Mr. Doyon's petition.

Further, substantial evidence supports the board's conclusion that the "evidence submitted was insufficient to establish the existence or probably material or injustice." Appx1049. Although Mr. Doyon invites this Court to reweigh the evidence, that is not the Court's role when reviewing the board's decision. *Hesig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983). Thus, the board's decision satisfies the applicable standard or review and should be sustained.

ARGUMENT

I. Standard Of Review

A. Standards Of Appellate Review

We agree with Mr. Doyon that this Court reviews the grant of judgment on the administrative record *de novo*, reapplying the same standard as the trial court, and reviews factual findings by the trial court for clear error. *See* Applnt. Br. at 31-32.

B. Standards For Military Pay Cases

It is well established that judicial review of military correction boards is conducted pursuant to Administrative Procedure Act (APA) standards of review. *See Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009). The Court must determine whether 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). When a branch of the armed forces has made a decision concerning who is or who is not fit to serve, that decision is entitled to great deference. *Doe v. United States*, 132 F.3d 1430, 1435 (Fed. Cir. 1997). Thus, "[p]laintiff bears the heavy burden of proving by clear and convincing evidence that the board's decision was arbitrary and capricious." *Rose v. United States*, 35 Fed. Cl. 510, 512 (1996); *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986). Indeed, the plaintiff must present "cogent and convincing evidence" that the board's decision was arbitrary, capricious, or unlawful. *Dorl v. United States*, 200 Ct. Cl. 626, 633 (Ct. Cl. 1973). This standard of review "does not require a reweighing of the evidence, but a determination whether the conclusion being reviewed is supported by substantial evidence." *Heisig*, 719 F.2d at 1157. Thus, because this Court does not sit as a "super correction board," *Skinner v. United States*, 594 F.2d 824, 829-30 (Ct. Cl. 1979), where reasonable minds might reach differing conclusions on the evidence, the Court will not substitute its judgment for

that of the board's. *Fleming v. Escort, Inc.*, 774 F.3d 1371, 1375 (Fed. Cir. 2014) ("Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.") (quoting *Landes Const. Co., Inc. v. Royal Bank of Can.*, 833 F.2d 1365, 1371 (9th Cir. 1987)).

Finally, a determination by a military service that a service member is fit for duty, is one that is inherently military in nature. *Fisher v. United States*, 402 F.3d 1167, 1177 (Fed. Cir. 2005) (citing *Heisig*, 719 F. 2d. at 1156 ("responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province"); *see also Dzialo v. United States*, 5 Cl. Ct. 554, 561 (1984) (explaining that given the deference paid to the military determination of fitness for duty, "it is not the province of this court to factually determine, *ab initio*, whether [the member] was unfit for military service at the time of his release."); *Harris v. United States*, 177 Ct. Cl. 538, 541 (1966) ("traditional role of the court on review 'is to determine not whether [service member] was unfit'" when discharged).

II. Mr. Doyon Failed To Raise An Argument Regarding 10 U.S.C § 1552(h) Before The Board

Mr. Doyon devotes seven pages of the arguments section of his brief to an argument – that 10 U.S.C. § 1552(h) mandates liberal consideration – that he never raised before the board and that was not even mentioned in his complaint. Applnt. Br. at 32-39. Thus, because Mr. Doyon failed to exhaust his administrative

remedies, the argument is not preserved for appeal. *Metz v. United States*, 466 F.3d 991, 999 (Fed. Cir. 2006) (failure to raise at the administrative level risks waiver).

Mr. Doyon filed his petition for review on September 16, 2017. Appx1068. At that time, section 1552(h) had not been amended to reference the "liberal consideration" standard as that language was not added until three months later, with the National Defense Authorization Act of 2018, Pub. L. No. 155-91, § 520(a)(2), 131 Stat. 1379 (Dec. 12, 2017). But the board did not issue its decision until November 20, 2018, Appx1052, nearly a year later. Mr. Doyon was represented by counsel at all times, and on September 20, 2018, submitted a response to the SMA's opinion, which included both an approximately 12-page legal brief explaining why the opinion was arbitrary and capricious and several supporting exhibits. Appx1801-1813. Although that brief discussed the Hagel and Kurta memoranda, it did not argue that 10 U.S.C. § 1552(h) obligated the board (or the SMA) to apply liberal consideration. *Id.* Thus, because Mr. Doyon failed to raise the argument before the agency, he cannot raise it before this Court. *In re DBC*, 545 F.3d 1373, 1378 (Fed. Cir. 2008); *Woodford v. Ngo*, 548 U.S. 81, 111 ("[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only erred, *but has erred against objection made at the time appropriate under its practice.*") (citation

omitted). Because Mr. Doyon did not raise the issue before the board, the board did not have the opportunity to explain why Mr. Doyon's interpretation is not in accordance with military regulations or the military's settled understanding of certain terms such as "discharge." Mr. Doyon has also failed to address whether the statute could be applicable to a petition that was filed before the amendments were enacted. *See Sargisson v. United States*, 913 F.2d 918 (Fed. Cir. 1990) (applying presumption against retroactive application of a statute in the military pay context).

III. Neither 10 U.S.C. § 1552(h), Nor Applicable DoD Guidance Required The Board To Apply The "Liberal Consideration" Standard

The plain language of 10 U.S.C. § 1552(h)(2) did not require the board to apply "liberal consideration." Nor do other canons of statutory construction or the applicable legislative history support Mr. Doyon's interpretation. Applnt. Br. at 32-38. We agree that the BCNR is the only board that could entertain a request for a disability retirement. Applnt. Br. at 34-35. But this does not mean that the board had to apply the "liberal consideration" standard.[1]

[1] Amicus Vietnam Veterans of America contends that "a veteran whose discharge was due to a misdiagnosed mental condition should be able to correct their military records to seek medical retirement." Vietnam Vet. of Am. Br. at 3. We agree. Neither the board nor the trial court stated that military records could not be corrected for this purpose. The issue is whether "liberal consideration" applies in considering those petitions.

Mr. Doyon incorrectly contends that his claim "falls squarely within the plain meaning" of 10 U.S.C. §§ 1552(h)(1)-(2). Applnt. Br. 33. The plain meaning of "review of a discharge or dismissal" in section 1552(h) does not include review of an honorable discharge for reasons other than misconduct. We do not dispute that "[w]hen the statute's language is plain, the sole function of the courts . . is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). But "[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Thus, determining whether term has a plain meaning also requires an examination of "the language itself" as well as "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates*, 574 U.S. at 537 (quoting *Robinson*, 519 U.S. at 341). When the statutory language is not clear, the Court turns "traditional tools" of statutory construction, which include "the statute's structure, canons of statutory construction, and legislative history." *Ravin v. Wilkie*, 956 F.3d 1346, 1350 (Fed. Cir. 2020) (citation and quotation omitted).

Congress did not define the phrase "review of a discharge or dismissal" and neither "discharge" nor "dismissal" has a single plain, ordinary meaning, as

Mr. Doyon incorrectly contends. Applnt. Br. at 32. Black's Law Dictionary, for example, has several definitions for the term "discharge." Discharge, Black's Law Dictionary (11th ed. 2019). Significantly, in the military context, Black's Law Dictionary defines "discharge" as "[t]he dismissal of a member of the armed services from military service" and includes as examples, "administrative discharge," bad-conduct discharge," dishonorable discharge," general discharge, honorable discharge" and "undesirable discharge." *Id.* All of these definitions address whether a service member left in a status of honor.

The Department of Defense also defines the terms "discharge" and "dismissal." Department of Defense Directive 1332.14's glossary defines "discharge" as "[c]omplete severance from all military status gained through enlistment or induction." A "dismissal" is a "punitive separation" that applies to commissioned officers. RULES FOR COURTS-MARTIAL R. 1003(b)(8) (2019).

Under the canon of *noscitur a sociis*, meaning that "a word is known by the company it keeps," which is "applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress," it is appropriate to analyze the terms "discharge" and "dismissal" together. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Neal v. Clark*, 95 U.S. 704, 708-09 (1878). Placed in this context, it is also evident that "discharge" means a less-than-honorable discharge.

The phrase "review of a discharge or dismissal" in section 1552(h)(1) also limits the applicability of section 1552(h)(2)(B)'s "liberal consideration" standard. Although a military record correction board may correct "any military record," the board is required to apply "liberal consideration" only to the claims of former members who seek review of a discharge or dismissal, when the claims are based on combat-related PTSD or traumatic brain injury. And "liberal consideration" is applied only to determine whether those conditions "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). This means that the board must liberally consider whether PTSD or traumatic brain injury contributed to the reason or basis for the undesirable discharge itself or to "the original characterization" of discharge, which would include, for example, as other than honorable or general (under honorable conditions).

Section 1552(h)'s broader statutory context also supports that Congress intended the phrase "review of a discharge or dismissal" to apply only to upgrades to discharge characterization. Specifically, the text of 10 U.S.C. § 1553(d)(3)(A)(i)-(ii), which is the statute that is applicable to discharge review boards, is virtually identical to the provisions that were codified one year later in 10 U.S.C. § 1552(h).

"Under the *in pari materia* canon of statutory construction, 'courts should interpret statutes with similar language that generally address the same subject matter together, 'as if they were one law.'" *Strategic Hous. Fin. Corp. of Travis Cty. v. United States*, 608 F.3d 1317, 1330 (Fed. Cir. 2010) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1973). Since 1958, the military discharge review boards have understood the phrase "review of a discharge or dismissal" to apply only to the consideration of a former service member's request to upgrade a less-than-honorable discharge. *E.g.*, Pub. L. No. 85-857, § 13(v)(2), 72 Stat. 1267 (Sep. 2, 1958) (original version of 10 U.S.C. § 1553) (requiring that boards be established to, "review . . . the type and nature of discharge or dismissal," except those resulting from the sentence of a general court-martial, and "to *change, correct, or modify any discharge or dismissal*, and to *issue a new discharge* in accord with the facts presented to the board") (emphasis added); 32 C.F.R. § 724.107 (defining discharge); *id*. at § 724.205(a)(9) (providing that review of a discharge does not include the authority to entertain a request to "[c]hange the reason for discharge from or to a physical disability."); *see also Loving v. IRS*, 742 F.3d 1013, 1017 (D.C. Cir. 2014) (explaining that in interpreting a statute the agency's use of a term may provide context about a "specialized" meaning).

The amendments to section 1553(d) were enacted as part of the National Defense Authorization Act for Fiscal Year 2017 (NDAA), Pub. L. No. 114-328

§ 535 (Dec. 23 2016), which is one year before the same Congress enacted the amendments to section 1552(h).[2] *See* Pub. L. No. 115–91, § 520(a)(2), 131 Stat. 1379 (Dec. 12, 2017). When Congress passed section 1553, it thus necessarily understood it to apply only to requests for discharge upgrade requests. Congress's comments when enacting the amendments to section 1553 confirm that they understood the bill to remedy the effects of "less-than-honorable" discharges. 162 Cong. Rec. S3258-01 (daily ed. May 26, 2016) (statement of Sen. Peters). Senator Peters, who introduced the "Freedom for Veterans Act" that eventually resulted in the amendments to section 1553(d), explained that the bill's purpose was to address "bad paper discharge[s]" that are related to misconduct but which were actually the result of PTSD, traumatic brain injury, or other military sexual trauma and resulted in the service member's losing eligibility for a variety of benefits. *Id.*

Tying the amendments to the Hagel Memo, Senator Peters explained: "The Peters amendment would codify the commonsense principles of the Hagel memo, ensuring that liberal consideration will be given to petitions for changes in characterization of service related to PTSD or traumatic brain injury (TBI) before

[2] Although amendments to section 1552(d) were eventually enacted as part of the NDAA, they were originally introduced in the House as the "Fairness for Veterans Act of 2016," H.R. 4683, 114th Cong. (2016), which was captioned to "provide for a review of the characterization or terms of discharge from the Armed Forces of individuals with mental health disorders to affect terms of discharge." A similar bill introduced in the Senate as S.1567, 114th Cong. (2015).

discharge review boards." 162 Cong. Rec. at S3258-01. To the same effect, in House Report 114-840, which was the Conference Report for the National Defense Authorization Act for Fiscal Year 2017 (114th Cong. 2d Sess. Nov. 30, 2016), Congress explained that the House "reced[ed]" to a provision in the Senate's bill to amend 10 U.S.C. § 1553(d) "to require discharge review boards . . . to grant liberal consideration to claims by a former member of the Armed Forces that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in a less than favorable characterization of discharge." *Id.* at 1023.

Also, in the House Report from the Committee on Armed Services for Fiscal Year 2017, H.R. 114-537 at 148 (114th Cong. 2d Sess. May 14, 2016), Congress stated that "the committee encourages the Department to extend the 'liberal consideration' standard established for those applicants who allege a nexus between their misconduct and a diagnosis of [PTSD] or related conditions to *all discharge upgrade* cases considered by Discharge Review Boards, in addition to Boards for Correction of Military Records." *Id.* (emphasis added)

Given that the boards for correction of military records also possess jurisdiction to review requests to upgrade or to change the characterization of a discharge, and both sections 1552 and 1553 are remedial statutes, it is logical that Congress would make a corresponding identical amendment to 10 U.S.C. § 1552.

Romag Fasteners, Inc. v. Fossil, Inc., 866 F.3d 1330, 1335 (Fed. Cir. 2017) (explaining that when Congress uses the same language in two statutes that have similar purposes, it is appropriate to presume that Congress intended the text to have the same meaning in both statutes). And Congress's use of identical language when it amending section 1552 demonstrates that it merely intended for the military corrections boards to apply the same standard when adjudicating discharge upgrade requests that are related to discharges that occurred more than 15 years ago.

Further, Congress has enacted legislation (and made conforming amendments to sections 1552 and 1553) that reflects that review of discharges and dismissals extends only to upgrades of characterizations of services (and, per Department of Defense guidance and service regulations, corresponding changes to narrative reasons for separation and separation codes). For example, Pub. L. No. 116–92, § 523, 133 Stat. 1354–55 (Dec. 20, 2019), enacted as 10 U.S.C. § 1553a, requires the Secretary of Defense to establish a procedure for final review of a BCMR/NR or DRB decision to deny a request for an upgrade to the characterization of a discharge or dismissal, and made conforming amendments to 10 U.S.C. §§ 1552 and 1553. And section 1552(i), requires the military record corrections boards to make publicly available quarterly reports addressing the number of claims considered and whether PTSD, sexual assault or traumatic brain

injury "is alleged to have contributed . . . to the original characterization of the discharge or release of the former member." Pub. L. 114-328 § 533(a), 130 Stat. 2121; 10 U.S.C. §§ 1552(i)(1), (3) and (4).

Nor does Mr. Doyon's and Amicus Connecticut Veterans Legal Center's reliance on an isolated example from a cryptic statement from the Deputy Assistant Secretary of the Army Review Boards during a hearing of the House Armed Services Committee materially advance his case. Applnt. Br. at 35-36 (discussing H.A.S.C. No. 115-10 (2017)); Conn. Vet. Legal Ctr. Am. Br. at 18-19. Numerous other examples from the same hearing confirm that the witnesses and the members of Congress understood "liberal consideration" to apply only to requests for upgrades to discharges or dismissals related to misconduct.

For example, Representative Coffman, Chairman of Military Personnel for the committee stated "Many have . . raised concerns about the treatment of applicants with PTSD . . or TBI . . who are seeking discharge upgrades based on mitigating medical facts in order to obtain essential behavioural health treatment." H.A.S.C. No. 115-10, at 1 (Appx2228). Representative Tsongas also stated "[w]e must make sure that the boards make every possible effort to take these factors into account when considering a request to upgrade [a veteran's] discharge status." *Id.* at 2 (Appx2229). And Mark Teskey, Director of the Air Force Review Boards Agency stated: "The recent legislation required the Discharge Review Boards and

the Boards for Correction of Military Records to review and consider upgrading discharge characterization of veterans who experience these conditions and were subsequently discharged with other-than-honorable discharges." *Id.* at 6 (Appx2234). There are many other examples on pages 2, 5-6, 8, 13-15, 19-20, and 39-48 (Appx2229, Appx2232-2233, Appx2235, Appx2240-2242, Appx2246-2247, Appx2266-2275), that further support that Congress understood "liberal consideration" to apply to discharge upgrade requests and to mitigate the harsh consequences that can result when a discharge was attributed to misconduct, but as really behavior that resulted from combat-related PTSD, traumatic brain injury, or sexual assault.[3]

IV. The Hagel And Kurta Memoranda Do Not Apply To Requests To Convert A Discharge For Unsuitability To A Discharge For Unfitness For Duty

Nor do the Hagel or Kurta memoranda support that the board was required to apply "liberal consideration" to Mr. Doyon's request for a disability retirement, as Mr. Doyon incorrectly contends. Applnt. Br. at 39-49.

[3] Amicus Connecticut Veterans Legal Center also emphasizes the testimony of Robert L. Woods, the then-Assistant General Counsel for the Assistant Secretary of the Navy for Manpower and Reserve Affairs, and contend that his testimony supports a broad application of the Kurta memo. Conn. Vet. Legal Ctr. Am. Br. at 18. A review of Mr. Woods's testimony and prepared statements, however, demonstrates that his comments did not concern applying "liberal consideration" to requests to covert an administrative discharge to a disability retirement; instead, they focused upon reviews of discharge upgrade requests. H.A.S.C. No. 115-10, at 5-6, 8, 14-15, 37-44 (Appx2232-2233, Appx2235,

Mr. Doyon does not substantively address the Hagel memo. Notably, the title of the memo is "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming [PTSD]," which indicates that it was intended to apply only to discharge upgrade requests. Appx1232, Appx1234. Thus, unsurprisingly, the body of the memo discusses liberal consideration only in the context of discharge upgrades and of the mitigating the effects of discharges that were attributed to misconduct, when the behavior was actually the result of undiagnosed PTSD. Appx1234-1235. For example, the memo states: "Liberal consideration will also be given" when "[the service member presented evidence establishing] that PTSD or PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service." Appx1234. Also, the section titled "Consideration of Mitigating Factors" states that PTSD and PTSD-related conditions "will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service." *Id.*; *see also id.* (cautioning corrections boards when "serious misconduct precipitated a discharge" with a less-than-honorable characterization). Indeed, two amici who filed briefs, the Connecticut Veterans Legal Center and the Vietnam Veterans of America, appear

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Appx2241-2242, Appx2264-2271).

to agree that the Hagel memo addresses only discharge upgrades. Conn. Vet. Legal Ctr. Am. Br. at 12-13; Vietnam Vet. of Am. Br. at 13.

Mr. Doyon's arguments regarding the Kurta memo fare no better. Applnt. Br. at 39-48. Mr. Doyon ignores that title of the memo is "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment." Appx1941. Thus, the memo was designed to provide "clarifying guidance" concerning the Hagel memo, which, as explained above, exclusively applies to discharge upgrade requests. Appx1941.[4]

The Kurta memo provided clarifying guidance as to how to apply the "liberal consideration" standard, and provided questions for the boards to apply when considering whether the service member's PTSD or other condition outweighed or mitigated the misconduct that had resulted in a less than honorable characterization. It also expanded the standard's applicability to all veterans, all

[4] A dishonorable discharge is the worst characterization of service available to an enlisted person and is issued only at a general court-martial (the military's felony court). Amicus Vietnam Veterans of America acknowledges this point, discussing the Kurta memo and stating "the memo established a policy framework intended to bring justice to veterans who received a dishonorable discharge when the misconduct leading to the discharge may have been due to PTSD . . . it requires that discharge review boards use liberal consideration when determining whether a veteran's actions that led to a dishonorable discharge were related to PTSD." Vietnam Vet. of Am. Br. at 14.

less-than-honorable discharges, and to traumatic brain injury, other mental health conditions, and sexual assault/sexual harassment. Appx1940-1944. But nothing in the memo indicates that Kurta intended to expand the Hagel memo's clear limitation to apply only to the characterization of a discharge and discharge upgrade requests. Appx1232, Appx1234; *see also* 10 U.S.C. §§ 1553(a)-(b) (explaining the discharge review process); 32 C.F.R. § 724.205(a) (review of a discharge does not include the authority to entertain a request to change the reason for a discharge to a physical disability)

Further, the Kurta memo clarified that "discharge relief" is limited to discharge upgrades or modifications including characterization of service, changes to the corresponding narrative reason for discharge, separation code, and re-enlistment code. Appx1941, Appx1943, at ¶¶ 20, 24. Mr. Doyon and Amicus Protect our Defenders, focus upon this language and contend that it requires the board to apply "liberal consideration," to a request to convert an administrative separation to a medical retirement based on disability. Applnt. Br. at 39-40; Protect Our Defenders Am. Br. at 7. They do not explain why other than to offer their opinion with no support that modification of a separation code or a re-enlistment code necessarily means the ability to entertain a request to convert an administrative discharge code to a disability code. But, as explained above, "discharge" in the context of military review boards has a settled meaning and is

separate and apart from the disability evaluation process. Contrary to Mr. Doyon's assertions, changing a narrative reason for a discharge to a medical retirement, or a discharge separation code to a medical retirement code is not "discharge relief" as it is understood in the Kurta memo. Appx1941, Appx1943. And Mr. Doyon's singular focus on the fact that the memo mentions separation codes avoids dealing with the fact that the entire focus on the memo is whether a particular condition mitigates the misconduct that led to the discharge characterization.

Nor does paragraph 26(j) of the Kurta memo, which references the need for a "less prejudicial discharge" in order to obtain benefits such as "medical care" address disability retirements as Amicus Protect Our Defenders incorrectly contends. Protect Our Defenders Am. Br. at 7-8 (citing Appx1944). As explained above, a dishonorable discharge precludes a veteran from obtaining VA benefits, such as access to the VA health system, which was one of the main reasons Congress codified the "liberal consideration" standard in 10 U.S.C. § 1553, but nowhere in the paragraph cited (or anywhere else) does the memo address disability retirements. Thus, the Kurta memo did not expand the applicability of liberal consideration to claims for relief not involving misconduct discharge upgrades modifications.

Indeed, the Kurta memo's repeated use of the word "misconduct" and misconduct-related language underscores that the memo was intended to address

the discharge review process and not disability retirements. Appx1940-1944. That is so because misconduct is the premise for a non-disability discharge. By contrast, a disability discharge is based on medically (including psychologically) based unfitness to perform military duties, not intransigence or other forms of unsuitability. Kurta's focus on misconduct represented an effort to mitigate (on paper) the misconduct that brought about the discharge, recognizing the unique service conditions that might have contributed to the basis for discharge. To be sure should those conditions have resulted in unfitness, a disability discharge would be warranted.

To that effect, the memo repeatedly addresses whether the listed conditions "excuse," "mitigate," or "outweigh" the "misconduct" or discharge. Appx1941 at Attachment, ¶ 2a ("condition or experience that may excuse or mitigate the discharge"); *id.* at ¶ 2c ("condition or experience actually excuse or mitigate the discharge"); *id.* at ¶ 2d ("condition or experience outweigh[s] the discharge"); *id.* at ¶ 6 ("Evidence of misconduct, including any misconduct underlying a veteran's discharge"); Appx1942 at ¶ 7 ("condition or experience excuses or mitigates the discharge"); *id.* at ¶ 9 ("condition that may excuse or mitigate the discharge"); *id.* at ¶ 10 ("a diagnosis . . . that could excuse or mitigate the discharge"); *id.* at ¶ 12 ("or that it excuses or mitigates the discharge"); *id.* at ¶ 16 ("liberally considered as excusing or mitigating the discharge"); Appx1943 at ¶ 18 ("In some cases, the

severity of misconduct may outweigh any mitigation"); *id.* at ¶ 19 ("Premeditated misconduct is not generally excused by mental health conditions"); Appx1944 at ¶ 26e ("Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices"); *id.* at ¶ 26h ("An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct."); *id.* at ¶ 26i ("The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case."); *id.* at ¶ 26j ("However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits") (emphasis added); *id.* at ¶ 26k ("Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances."). Mr. Doyon's brief ignores this language and the fact that the memorandum does not mention disability retirement.

Nor is there merit to Mr. Doyon's reliance upon the Department of Justice's trial attorney's statements during the oral argument in *Hassay v. United States*, 150 Fed. Cl. 467, 470 (2020). Applnt. Br. at 45. We recognize that the Court of Federal Claims, in *Hassay*, 150 Fed. Cl. 467, 482-484, held that the guidance in the Kurta memorandum applies to the board's fitness for duty determination and in doing so understood the Government to concede that the Department of Defense's guidance regarding the "liberal consideration" standard applied to fitness for duty determinations.

Any such concession was in error, as demonstrated by the Government's consistent position in written briefs filed in this case and in *Philippeaux v. United States*, No. 20-275, 2020 WL 7042908 (Fed. Cl. Dec. 1, 2020), *aff'd*, No. 21-1466, 2021 WL 4059100 (Fed. Cir. Sept. 7, 2021), after the court issued its decision in *Hassay*. Thus, that concession would not control here. *See, e.g., United States v. Thompson*, 851 F.3d 129,131 (1st Cir. 2017) (appellate court not bound by the Government's incorrect concession); *United States v. ResendizPatino*, 420 F.3d 1177, 1182 (10th Cir. 2005) (disregarding concession when Government was "too quick to concede the point"); *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987) ("Even if a concession is made by the government, we are not bound by the government's 'erroneous view of the law.'") (citation omitted).

The trial court's conclusion in *Hassay* that the Hagel and Kurta memoranda apply to disability retirement claims is also flawed. In *Hassay*, the court concluded that the guidance contained in the Hagel and Kurta memoranda were applicable to a request for a disability retirement but failed to address the language in the memoranda that is discussed above that demonstrates that the memoranda were not intended to apply in the disability context. 150 Fed. Cl. at 483-84. Conversely, in *Philippeaux*, which was affirmed by this Court, the trial court held that the Hagel memo applied only to discharge upgrade requests and that the Kurta memo provided additional guidance for "petitions for changes in discharge characterizations, not to BCNR determinations with respect to disability benefits." 2020 WL 7042908, at *8-9. Mr. Doyon erroneously contends that this Court should disregard *Philippeaux* because Mr. Doyon disagrees with the Court's interpretation, but, as we have explained above, the language contained in the Kurta memo does not support Mr. Doyon's interpretation.

Finally, there is no merit to Mr. Doyon's efforts to demonstrate that applying "liberal consideration" would necessarily result in a finding that he was entitled to a disability retirement. Applnt. Br. at 45-48. For example, on remand in *Hassay,* applying "liberal consideration" to a request for a disability retirement, the board still found that Mr. Hassay was not entitled to a disability retirement. Decision on

Remand, *Hassay v. United States*, No. 19-594 (Fed. Cl.), dated June 2, 2021, ECF No. 43.

V. Substantial Evidence Supports The Board's Decision

As the trial court correctly concluded, substantial record evidence supports the board's conclusion that Mr. Doyon was properly separated in 1968 for unsuitability based upon a personality disorder. The substantial evidence standard is not rigorous. It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951)); *see also Fleming*, 774 F.3d at 1375 ("Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.") (quoting *Landes*, 833 F.2d at 1371). It does not have to be a preponderance of the evidence, but must be "more than a scintilla." *Siemens*, 806 F.3d at 1369 (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). The board's analysis more than satisfies this deferential standard of review.

A. Mr. Doyon's Disagreement With The Board's Conclusions Does Not Mean That The Board Failed To Consider The Record Evidence

Before the board, Mr. Doyon objected to the validity of the in-service personality disorder diagnosis. Appx1068. He requested that board correct his

Navy records to show that he was found unfit for duty and medically retired for psychosis or psychoneurosis, conditions that he believes more closely matched his symptoms in 1968. *Id.* When considering the merits of Mr. Doyon's disability retirement claim, the board did not contest that Mr. Doyon had been diagnosed with PTSD in 2014, or that he may have not been currently symptomatic of the personality disorder, but it found that there was "more than enough evidence of behavior consistent with a personality disorder to support the [1968] diagnosis." Appx1050. Thus, it disagreed that Mr. Doyon had proven that he was unfit for duty because of a medical condition in 1968. Appx1050, Appx1056-1057.

The board considered, but was not persuaded by, either the VA ratings issued for Mr. Doyon's service-connected PTSD condition, or the private medical opinion that he provided. Appx1049-1050; *see also* Appx1055. Specifically, the board concluded that the VA and private medical opinions were "made too distant in time from 1968 to be probative of [Mr. Doyon's] fitness for continued naval service in 1968." Appx1050; *see also* Appx1112-1129, Appx1559-1565. The board determined that the 1968 diagnosis of a personality disorder was "more credible" than the private medical opinion because the Navy medical providers had "personally observed" Mr. Doyon, rather than relying on medical records and assertions made by Mr. Doyon over 40 years after his discharge. Appx1050.

Also, the Board substantially concurred with the two advisory opinions prepared for the board's consideration. *See Volk v. United States*, 111 Fed. Cl. 313, 334 (2013) (the board may rely on advisory opinions). In the September 20, 2018 advisory opinion, the SMA concluded that the preponderance of the evidence required a determination that Mr. Doyon was "appropriately separated administratively." Appx1052-1056. The SMA considered many documents, including Mr. Doyon's military medical records, April 1967 correspondence from Mr. Doyon's commanding officer, the September 1968 discharge recommendation, an October 1968 psychiatric clinical note, and the VA's rating decisions. *Id.*

Concerning Mr. Doyon's VA disability rating, the SMA noted:

> Besides the fact that the considerable passage of time renders this determination of significantly less probative value relative to the applicant's mental health presentation in 1968, it is noted that VA determinations of Service Connection are manifestation based without a requirement for the establishment of unfitness for continued naval service at the time of separation or discharge.

Appx1055, Appx1136-1139, Appx1141-1144. The SMA observed that the PTSD diagnosis was not part of the then-existing DSM II (1968) and did not become official until publication of the DSM III (1980), 12 years later. Appx1056. Also, the diagnoses in the DSM II compensable by Department of Defense Physical Evaluation Board action were known as "psychoses and pychoneuroses," neither of which were consistent with Mr. Doyon's clinical presentation in 1968. *Id.* And

the SMA determined that there was no indication that Mr. Doyon had ever complained of symptoms directly related to his claimed in-service stressors (*i.e.*, the USS Forestall fire in July 1967 and a plane crash on the flight deck of the USS Intrepid in 1968). Appx1055-1056. Instead, the SMA concluded that Mr. Doyon had "demonstrated problems adjusting to the Navy prior to either of th[o]se tragic events." *Id.* The SMA further noted, "[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." Appx1056.

As the SMA noted, an October 28, 1968 neuropsychiatric treatment record indicated a diagnosis of emotionally unstable personality. Appx1052, Appx1282. The psychiatrist stated that, in addition to Mr. Doyon's reported in-service conflicts, he had experienced conflicts with other organizations, including a pre-service incident in which he was almost placed on academic probation while attending an architecture school. Appx1282. The psychiatrist further noted that Mr. Doyon "evidences a long standing characterological, attitudinal and behavioral pattern which existed prior to enlistment and will continue to manifest itself in service." *Id.* The psychiatrist opined that Mr. Doyon was "clearly sane and responsible" but not amenable to psychiatric treatment within the service and did not appear likely to respond to service rehabilitation. *Id.* The psychiatrist

concluded that Mr. Doyon was "an appropriate individual for administrative separation under BuPersManArt C10310." *Id.*

The SMA also cited the September 30, 1968 recommendation for discharge. Appx1053, Appx1279. It reflected a diagnosis of passive aggressive personality, and Mr. Doyon's commanding officer made the following comments: "It is strongly recommended that Airman Doyon be separated from the Naval Service by reason of unsuitability. Further retention in the service would not be in the best interest of the U.S. Navy." Appx1053, Appx1279.

Thus, the SMA concluded that a "preponderance of objective evidence" supported "the existence of significant adjustment difficulties beginning prior to 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." Appx1056.

The September 24, 2018 advisory opinion agreed with the SMA's recommendation. Appx1057. Other comments included:

> [T]here is little objective evidence in the applicant's Service Treatment Record suggesting PTSD-related stress reaction contributed to the circumstances resulting in administrative separation. While an ADJUSTMENT REACTION OF ADULT LIFE or OCCUPATIONAL MALADJUSTMENT might have been alternate diagnostic choices, administrative separation would have

> still occurred as neither condition was considered compensable by the DON PEB at that time.

Id.

Beyond the advisory opinions, the board was persuaded by the fact 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." 1050. The board noted that, in August 1968, Mr. Doyon was referred for mental health observation and diagnosed with passive aggressive personality, but was ultimately released back to full duty. *Id.*; *see also* AR1057, Appx1274-1275. Because Mr. Doyon was returned to full duty, the board found that those circumstances did "not meet the criteria for a psychosis diagnosis." Appx1050. The board noted that there was no evidence that Mr. Doyon had received continuing treatment for psychosis after his military discharge. *Id.*

Other record evidence upon which the board relied includes Mr. Doyon's performance evaluation for September 17, 1966, to March 16, 1967, which included a statement that Mr. Doyon "seldom displays any initiative or interest in his work. Doyon has found it difficult to adjust to Navy life." Appx1654; *see also* Appx1631 (Sept. 16, 1967 performance evaluation report excerpt), Appx1651 (Commanding Officer, USS Intrepid, April 19, 1967 statement in support of reply to Senator Kennedy's inquiry).

Based on those findings and its reliance on the advisory opinions, to which the board assigned more probative value, the board concluded that "insufficient evidence of error or injustice exists to warrant a change to [Mr. Doyon's military] record." Appx1050. As this record evidence demonstrates, the board gave appropriate consideration to the evidentiary record, thus fully complying with the substantial evidence rule. Although reasonable minds may differ about whether the circumstances surrounding Mr. Doyon's separation warranted a determination that he was unfit for service due to psychosis or psychoneurosis, the "responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province." *Heisig*, 719 F.2d at1156 ("[C]ourts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence.").

Mr. Doyon first claims that the board failed to assess the entire record when deciding his claim, including evidence that demonstrated flaws in the 1968 personality disorder diagnosis, particularly the diagnosing psychiatrist's statement that he had "a long standing characterological, attitudinal and behavior pattern which existed prior to enlistment and will continue to manifest itself in the service." Appx1282; Applnt. Br. at 48-53. He also claims that the board failed to consider whether a preponderance of the evidence supported that he had a preexisting personality disorder. Applnt. Br. at 50 (citing Appx1155-1156). But,

as discussed above, the board's decision contradicts this argument and explicitly states that the board applied the correct standards, considered the contents of his application and attachments, relevant portions his naval record, and the two advisory opinions all of which supported the board's conclusion that he was appropriately dismissed in 1968 for unsuitability based upon a personality disorder. Appx1049-1051, Appx1054, Appx1274-1275, Appx1282. *See also Plant Genetic Sys., N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1343 (Fed. Cir. 2003) ("We presume that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise.").

Further, Mr. 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. Applnt. Br. at 50. As the version DoD Instruction 1332.18 that was in effect at the time of his discharge states: "The mere presence of an impairment, does not, of itself, justify a finding of unfitness because of physical disability." Appx1153.

Notably, in addition to the record evidence discussed above, the trial court's review of the record evidence further supports 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." *Doyon*, 2021 WL 120923, at *12 (citing Appx1050). Specifically, the trial court noted that Mr. Doyon went on

unauthorized absence with the Navy in May 1968, because he was "suffering from significant emotional torment." *Id.* (citing Appx1054); Appx1274. The trial court also noted that when Mr. Doyon returned to duty he was transferred to the 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.'" *Doyon*, 2021 WL 120923, at *12 (citing Appx1054 and Appx1274). Further the trial court explained that Mr. Doyon's hospital records "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.* And the trial court cited other evidence from 1968 diagnosing Mr. Doyon with a passive aggressive personality disorder and recommending that he be returned to full duty. *Doyon*, 2021 WL 120923, at *12 (citing Appx1277 and Appx1282).

Consequently, although Mr. Doyon disagrees with board's (and the trial court's analysis) of the cited record evidence, that is not a basis for overturning the board's decision. *Skinner*, 594 F.2d at 829-30 (explaining that the reviewing court's role is not to sit as a "super correction board"); *Fleming*, 774 F.3d at 1375 (Fed. Cir. 2014) ("Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.") (quoting *Landes Const. Co.*, 833 F.2d at 1371).

B. Substantial Evidence Supports The Board's Conclusion That Mr. Doyon Should Not Have Been Found Unfit For Duty Because Of Psychoses Or Psychoneuroses

Despite Mr. Doyon's subjective disagreement, substantial evidence also supports the board's conclusion that Mr. Doyon should not have been found unfit for duty because of psychoses or psychoneouroses. Applnt. Br. at 54-57. As the trial court correctly concluded, "substantial evidence" supports the board's finding "that there is little objective evidence in [Mr. Doyon's] service treatment record[s] suggesting that a PTSD-related stress reaction made a significant contribution to the circumstances resulting in his administrative separation[.]" *Doyon*, 2021 WL 120923, at *12 (citing Appx1056-1057). First the trial court noted that the medical records from Mr. Doyon's August 1968 hospitalization are "devoid of any indication that [he] was suffering from psychoses or psychoneuroses" and that the record showed that Mr. Doyon had returned to duty after the hospitalization. *Doyon*, 2021 WL 120923, at *12-13 (citing Appx1274-1275, Appx1277). Although Mr. Doyon emphasizes that the board erred in stating that he returned to duty the next day, Applnt. Br. at 54-55, it is undisputed that he was "return[ed] to full duty" shortly after his hospitalization with no restrictions. Appx1277. Also, an examination was performed one day after his admission and recommended he be returned to full duty. Appx1272, Appx1274-1275. Indeed, in its decision the trial court concluded that the fact that he "returned to duty" supported the board's

findings that he did not suffer from psychoses or psychoneuroses. *Doyon*, 2021 WL 120923, at *13. Thus, any error was harmless. *Systems Studies & Simulation, Inc. v. United States*, 22 F. 4th 994, 996-997 (Fed. Cir. 2021) (explaining that "the challenger of agency action generally bears the burden of showing that an error was harmful") (citing *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009)).

Further, as the trial court explained, the evidentiary record from a subsequent 1968 examination found Mr. Doyon to be "'clearly sane and responsible, not amenable to psychiatric treatment within the service,' and that he '[did] not warrant hospitalization.'" *Doyon*, 2021 WL 120923, at *13 (citing Appx1282). And the trial court noted other record evidence confirmed that substantial evidence supported the board's conclusion, such as the fact that Mr. Doyon enrolled in a major university after being discharged from the Navy and that he "did not suffer from any documented episodes for 40 years." *Doyon*, 2021 WL 120923, at *13 (citing Appx1056-1057). Also, the trial court cited other evidence supporting that the board reasonably concluded that Mr. Doyon's "personal convictions, rather than traumatic incidents that [he] witnessed during his military service, were the basis for the conduct which led to [his] discharge due to unsuitability." *Doyon*, 2021 WL 120923, at *13; Appx1050, Appx1651, Appx1654, Appx1270, Appx1924.

Again, Mr. Doyon's arguments demonstrate only that he would have weighed the evidence differently, Applnt. Br. at 54-56, but that does not mean that the board's decision is unsupported by substantial evidence. A decision can be supported by substantial evidence even when reasonable minds can disagree. *Fleming v. Escort, Inc.*, 774 F.3d at 1375; *Heisig*, 719 F.2d at 1156.

Finally, there is no merit to Mr. Doyon's position that the board failed to consider Mr. Doyon's claim that he suffered from PTSD based upon his experiences aboard the Intrepid. Applnt. Br. at 56-57 (citing *Motor Vehicle Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 and *Heisig*, 719 F.2d at 1157). Mr. Doyon ignores that the SMA reviewed the contemporaneous record evidence and concluded that there was no indication that Mr. Doyon had ever complained of symptoms directly related to this experiences aboard the Intrepid. Appx1055. Specifically, the SMA's report explained: "The 26 September acknowledgement of the Commanding Officer's recommendation for administrative separation signed by the applicant occurred just three days following the plane crash aboard the Intrepid and does not appear to be related to the applicant's reaction to either that or the earlier Forrestal plane crash." Appx1055-1056. Instead, the SMA concluded that Mr. Doyon "demonstrated problems adjusting to the Navy prior to either of th[o]se tragic events." Appx1055.

C. Mr. Doyon's Subsequent PTSD Diagnosis Does Not Prove That He Was Unfit For Duty In 1968

Mr. Doyon was administratively separated for unsuitability. He appears to claim that because he was subsequently diagnosed with PTSD by the VA and a private psychiatrist, this proves that he was unfit for duty in 1968. Applnt. Br. at 58. As a threshold matter, a "long line of decisions" supports that VA ratings are "in no way determinative on the issue of [a] plaintiff's eligibility for disability retirement pay." *Ward v. United States*, 133 Fed. Cl. 418, 431 (2017) (quoting *Dzialo v. United States*, 5 Cl. Ct. 554, 565 (1984)); *see also id.* (explaining that the VA "lacks the authority to determine whether or not a soldier is fit for duty, a determination that falls exclusively within the purview of the armed forces"); *Bennett v. United States*, 200 Ct. Cl. 635, 643-44 (1973) (*per curiam*) (explaining that VA ratings are not "determinative of the issues involved in a disability retirement determination by the military"); Appx1157-1158 ("The VA Schedule for Rating Disabilities does not relate to findings of unfitness for military duty.").

Here, the SMA analyzed the entire record but concluded that Mr. Doyon's service record contained "little objective evidence . . . suggesting a significant PTSD-related stress reaction made a significant contribution to the circumstances resulting in the contested administrative separation." Appx1056. Further, he concluded that "[r]etrospective subjective accounts occurring remote from an applicant's active service are significantly less probative value with respect to

determining fitness contemporary with a given period of active duty." *Id.* Thus, the SMA explained that even though Mr. Doyon had subsequently been diagnosed with PTSD, he could not conclude that the record supported a finding that Mr. Doyon was medically unfit for duty in 1968. Similarly, the trial court agreed that the board reasonably concluded that record evidence supported that Mr. Doyon's "personal convictions, rather than traumatic incidents that [he] witnessed during his military service, were the basis for the conduct which led to [his] discharge due to unsuitability." *Doyon*, 2021 WL 120923, at *13; Appx1050, Appx1270, Appx1651, Appx1654, Appx1924. And after considering this evidence, the trial court declined to substitute its judgment for that of the board "when reasonable minds could reach different conclusions about [Mr. Doyon's] mental health in 1968 based upon the same evidence." *Doyon*, 2021 WL 120923, at *13 (citing *Wronke*, 787 F.2d at 1576). This Court should similarly decline Mr. Doyon's invitation to reweigh the evidence on appeal.

Nor is there merit to Mr. Doyon's position that, under the standards applicable to a discharge for a personality disorder in 1968, a dismissal for unsuitability was the "functional equivalent" of a finding of unfitness, which requires a permanent disability retirement. Applnt. Br. at 58 (citing Appx1164 and 1834). Department of Defense Instruction 1332.18 (Sept. 9, 1968), Enclosure 2, explicitly stated that the military did *not* consider them functional equivalents.

Appx1190. Section XIV differentiates between "psychoses, psychoneuroses, and personality disorders," and grouped "personality disorders" into two categories, (1) character and behavior disorders, and (2) transient personality disorders. Appx1190-1191. For character and personality disorders, the regulation stated that: "Character and behavior disorders may render an individual unsuitable rather than unfit because of physical disability. Interferences with performance of effective duty will be dealt with through appropriate administrative channels." Appx1191, Appx1164 (explaining what constituted a finding of unfitness in 1968). The Instruction also explained that transient personality disorders are "Transient personality disruptions of a nonpsychotic nature or situational maladjustments due to acute or special stress that do not render an individual unfit because of physical disability." Appx1191, Appx1055 (discussing the DoD instruction). Further, the Instruction stated: "The mere presence of an impairment, does not, of itself, justify a finding of unfitness because of physical disability" and that an individual analysis was required in each case. Appx1153-1154. Thus, there is no merit to Mr. Doyon's position that he was necessarily unfit for duty in 1968 because he was found unsuitable based upon a personality disorder.

Mr. Doyon also emphasizes that under the version of 38 C.F.R. § 4.131 (1968) that was in effect at the time of his separation, a soldier who was found unfit for duty due to a "mental disorder" that "ha[d] at [its] onset as an incident of

battle or enemy action," was assigned a "minimum rating of 50 percent." Appx1796. Again, Mr. Doyon was not found to be unfit for duty. Further, he neglects to include the rest of the sentence, which states "*with an examination to be scheduled within six months of discharge*." *Id.* (emphasis added). Thus, Mr. Doyon would not necessarily have received a permanent disability retirement had he had initially been separated based upon a finding of unfitness because his condition would have been reevaluated in six months. 10 U.S.C. § 1201 (1968) (requiring, among other things a finding of a 30 percent disability rating at the time it is determined "the disability is of a permanent nature"), Appx1165 (explaining what constitutes a permanent disability), Appx1159-1160 (explaining the role of the temporary disability retired list); *see also Petro v. United States*, 104 Fed. Cl. 537, 552-557 (2012) (addressing a different version of the applicable Veterans Administration Schedule for Rating Disabilities).

In sum, Mr. Doyon has failed to meet his considerable burden of presenting "cogent and clearly convincing evidence" that the board's decision was in error. *Dorl*, 200 Ct. Cl. at 633.

CONCLUSION

For all of these reasons, we respectfully request that the Court affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 32(b), the undersigned certifies that the word processing software used to prepare this brief indicates there are a total of 11,747 words, excluding the portions of the brief identified in the rules. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

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