No. _____

In The
Supreme Court of the United States

JEFFRY SCHMIDT,

Petitioner,

v.

JAMES E. MCPHERSON, ACTING SECRETARY, U.S. NAVY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Federal Circuits, including the U.S. Court of Appeals for the District of Columbia Circuit, Refuse to Recognize that the U.S. Military and the Department of Veterans Affairs use the same disability evaluation systems for determining Veteran's disability such that the same medical evidence should have consistent ratings between the two Agencies and that VA treatment shortly after discharge gives rise to whether all medical issues were properly addressed before the Military, denying Veterans of proper and well-deserved disability Military compensation.

2. Did the Board of Corrections for Naval Records fail to consider the discrepancy ratings between the military and the VA, and other new and material evidence violating the arbitrary and capricious standard.

PARTIES TO THE PROCEEDING

All the parties are listed out in the Caption on the cover.

STATEMENT OF RELATED CASES

United States District Court for the District of Columbia, Civil Action No. 14-cv-01055, JEFFRY SCHMIDT, Plaintiff v. RAY MABUS, Secretary, U.S. Department of Navy, Defendant. (March 29, 2019).

United States Court of Appeals for the District of Columbia Circuit, No. 15-5298, JEFFRY SCHMIDT, Plaintiff-Appellant v. THOMAS B. MODLY, Acting Secretary, U.S. Department of Navy; Defendant-Appellee. (December 16, 2019).

United States Court of Appeals for the District of Columbia Circuit, No. 18-5304 JEFFRY SCHMIDT, Plaintiff-Appellant v. THOMAS B. MODLY, Acting Secretary, U.S. Department of Navy; Defendant-Appellee. (March 20, 2020).

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I. OPINIONS BELOW

Schmidt v. McPherson, No. 1:14-cv-01055, (DC Circuit 2020), represents the D.C. Circuit's final decision was decided on May 8, 2020. See Appendix page 1a. Then, the D.C. Circuit upheld the Secretary of the Navy's Motion for Summary Judgment on August 8, 2018. See at Appendix page 7a. *Schmidt v. Spencer,* No. 14-1055 (D.C. Cir. 2018) represents the Opinion of the United States District Court for the District of Columbia to deny reconsidering the 2011 Board for Corrections of Naval Records decision was entered August 8, 2018, See Appendix page 9a. *Schmidt v. McPherson,* 1:14-cv-01055-DLF (USCA DC 2020) serves as the order of the United States Court of Appeals for District of Columbia Circuit, denying appellant's petition for rehearing *en banc*. See Appendix page 26a. Opinions Presented: *Schmidt v. McPherson*, No. 1:14-cv-01055, (DC Circuit 2020) represents the D.C. Circuit's final decision on appellant's case and was decided on May 8, 2020. See Appendix page 1a. Then, the D.C. Circuit upheld the Secretary of the Navy's Motion for Summary Judgment on August 8, 2018. See Appendix page 7a. *Schmidt v. Spencer,* No. 14-1055 (D.C. Cir. 2018) represents the Opinion of the United States District Court for the District of Columbia to deny reconsidering the 2011 Board for Corrections of Naval Records decision. Opinion entered August 8, 2018. See Appendix page 9a. *Schmidt v. McPherson,* 1:14-cv-01055-DLF (USCA DC 2020) serves as the Order of the United States Court of Appeals for District of Columbia Circuit, denying appellant's petition for rehearing *en banc*. See Appendix page 26a.

II. JURISDICTION

The United States Courts of Appeals for the District of Columbia Circuit issued its final decision on May 8, 2020. On July 7, 2020, the District of Columbia Circuit denied Petitioner's petition for rehearing *en banc*. This Court has jurisdiction over Petitioner's claims under 28 U.S.C. §§ 1254 & 1331 (2020).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Produced in the Appendix on Appendix Pages 28a-36a.

IV. STATEMENT OF THE CASE

This petition arises from a nearly two-decade old dispute between Petitioner and the United States Department of the Navy (Navy) regarding the denial of a February 27, 1992, dated military records correction request from the Board of Correction of Naval Records.[1] He was given a military medical disability rating of 10%. Following his discharge from the Marine Corps on March 1, 1989, Petitioner received all of his medical treatments from the VA. The VA provided him with a disability evaluation of 60% soon after, and evaluated him to be 100% disabled on January 29, 2001. The Board of Correction for Naval Records (BCNR), the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia

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1 Hereinafter the BCNR, and Department of the Navy will be collectively referred to as "Respondents". The Department of Veterans Affairs will hereinafter be referred to as "VA".

Circuit have repeatedly denied Petitioner's attempts to have his military disability rating reevaluated. A *writ* was timely filed before this Honorable Court to obtain justice for a decorated soldier, Mr. Jeffry Schmidt, who honorably served his country.

1. HISTORY

a. Military History

Since February 1989, Petitioner has been dealing with the daunting task of correcting his military records due to the BCNR's failure to adequately review his medical conditions, alongside his nearly concurrent VA results.

In March of 1983, soldiers fell onto Petitioner during training.[2] The incident resulted in injuries to his left shoulder and back.[3] In August 1983, Petitioner was pushed out of a moving vehicle. The incident injured his lower back, and caused a third-degree right ankle sprain.[4] Petitioner was also injured in February 1987 when a metal pallet fell onto his foot, causing him to suffer multiple puncture wounds and a fracture of his metatarsal. He also suffered left shoulder, right ankle, and left great toe injuries during his military service.[5]

Petitioner was not provided physical medical treatment for many of the permanent results of his

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2 (Schmidt Int. App. Brief at 1-2, referencing Schmidt. Int. App. Brief JA at 43).

3 *Id.*

4 *Id* at 2, referencing Schmidt. Int. App. Brief JA at 44.

5 In August of 1988, Petitioner was diagnosed with hypertension, two ankle and his left toe during the course of service. *Id.*, referencing Schmidt. Int. App. Brief JA at 44.

sustained injuries during military service.[6] This lack of treatment caused mental health issues while in service. Petitioner endured a major depression episode during his final three years of the Marine Corps that only continued to worsen while in service.[7] The military never treated this condition with any anti-depression medication. Petitioner was ordered into an alcohol rehabilitation program.[8] His fellow Marines ridiculed him for his condition by calling him a malingerer and had him escorted to his physical therapy and activities.[9] His fellow Marines also observed him being "excused" for performing his primary Marines duties, like running daily three to ten mile runs.[10]

But the Physical Evaluation Board (PEB) gave Petitioner a 10% medical disability separation for his lower back condition, despite the Medical Review Board acknowledging his various disabilities.[11], [12] The constant severe stress of his military duties, physical ailments, and untreated mental health conditions was an extreme exacerbating contributing element to an Axis II diagnosis of Intermitted Rage Disorder.[13] Petitioner's continued deterioration of his physical health increased the severity of his physical

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6 *Id.*at 3.

7 (Schmidt. Int. App. Brief JA at 51-52).

8 (Schmidt. Int. App. Brief JA at 51).

9 *See* fn 7, *supra.*

10 (Schmidt. Int. App. Reply Brief AR at 28).

11 (Schmidt Int. App. Brief at 2), referencing Schmidt. Int. App. Brief JA at 44.

12 *See* fn 11, *supra.*

13 (Schmidt. Int. App. Brief JA at 52).

and mental conditions before and after his discharge.[14]

It was not until February 23, 2013 (with an effective date of October 2, 2013), where the military changed its outboarding process to require three mental health evaluation stages upon deployment return.[15] [16]

On February 8, 1989, the PEB recommended Petitioner's discharge rated at 10% disabling after finding "no error" in his case.[17] Petitioner was then

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14 *Id.*

15 The purpose of the deployment mental health assessment is to identify mental health conditions including post-traumatic stress disorder, suicidal tendencies, and other behavioral health conditions that require referral for additional care and treatment in order to ensure individual and unit readiness. DoDI 6490.12, Enclosure 3(1)(c) (February 26, 2013).

16 Stage 1 involves the completion of a self-report survey which includes initial screening questions that are completed by all deploying Service members. This stage is designed to detect potential problem areas and define high-risk groups. In Stage 2, all deploying Service members complete additional questionnaires if the Stage 1 screening for either PTSD or depression is positive. This stage is designed to "drill down" to PTSD and depression criteria, measure symptom severity, and help providers identify concerns further evaluation or treatment. Stage 3 is the person-to-person provider interview during which the provider reviews and clarifies responses, identifies areas of concern, conducts Brief Intervention for Risky Drinking (if applicable), and provides referrals for further evaluation or treatment indicated. It is during this stage that the provider also assesses for risk of suicide or violence toward others. DoDI 6490.12, Enclosure 3 (2)(a)(1-3) (February 26, 2013).

17 (Schmidt Int. App. Brief at 3), referencing Schmidt Int. App. Brief JA at 104-105, 107.

honorably medically discharged on March 1, 1989, due to his 10% physical disability.[18]

b. Contrasting Military and VA Disability Ratings

The Military found Petitioner's only unfitting condition was mechanical chronic low back pain at 10% disabling.[19] The military did not include Petitioner's metatarsophalangeal joint arthralgia bilateral, and scapulothoracic bursitis.[20] Recall, the record is void of any mental health treatment. The military allegedly used the Veterans Administration Disability Schedule for Rating Disabilities VASRD.[21] This PEB decision was issued on February 8, 1989.[22]

In contrast, the VA assigned different disability ratings from the military ratings ranging from March 3, 1989 (the date of Petitioner's discharge to September 16, 2000.[23] These findings show that

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18 *Id.*

19 (Schmidt Int. App. Brief at 3), referencing Schmidt Int. App. Brief JA at 104.

20 This category was labeled "Those conditions that are not separately unfitting and do not contribute to the unfitting conditions." Findings of Record Review Panel in December 21, 1988. AR at 4.

21 *Id.*

22 See fn 19*, supra.*

23 March 3, 1989: Total Disability Rating 60% (Scapulothoracic bursitis with history of left shoulder injury: 10%, Status post fracture of the left metarsal: 10%, intervertebral disc syndrome: 40%, and hypertensive heart disease: 10%) (VA Rating Decision Codesheet, (December 12, 1994).

Petitioner's conditions were not settled, but progressed overtime. There is also a significant difference between the military's 10% assigned disability rating, and the VA's overall 60% disability rating at the time of his discharge on March 3, 1989.[24] Most telling is the overnight rating increase of 10% to 40% disability rating for his back, i.e., intervertebral disc syndrome.

Further, given the significant 50% difference in the assigned disability ratings, and the limited medical listing in the military's February 8, 1989 decision, they should've placed Petitioner on the Temporary Disability Retired List ("TDRL")[25, 26] until

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November 4, 1998: Total Disability Rating 80%.

September 16, 2000: 100% Individual Unemployability

(Schmidt Int. App. Brief at 3-4), referencing Schmidt. Int. App. Brief JA at 47, 48.

24 *Id.*

25 If a service member meets all of the criteria for disability retirement but the unfitting disability is not determined to be of a permanent nature and stable, the service secretary will place the member on the TDRL. See 10 U.S.C.S. §1202, 10 U.S.C.S. §1205. (To be eligible for the TDRL, the member must have at least twenty years of service or the disability must be at least 30% disabling.) A member placed on TDRL has a disability that has not stabilized sufficiently to permit an accurate assessment of a permanent degree of disability, but has become severe enough to make the individual unfit for further duty at that time. See also Veterans Benefits Manual ("VBM") § 20.3.4 at 1736 (Barton F. Stichman & Ronald B. Abrams eds., 2019).

26 An individual must be removed by the service from the TDRL within three years of the date of placement on the list. See 10 U.S.C.S. § 1210(h). Pub. L. No. 114-328,10 U.S.C.S. § 525, 130 Stat. 2000 (Dec. 23, 2016) (amended the period for which retired service members could remain on the TDRL from five years to three years. Prior to this amendment, which took effect

a more thorough treatment could be conducted on his behalf.

On January 29, 2001, the VA found Petitioner to have a total disability rating of 100% effective September 16, 2000, along with further disabling conditions not considered by the military at the time of his PEB evaluation for fitness of duty.[27, 28]

c. Further BCNR Action Given the New VA Results.

On February 27, 1992, Petitioner filed a records correction request for an upgrade to the character of his discharge due to Respondent's failure to adequately evaluate him due to his VA results.[29] On March 16, 1992, a three-member panel of the BCNR denied his request under the *assumption* that the VA may assign disability ratings without considering military service fitness.[30]

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on January 1, 2017, retired service members were permitted to stay on TDRL and receive retired pay for a maximum period of five years). To effectuate this removal, each service branch must make a final disability determination upon the expiration of the third year after an individual was placed on the TDRL. See 10 U.S.C.S. 1210(b). See also VBM § 20.3.4 at 1736.

27 (Schmidt Int. App. Brief at 4), referencing Schmidt. Int. App. Brief JA at 47.

28 Major Depressive Disorder/PTSD: 70%, Degenerative Arthritis of the Spine: 40%, Hypertensive Heart Disease: 30%, Clavicle or Scapula, Impairment of: 10%, Residuals of Foot Injury: 10%, *Id.*

29 (Schmidt Int. App. Brief at 4), referencing Schmidt. Int. App. Brief JA at 74-75.

30 "The fact that the VA awarded you a combined rating of 30% is insufficient to demonstrate that your discharge from the Marine Corps was erroneous, because the VA, unlike the

On March 27 & 30, 2008, Petitioner filed a new records correction request with the BCNR.[31] Petitioner's request eventually lead to three important decisions by Respondent, the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the District of Columbia Circuit, outlined below.

d. United States Department of Navy Records Request Decision

First, the military erred as a matter of law by allowing its executive director to deny Petitioner's records correction application on May 13, 2008.[32] On September 16, 2009, the Court of Federal Claims transferred the Administrative Procedure Act challenge to the District Court (Civil Action No. 10-570GK). On June 5, 2010, the parties agreed to remand Petitioner's case to the BCNR for Board consideration of Petitioner's March 27, 2008, Request for Reconsideration. (Civil Action No. 10-570GK, ECF No. 12). On March 17, 2011, the BCNR reconsidered Petitioner's Request for Reconsideration and found "[t]here is no credible evidence that the findings made by the [PEB] in your case represent anything other than fair and impartial assessments of your fitness

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military departments, may assign disability ratings without regard to the issue of fitness for military service. In the absence of any evidence which establishes that you suffered from any unfitting conditions other than your lower back condition, the Board was unable to recommend any corrective action in your case……" (1992 March 16): *Naval Record Correction Decision Letter*.

31 (Schmidt Int. App. Brief at 4-5), referencing Schmidt Int. App. Brief JA at 42-70.

32 Board Members not its Executive Director decide military records request applications. 10 U.S.C. § 1552.

for duty and determination of an appropriate disability rating for the condition that it determined was unfitting."[33]

e. U.S. District Court for the District of Columbia Decision

On March 9, 2012, Petitioner filed an amended complaint for judicial review of the March 17, 2011, BCNR decision being arbitrary and capricious under the APA. (Civil Action No. 10-570, ECF No. 15). On October 18, 2012, the Court granted the Defendant's Motion to Dismiss for a lack of subject matter jurisdiction because a) the only pending issue before the Court was rendered moot by the remand to the BCNR, b) the claim was barred by the statute of limitations because "a denial of reconsideration does not give rise to a new cause of action and does not restart the running of a new statute of limitations period…", and c) the Court of Federal Claims had exclusive jurisdiction under 28 U.S.C. § 1491 (Civil Action No. 10-570, ECF No. 25, 1-6). Petitioner then appealed the dismissal to the U.S. Court of Appeals for the District of Columbia. (Case No. 13-5007).

f. U.S. Court of Appeals for the District Court of Columbia Circuit Decision

Petitioner filed a complaint against the Secretary of the Navy in the United States District Court of Columbia (Civil Action No. 1:14-cv-01055 Doc. No. 1). Respondent filed a motion for Summary Judgment, which was granted by that Court on August 8, 2018. (Civil Action No. 1:14-cv-01055 Doc. No. 33). Respondent filed his Initial Brief on

33 (Schmidt Int. App. Brief at 5-6), referencing Schmidt Int. App. Brief JA at 31-33.

December 16, 2019. (Case No. 18-5304). Petitioner filed his Initial Brief and Reply Brief on March 20, 2020. (Case No. 18-5304).

The Court of Appeals affirmed the District Court's judgment on the grounds of mootness since the only issue before the District Court (the "APA" challenge to the Executive Director's decision) had been resolved through the BCNR's consideration on remand. Nevertheless, the Court of Appeals vacated the District Court's judgment as to timeliness, exclusive jurisdiction of the Court of Federal Claims under the Tucker Act, and whether the case was barred by *res judicata*, law-of-the-case, or any other doctrine preclusion since the claim was deemed moot by the BCNR's remand decision.[34] Case No. 13-5007 at 12. The Court of Appeals also noted that "these matters can be resolved, if at all, should Schmidt choose to file a new lawsuit properly asserting such a claim with the District Court of the Court of Federal Claims."[35]

The Court of Appeals denied the appeal on July 15, 2020. It was denied on grounds that Respondent and the VA use the VASRD for different purposes, one for determining military service fitness and the other for the progression of a disability over a period of

34 (Schmidt Int. App. Brief at 6-7).

35 *Id.*

time.[36] A *Writ of Certiorari* was timely filed before this Honorable Court.

V. REASONS FOR GRANTING THIS PETITION

a. Some Federal Circuits, including the U.S. Court of Appeals for the District of Columbia Circuit, Refuse To Recognize that the U.S. Military and the Department of Veterans Affairs' Use The Same Disability Evaluation Systems for Determining Veteran's Disability, Thereby Denying Veterans of Proper and Well-Deserved Military Disability Compensation.

The Court of Appeals erred in holding there is a difference between the military and the VA

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36 "Schmidt misapprehends the difference between military and civilian disability ratings. The Navy and the VA both use the VASRD, "but for different purposes." *Stine v. United States*, 92 Fed. Cl. 776, 795 (2010), *aff'd*, 417 F. App'x 979 (Fed. Cir. 2011). The Navy uses [VASRD] to decide 'whether or not the service member is able to perform the duties of office, grade, rank or rating.' Id. (quotation marks omitted); see 10 U.S.C. § 1203. The VA uses the schedule to 'determine disability ratings based on an evaluation of the individual's capacity to function and perform tasks in the civilian world." *Stine*, 92 Fed. Cl. At 795 (quotation marks omitted); see 10 U.S.C. § 1155. Furthermore, the Navy assigns disability percentages only to conditions found to be "unfitting" for military service. SECNAV Instruction 1850.4E § 3801(a); see also 10 U.S.C. § 1203. And the Navy 'takes a snapshot of the service member's condition at the time of separation from the service,' while the VA 'evaluates and adjusts disability ratings throughout the individual's lifetime." *Stine*, 92 Fed. Cl. at 795. For these reasons, disparities between military and VA disability ratings are commonplace, and courts often uphold refusals to correct military records to reflect higher VA disability ratings. See, e.g., *Gay v. United States*, 116 Fed. Cl. 22,32 (2014); *Zappley v. United States*, 39 Fed. Cl. 213, 218-20 (1997)."

disability rating systems, i.e., use of VASRD. This decision to uphold the BCNR Decision barred Petitioner relief from Respondents. These two disability systems have co-existed for more than one hundred years.[37] The U.S. Court of Appeals for the District of Columbia Circuit's and the BCNR's baseless belief that the military and VA's disability systems are so different that they're incapable to co-exist to properly determine the disability status of a veteran unilaterally deprived Petitioner of necessary compensation.

i. The Roles of the VA Disability System

VA compensation benefits are awarded when the claimant meets the statutory burden of proof.[38] A VA compensation claim requires proof of (a) "a medical diagnosis of current disability," (b) "medical…evidence of in-service occurrence or

37 The War Department administered military retirement benefits and disability benefits from 1789 to 1833. In 1883, Congress separated the two systems by establishing the Pension Bureau to administer the disability retirement program for Union Civil War veterans. Confederate Civil War Veterans started to receive veterans' pensions with commencement dates ranging from 1867-1915 by the states. National Archives and Records Administration, available at https://www.archives.gov/files/research/military/civil-war/confederate/confederate-pensions.pdf. Regular military retirement continued to be under War Department supervision. U.S. Dep't of Veterans Affairs, VA History In Brief 1-5, available at https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf . In 1930, the VA took over the Pension Bureau's functions and became responsible for this disability system outside the military. Exec. Order No. 5398, reprinted in 46 Stat. 1016 (1930).

38 U.S.C.S. § 5107; see also VBM § 3.1.5 at 64-65, §§ 3.2, 3.2.1, 3.2.4, 3.3, 3.3.1,3.3.2.1 , at 69,70-72,78-80,82-83,83-87,88-90.

aggravation of a disease or injury," and (c) "a medical expert opinion linking the in-service injury or disease to current symptoms."[39]

When the evidence supporting or opposing a claim is equal, the claimant must prevail.[40] Please note, the claimant is not expected to provide evidence that a service-related event, act, or omission was the proximate cause of the claimant's injuries.[41] Instead, the claim will be granted if the claimant's medical evidence shows "that it is as likely as not that" the claimant's current condition is related in some way to an in-service occurrence.[42] A service member is presumed to be "sound" on enlistment if no medical defects are in the pre-enlistment physical examination.[43] The burden of demonstrating any preexisting or later source of injury is on the VA.[44] The VA must prove that "the preponderance of the

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39 VBM § 3.1.5 at 64-65. See 38 U.S.C. §1110 (providing for an award of compensation in time of war); see *Id.* 38 U.S.C. §1112 (establishing an award of compensation in peacetime); see *Id.* 38 U.S.C. §7261 (outlining the scope of review); *Caluza v. Brown*, 7 Vet. App. 498, 506, (Ct. Vet. App. 1995). For discussion and application of the three elements of a service-connection claim, see *Cotant v. Principi*, 17 Vet. App. 116, 132-34 (Ct. Vet. App. 2003); *Hickerson v. West*, 12 Vet. App. 247, 252-54 (Ct. Vet. App. 1999); *Hicks v. West*, 12 Vet. App. 86, 89-92 (Ct. Vet. App. 1998); *Rose v. West*, 11 Vet. App. 169, 171-72 (Ct. Vet. App. 1998).

40 38 USCS § 5107(b).

41 Id., VBM §3.3 at 82, §3.3.1 at 83.

42 *Id.* VBM § 3.3.1 at 83; see also 38 C.F.R. §3.102 (2009). For a discussion of the burden of proof, see also, *Ortiz v. Principi*, 274 F.3d 1361, 1364-66 (Fed. Cir. 2001) and *Gilbert v. Derwinski*, 1 Vet. App. 49,53-56 (Ct. Vet App. 1990).

43 38 U.S.C. § 1111.

44 *Id*. See also VBM § 3.3.2 at 87-88 (explaining the VA records process).

evidence is against the claim for benefits to be denied. [45] If the VA does not meet the burden of proof by a preponderance of the evidence, the claimant prevails in the matter.[46]

ii. Congressional Enactments to Correct Military and VA Disability Ratings Discrepancies

In recent years, Congress has attempted to eliminate the discrepancy between the Military and VA ratings by creating the Integrated Disability Evaluation System ("IDES") program. Congress enacted an IDES pilot program on November 26, 2007.[47] Its purpose was to simplify the disability evaluation process by eliminating duplicate disability examinations and ratings, along with placing VA counselors in military treatment facilities to ensure a smooth transition to Veteran status.[48] In January 2009, the Department of Defense created guidance for an Expedited Disability Evaluation System for soldiers who sustained catastrophic illnesses from combat or combat-related operations.[49] It assists in moving the soldier to permanent disability retirement to obtain benefits from the VA and other federal/ state

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45 *Gilbert*, 1 Vet. App. At 54 (stating that where there is an appropriate balance for and against an issue, the veteran should prevail).

46 *Id.*

47 Military Health System, *Integrated Disability System*, https://www.health.mil/Military-Health-Topics/Conditions-and-Treatments/Physical-Disability/Disability-Evaluation/Integrated-Evaluation-System, (last visited October 3, 2020).

48 *Id.*

49 *Id.*

agencies.[50] On April 7, 2020, Congress enacted the Integrated Evaluation Systems Accountability Act.[51] This bill required the Secretary of Defense to provide a report to Congress regarding the findings of a study conducted by the Secretary for the implementation and application of the IDES.[52] These enacted programs and legislations solidified the point that Respondent and the VA are mandated to work together to ensure continuity of care, timely processing, and seamless transition of the soldier from the Department of Defense to the VA in cases of disability, separation, or retirement.[53] Thus, this transition should have a consistent disability from the day the soldier leaves military service and enters the VA as a Veteran.

iii. The Roles of the Military and VA Disability Systems

However, the Department of Defense maintains a separate disability system that is parallel with the VA's compensation system.[54] A service member may be separated from military service for either a physical or mental disability.[55] If the service

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50 *Id.*

51 H.R. 6466 (April 7, 2020) *available at* https://www.scribd.com/document/463544727/Integrated-Disability-Evaluation-System-Accountability-Act#fullscreen&from_embed.

52 *Id.*

53 *Id.*

54 VBM § 3.1.2.1 at 62 (explaining the VA records process)

55 10 U.S.C. §1201(a) ("Upon determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank or

member's disability is related to an incident "in the line of duty," the service member may receive severance pay[56] or disability retirement benefits[57] according to the disability percentage awarded by the service board with jurisdiction on the case.[58] Service members who receive severance pay or disability pay, or disability retirement benefits are also eligible for VA benefits for the same condition.[59]

The military disability discharge process contains a series of steps like the VA. The Disability Evaluation System Process for Respondent involves three phases: Medical Evaluation Board ("MEB"), PEB, and Transition.[60] The MEB phase involves confirming that proper standards for evaluation, diagnosis, documentation referrals for the informed clinical opinion of the soldier's conditions are maintained when cases are referred to the PEB.[61] In

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rating because of physical disability incurred while entitled to basic pay…the Secretary may retire the member, with retired pay…).

56 *Id.* 10 U.S.C. § 1201(b)(3)(B)(iii)-(iv), 10 U.S.C. §1203(a), 10 U.S.C. §1212(a).

57 *Id.* 10 U.S.C. § 1201(a), (b)(3)(B)(iii)-(iv); see also *Id.* 10 U.S.C. §1204 (dealing with veterans who serve thirty days of active duty or less).

58 *See Id.*, 10 U.S.C. § 1201(b)(3)(B)(iii), 10 U.S.C. §1203(b)(3)-(4); *see also Id.* 10 U.S.C. § 1552-1554 (containing the enabling legislation for the Board for Correction of Records, which allows the Board to review records dealing with claimants who did not receive disability benefits).

59 See VBM § 20.3.1 at 1731-1735. For a description of the military disability retirement program and its interface with VA compensation, *See Id.* VBM § 20.3.1 at 1731-1735.

60 SECNAV M-1850.1(1) at 1-1.

61 SECNAV M-1850.1 (3) at 1-4a.

contrast to the VA disability compensation system, the MEB phase does not determine or recommend benefits unless a disease or an injury makes the service member "unfit to perform the duties of the member's office, grade, rank, or rating."[62] The MEB determines that a condition is considered "unfitting" when "the preponderance of the evidence establishes that the service member, due to disability is unable to reasonably perform duties of his or her office, grade, rank, or rating; the service member's disability represents a decided medical risk to the health of the member or the welfare or safety of other members; or when the service member's disability imposes unreasonable requirements on the military to maintain or protect the service member."[63] Issues pertaining to fitness performance involves the service member's ability to perform his required military duties, pass his physical fitness test, and any necessary specialized tasks for his specific branch.[64] If the Service Member cannot fulfill this standard, the MEB refers the case to the PEB.[65]

The PEB determines the soldier's medical fitness to perform their military duties and to determine benefits eligibility if deemed unfit.[66] Prior to IDES, the PEB would use the VASRD to determine the discharge rating for the member. Now under IDES, the PEB uses the VA rating determination under the VASRD when evaluating the medical fitness of a soldier's ability to continue military

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62 10 U.S.C. §1201(a).; *See also* VBM §20.3.7 at 1738.

63 *Id.*

64 *Id.*

65 SECNAV M-1850.1 (3) at 2-4b.

66 SECNAV M-1850.1 (4) at 1-1a.

service.[67] In either process, not only have both of them always used the same VASRD, but temporally speaking the ratings should be consistent.

I. The BCNR failed to consider the discrepancy ratings between the military and the VA, and other new and material evidence, thereby violating the arbitrary and capricious standard.

As discussed in Sections (i), and (iii), the military and the VA used the same rating schedule, VASRD[68], when a soldier is to be provided medical treatment. A soldier is brought before the PEB when he is deemed to be possibly "unfit for service".[69] One is brought before the VA when he is deemed to have a medical condition that is simply service-connected, regardless if the condition is individually unfitting.[70] Once either the military or the VA makes the appropriate nexus, the Agencies use the same VASRD, i.e., the same medical rating criteria, to determine the soldier's disability rating percentage. Now to eliminate discrepancy between Military and VA VARSD Ratings, Congress is having the military rely on the VA to determine the soldier's medical disability ratings through the IDES.[71]

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67 *Id.*

68 "VASRD", 38 C.F.R. Part 4, Subpart B - Disability Ratings

69 *See generally* SECNAVINST 1850.4E.

70 *See generally* 38 U.S.C. § 1155.

71 See 10 U.S.C. § 61 and DoDI 1332.18. (The military still determines if each condition is still in-of-itself unfitting for service, but to allow consistency between the two agencies, the

The PEB uses the following method when reaching a decision on a disability rating in addition to the IDES: when determining the percentage of a disability rating, the Secretary of the Navy will consider all medical conditions (referred or claimed), whether individually or collectively, that render the member unfit to reasonably perform the duties of the member's office, grade, rank or rating.[72] As stated in Section (b), the military only considered Petitioner "unfit" for service with mechanical chronic low back pain in its decision, rather than evaluating him for other conditions based on Petitioner's military record,[73] "The PEB must state, in its official findings, that combined effect was considered in the fitness determination (and whether it was applied in the final adjudication) of cases where two or more medical conditions are present in the service treatment record.[74] Combined effect includes the pairing of a singularly unfitting condition with a condition that standing alone would not be unfitting." The BCNR did not pair Petitioner's other conditions mentioned in its final decision, nor all those that were treated by the VA, which ranged from March 3, 1989 (the date of Petitioner's discharge) to September 16, 2000.[75] The Respondent did explain the inconsistent ratings between the military and the VA based on the medical evidence – just they were two different purposes of the VA and DoD use of the VASRD. Petitioner should've been placed on TDRL until his medical conditions

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VA conducts the medical tests and assign the ratings.)

72 SECNAV M-1850.1 (4) at 1-1a (2).

73 *See* fn 19, *supra.*

74 *See* fn 72, *supra.*

75 *See* fns 23 and 28, *supra.*

could be more thoroughly evaluated in order to prevent an injustice to Petitioner and a fair evaluation of his condition before discharge.[76]

Moreover, the evidence of the VA's treatment presented by Petitioner is clearly material as it would alter the outcome of the board's decision and Petitioner's entitlement to relief, given the significant discrepancies between Respondent's and the VA's disability ratings. Due to this outright dismissal of the two Agencies' use of the VASRD are "different", the BCNR's opinion fails twofold: First, it did not review if the VA medical evidence is actually different between the two Agencies (to justify an increased rating). Second, if the medical evidence for the VA identified conditions that weren't mentioned by the MEB is sufficient to reflect an administrative error by Respondent in continuing with the military medical separation process. The BCNR's opinion should not be given deference due to its arbitrary and capricious conduct.

b. Arbitrary and Capricious Standard

Under 5 U.S.C.S. § 706 (2)(A) of the Administrative Procedure Act, the reviewing court can set aside a Correction of Military Records' action, findings, and conclusions regarding the correction of military records if they are arbitrary, capricious, an abuse of discretion, or otherwise in accordance with law.[77] The Secretary has broad discretion in

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76 *See* fns 25 and 26, *supra*.

77 *See also Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989) ("decisions of the Board are reviewable under the APA, albeit by an unusually deferential application of the 'arbitrary or capricious standard.

administering the correction of military records. Nevertheless, it is crucial that the Board's action be supported by reasoned decision making.[78] If the Board's explanation for its determination lacks any coherence, the court owes no deference to the Board's purported expertise because we cannot discern it.[79, 80] When a military records correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its statutory mandate.[81] Such a violation, contrary to the evidence, is arbitrary and capricious.[82]

A board of correction of military records' decision is arbitrary, capricious, and contrary to law when it holds that evidence presented by Petitioner is

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78 *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983)). See also *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

79 *Tripoli Rocketry Ass'n Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75,77 (D.C. Cir. 2006); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (Conclusory statements will not do; an agency's statement must be one of reasoning).

80 *Dickson v. Sec'y of Def.,* 68 F.3d 1396, 1404 (D.C. Cir. 1995). (The agency's decision does not need to be a "model of analytic precision to survive a challenge, so long as the agency's path between the facts found and decision made may reasonably be discerned.").

81 10 U.S.C.S. § 1552.

82 *Yee v. United States*, 512 F.2d 1383, 1387 (Ct. Cl. 1975); see also *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959) ("We feel that the Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant through and fitting relief." *Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014).

insufficient without providing any reasoning or explanation.[83] A conclusory explanation for a matter involving a central factual dispute for which there is considerable evidence in conflict does not fulfill judicial review standards. [84]

As previously stated in Section (a) of this Writ, Petitioner has endured multiple service-connected injuries as early as March 1983. He has provided evidence, showing that the VA rated him with a disability rating of 60% that was effective the day of his discharge.[85] Even though the process took several years for the evidence (not the condition) to be developed, the medical conditions were always present and worsened before and just after discharge.[86] 40% of the 60% disability rating at discharge derived from a degenerative spine condition.[87] According to 10 U.S.C. §1201(b)(3)(B), this 40% rating for the degenerative spine condition renders Petitioner eligible for medical retirement as of the day of discharge.

Thus, Petitioner was eligible for medical retirement (or TDIU to at least monitor the spinal condition) on the day of his discharge.[88] Respondent

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83 *Haselwander* at 992.

84 *Hensley v. United States*, 292 F. Supp. 3d 399, 411 (D.D.C. 2018) (citing AT&T Wireless *Servs., Inc. v. FCC*, 270 F.3d 959, 968, 348 U.S. App. D.C. 135 (D.C. Cir. 2001)).

85 (Schmidt Int. App Rehear at 2), referencing Schmidt Int. App. Rehear AR at 20.

86 *Id.*

87 (Schmidt Int. App. Rehear. at 2) referencing Schmidt Int. App. Rehear AR at 20.

88 S*ee* fns 2-18, 25, 26, & 85 *supra*

violated the arbitrary and capricious standard by concluding that the VA 40% rating for the spinal condition as latent disability as being only 10% disabling as of 1989. *Schmidt v. McPherson*, USCA Case #18-5304 at 3 (USCADC May 8, 2020). As it took time for the case to work its way through the VA system, the VA backdated their finding of 40% disability for the degenerative spinal condition to 1989. Thus, concluding that Petitioner was suffering from this condition during his discharge in 1989.

This emphasizes a gap between Respondent's rating and the VA's effective rating at the time of discharge for the same condition. Nevertheless, Respondent erroneously stated that one should expect different ratings from the VA and from the Military because the VA is measuring any disability, and the Military is measuring fitness for duty. *Schmidt v. McPherson*, USCA Case #18-5304 at 2 (USCADC May 8, 2020). This point is easily refuted: We are discussing the same disability, i.e., Peitioner's spine,[89] and Respondent and the VA the same rating schedule, i.e., VASRD.[90]

The Military and the VA both use the same VASRD. 10 U.S.C. § 1216(a)(1)(A) ("[S]hall... utilize the schedule for rating disabilities in use by the [VA], including any applicable interpretation of the schedule by the United States Court of Appeals for

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89 The other medical conditions evaluated and rated by the VA temporality close to the military discharge raise the question why these conditions, given the ratings inherent severity, were not raised by the PEB

90 Any argument that the medical evidence could not be developed past his discharge, is refuted by the TDRL regulations. *See* fns 25 and 26, *supra.*

Veterans Claims.") While the Military may be using the number for a different purpose than the VA, it is still the same measure of disability, and the actual method for getting that number ought to match up with both agencies.

Regardless, the BCNR completely rejected the VA's rating without any reason or explanation.[91] It does not explain how a 40% rating from the VA backdated to the time of discharge is invalid. Respondent is permitted to conduct its own analysis using the VASRD. The Military's final *total* rating will occasionally differ from the VA as all conditions may not be individually unfitting and thus not counted in the total disability calculation. But the individual ratings, unfitting or not, should be consistent.

When the Military and the VA come to different conclusions regarding a single disabling condition using the VASRD, a conflict arises from it. The VA rating is a factual assertion that would substantially alter the outcome of the dispute. The BCNR cannot simply ignore it. The Board's failure to address the VA rating represents a dereliction of the Board's statutory mandate and is thus arbitrary and capricious.[92] In such instances, the Board's affronting decision must be vacated with the matter being remanded for proper reconsideration. Instead, the Panel affirmed the BCNR's arbitrary and capricious decision on May 8, 2020. *Schmidt v. McPherson*, USCA Case #18-5304 at 2 (USCADC May 8, 2020).

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91 (Schmidt Int. App. Rehear at 4), referencing Schmidt Int. App. Rehear AR at 3.

92 *Haselwander* at 996.

Unfortunately, Petitioner had to endure years of VA red tape for his service-connected conditions, since he was never given basic treatment options prior to discharge e.g., by placing him on TDRL.[93, 94] The military's record did not thoroughly examine Petitioner following his deployment return and pre discharge. If the military had properly examined Petitioner for his mental health conditions, permitted his physical and mental health conditions to stabilize and (if necessary) place him on TDRL, they would have arrived at a similar conclusion: a higher disability rating for his back, newly discovered untreated disabling conditions, and a service-connection for mental health issues prior to his discharge from active duty, like the VA.[95] Respondent's failure to follow basic protocol is evident of an arbitrary and capricious standard violation and should not be given deference.

c. New and Material Evidence Standard

Under 32 C.F.R. § 723.9, a Veteran is permitted to have their records correction reconsidered after final adjudication, provided there is a presentation of new and material evidence. The new and material evidence standard involves evidence that was not previously presented to the Board or reasonably available to the applicant at the time of the previous application, which can have a substantial effect on the outcome of the case.[96] The evidence of the VA's

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93 *See* fn 25, *supra.*

94 *See* fn 26, *supra.*

95 *See generally* 10 U.S.C. § 1202, 10 U.S.C. §1205, and 10 U.S.C. §1210.

96 32 C.F.R. § 723.9

treatment presented by Petitioner is clearly material as it would alter the outcome of the board' decision and Petitioner's entitlement to relief. Due to this outright dismissal, the BCNR's opinion should not be given deference. Further, Petitioner is not appealing his discharge; he is appealing the arbitrary and capricious action of the Board.

d. Burden of Proof

When an individual has met its burden of proof, it is not required that they produce evidence negating every single possible hypothetical explanation for a clear error.[97] For Petitioner, he has provided his military personnel file, physical conditions, and the subsequent diagnosis of major depressive disorder and PTSD. Petitioner is not required to provide evidence negating every argument, as he has met his burden by showing there was an injustice which was not corrected by Respondent.[98]

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97 *Code v. Esper*, 285 F. Supp. 3d 58, 73 (D.D.C. 2017) (citing *Haselwander* at 996.

98 *Haselwander* at 996.

e. The Military failed to treat Petitioner for his mental health condition leading up to his discharge despite the evidence before it at that time.

Petitioner was diagnosed by the VA as having PTSD.[99] The VA found service connection for this disability.[100] Since Petitioner's case partially arises from a claim of PTSD, the BCNR must give Petitioner's application for records correction "liberal consideration."[101]). Like *Coburn v. McHugh* 679 F.3d 924, 926 (D.C. Cir. 2012), ignoring this change in procedure and the evidence of trauma which caused Petitioner's PTSD is inconsistent with the record and is blatantly unfair and should not be given any deference.

The BCNR did not consider the evidence submitted of his known experiences during service. Mr. Schmidt was a field radio operator on the USS Saipan when a CH-46 helicopter and a CH-53 helicopter collided and eighteen Marines drowned. He handled the communications aspect during these rescue operations. Additionally, during a training exercise in France, Mr. Schmidt also witnessed a fellow Marine die from a grenade explosion.[102]

These events show that there is a systematic error that should have been corrected immediately by Respondent. When Petitioner was discharged, it was not required for soldiers returning from overseas

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99 (Schmidt Int. App. Rehear at 5), referencing Schmidt Int. App. Rehear AR at 18.

100 *Id.*

101 10 U.S.C. § 1552(h)

102 (Schmidt Int. App. Brief at 11.),

deployment to receive any mental health screening.[103] This rule wasn't changed until 2013.[104] If Respondent had properly examined Petitioner for mental health issues upon return from his overseas deployment, its findings would have reflected those of the VA. The Board, as a means of equitable relief, should have considered that Petitioner was entitled to relief based on mental health considerations later prior to, or clearly even at the time of his discharge. Respondent's analysis of the mental health considerations in Petitioner's disability ratings fails to consider the fact that Petitioner was not even screened for mental health problems upon discharge. The military should have at least considered that his time in military alcohol rehab as an *indicia* of needed mental health treatment.

For Respondent to conclude that Petitioner's discharge was the precipitating cause of his mental health problems is mere speculation. It is speculation given the military's lack of mental health screening prior to his discharge, its failure to prescribe depression medication while Petitioner was in a military alcohol rehabilitation center within the last year of service[105, 106], and the overwhelming evidence of the problems he encountered before he was even discharged (namely, the severe psychological trauma Petitioner suffered during his overseas deployment,

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103 *See* DODI 6490.12, Mental Health Assessment for Service Members Deployed in Connection with a Contingency Operation, February 26, 2013.

104 *Id.*

105 (Schmidt App. Reply Brief at 7), referencing Schmidt App. Reply Brief AR at 34, 43.

106 *See* fn 7, *supra*.

and the physical injuries to his back, left great toe metatarsophalangeal joint and left shoulder-all of which led up to discharge and went untreated) is not only cruel, insensitive, but arbitrary and capricious. It should not be given any deference by this Court.[107]

The effects of PTSD were not fully understood, and many service members suffered from this mental illness without being diagnosed or treated.[108] This trend of undiagnosed PTSD continued into the 21st century with Operation Iraqi Freedom and Operation Enduring Freedom.[109] Secretary of Defense Chuck Hagel tried to rectify this issue by creating guidance to military review boards, directing these boards to give "liberal consideration" to veterans for which PTSD and other mental conditions serve as the partial or entire basis for their application for relief.[110]

Congress has since amended 10 U.S.C. § 1552 and 10. U.S.C. § 1553 to codify Secretary Hagel's guidance in 10 U.S.C. § 1552(h)(2) and in 10 U.S.C. § 1553(d)(3). § 1552(h) and 10 U.S.C. § 1553(d) now

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107 *Haselwander* at 996. (holding that "when a military records correction board fails to correct an injustice clearly presented in the record before it," its action is contrary to its statutory mandate and accordingly arbitrary and capricious".

108 Madeline McGrane, Post-Traumatic Stress Disorder in the Military: The Need for Legislative Improvement of Mental Health Care for Veterans of Operation Iraqi Freedom and Operation Enduring Freedom, 24 J.L. & Health 183, 191 (2010). Schmidt. App. Pet. Recon. at 5.

109 *Id.*

110 Chuck Hagel, Supplemental Guidance to Military Boards for Correction of Military/Navy Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder, September 3, 2014.

require that military review boards give "liberal consideration" to veteran's applications arising out of PTSD or other mental impairments. 10 U.S.C. § 1552(h)(2); § 1553(d)(3). § 1552(h) also specifically mandates that military review boards "review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the [Veteran]."[111] (Emphasis added) 10 U.S.C. § 1553(d)(1)(A) further provides these requirements apply to veterans "deployed in support of a contingency operation and who, at any time after such deployment, [were] diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing post-traumatic stress disorder or traumatic brain injury as a consequence of that deployment..." 10 U.S.C. § 1553(d)(1)(A) (emphasis added). The BCNR is obligated to give Petitioner's application for records correction liberal consideration even if his diagnosis of PTSD has not been backdated to the time of discharge. Thus, the lower courts should have remanded the matter back to the Board for reconsideration.

Secretary Kurta's *Clarifying Guidance* makes it even clearer that military records review boards should accept a wide variety of evidence supporting a servicemember's claim of PTSD/ mental illness.[112] These include statements by fellow servicemembers/coworkers, behavioral patterns,

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111 *Id.*

112 Anthony Kurta, Clarifying Guidance to Military Discharge Review Board and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, at 3-4, August 25, 2017

depression, anxiety, relationship issues, substance abuse, and the servicemember's own statements.[113] Respondent failed to follow this precedent.

Even without these guidance, memos and codification, Respondent, in a meager two paragraphs of its 2011 decision, flatly rejects all of Petitioner's evidence, including Appellant's lengthy history of evaluation with the VA, the testimony of Petitioner's former superior officers, and Appellant's testimony.[114] The Board does not provide an explanation why the VA's rating was invalid, why the VA's diagnosis of PTSD should not be trusted, why the testimony of former superior officers should be discarded, why Petitioner's own testimony should be ignored.[115] The Board offers only lackluster conclusions with no foundation to hold them. A conclusory explanation for a matter involving a central factual dispute for which there is considerable evidence in conflict (recall, the VASRD rating of 40% for Petitioner's degenerative spinal condition at the core is itself in conflict) does not meet the deferential standards of judicial review.[116]

Overall, Respondent has always been required to give this claim liberal consideration due to Petitioner's PTSD. The Board's curt dismissal of material evidence falls so far below the statutory threshold of "liberal consideration" as to constitute a

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113 *Id.* at 4.

114 (Schmidt Int. App. Rehear at 10), referencing Schmidt Int. App. Rehear AR at 3-4.

115 *Id.*

116 *Hensley v. United States*, 292 F. Supp. 3d 399, 411 (D.D.C. 2018) (citing *AT&T Wireless Servs., Inc. v. F.C.C.,* 270 F.3d 959, 968, 348 U.S. App. D.C. 135 (D.C. Cir. 2001)).

total abdication of the Board's obligation under 10 U.S.C. § 1552(h) and is thus a decision not under the law. It abandoned its broad equity duties under 10 U.S.C. § 1552. The 2011 BCNR decision (as well as the lower Court's decisions) is *per se* arbitrary and capricious, which should not be given deference by this Court.

f. Veteran never waived any challenge to the District Court or the Military Review Board.

First, Respondent seeks to avoid its duty by arguing that since Petitioner waived his right to challenge the District Court's exclusion of material evidence never submitted to the Board.[117] There is a general rule that court should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.[118] However, even if specific arguments are

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117 "Although Veteran asked the District Court to consider materials outside of the administrative record in his opposition to summary judgment (R.37-1, Schmidt Affidavit dated June 23, 2017, and R.37-2, additional documents from the VA), the District Court declined to consider such extra-recorded material. *See* JA_[Aug.8, 2018 mem. Op. at 7] (citing *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014)). That decision was correct. Moreover, by failing to raise any argument in his opening brief concerning the District Court's denial of his request to supplement the administrative record, Veteran has waived the issue. *City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (per curiam) (argument first appearing in a reply brief is forfeited). Accordingly, the Court need not consider the material Veteran proffered for the first time with his opposition to summary judgment." (Schmidt Int. Appellee. Brief at 13-14).

118 *United States v. L.A. Tucker Truck Lines, Inc.,* 344

not expressly made to an agency, they may still be raised on appeal if the agency reasonably should have understood the full extent of Petitioner's argument.[119] Although an agency must have an opportunity to pass on an issue prior to judicial review, the issue need not be raised explicitly; it is sufficient if the issue was 'necessarily implicated' in agency proceedings. At all times, Petitioner has argued that his military medical disability was wrong.

g. Judicial Notice

Petitioner respectfully requested the Court to take judicial notice[120] of the "Hagel Memorandum"[121]

U.S. 33,37 (1952)

119 *Customs and Border Prot. V. Fed. Labor Relations Auth.* 751 F.3d 665, 669-70 (D.C. Cir. 2014) (citing *NetworkIP, LLC v. FCC,* 548 F.3d 116 (D.C. Cir. 2008) (stating that, although an agency must have an "opportunity to pass" on an issue prior to judicial review, the issue need not be raised explicitly; it is sufficient if the issues was 'necessarily implicated' in agency proceedings") see also *Yee v. United States*, 512 F.2d 1383, 1386 (U.S. Ct. Cl. 1975) (finding that the Board "missed the true intent of plaintiff's appeal" where it only addressed the specific request made and failed to fully correct the injustice clearly in the record before it).

120 Fed. R. Evid. 201(b) (2020)

121 On September 3, 2014, Defense Secretary Hagel submitted "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder" Memorandum. This memorandum directed the boards of correction to fully and carefully consider every petition based on PTSD brought by every Veteran, especially those who served in Vietnam before PTSD was recognized and may not have substantial information in either Service treatment records or personnel records which document this condition. This guidance is meant to help review boards ensure fair and consistent results across services and ease the application process who are seeking

and its effect on his case. The existence of the memo and its effect on Veterans who suffer from service-connected PTSD is such common knowledge in the jurisdiction of this Court that it cannot be reasonably subject of dispute. The record is void of Respondent following any guidance provided in the "Hagel Memorandum" in the current action.

This argument cannot have been deemed waived by either not bringing before the BCNR nor the lower courts. Petitioner has continuously asked Respondent to correct his discharge to reflect a more severe medical disability. The Hagel Memo is an element of this request that Respondent apparently never considered as it related to Petitioner's PTSD/mental health issues. Thus, inherent in his original application before the Board and the case's subsequent procedural process.[122] Petitioner timely brought it before the Court at all levels, which required them to take judicial notice of this information and include it in their decision. At very minimum, the lower Court's should have remanded it back to the BCNR for reconsideration based on

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to recertify injustice. The Board's actions appear devoid of any consideration of this memo in its deliberations. (Schmidt Int. App. Brief at 13).

122 Where a veteran filed an application with the Army Board for Correction of Military Records (Board) to correct his military records pursuant to 10 U.S.C.S. § 1552(a)(1) so that he could receive the Purple Heart, the veteran did not waive his request for correction of his medical records because the record before the Board, the application and supporting materials, made it clear that the application sought to correct his military records so that he could receive the Purple Heart; [2]-The Board's rejection of the application was largely incomprehensible and, thus, unworthy of any deference because the application as supported by uncontested, creditable evidence. *Haselwander* at 991.

Hagel's codified memo and Kurta's *Clarifying Guidance* (to at least remand during the lower court proceedings).

VI CONCLUSION

WHEREFORE, FOR ALL the reasons stated above, Petitioner, Jeffry Schmidt respectfully requests that this Court, Grant *Certiorari.*

Respectfully submitted,

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APPENDIX

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[ENTERED: May 8, 2020]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5304 **September Term, 2019**
FILED ON: MAY 8, 2020

JEFFRY SCHMIDT,
APPELLANT

V.

JAMES E. MCPHERSON, ACTING SECRETARY,
U.S. NAVY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01055)

Before: MILLETT, KATSAS, and RAO,
Circuit Judges.

JUDGMENT

The Court has considered this appeal on the record from the United States District Court for the District of Columbia and on the parties' briefs. The Court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED that the judgment of the district court be **AFFIRMED**.

This appeal arises from the discharge of Jeffry Schmidt from the United States Marine Corps for back pain. In 1988, the Navy determined that Schmidt's back pain rendered him unfit for military service, and it rated Schmidt's condition as 10% disabling. In 1989, the Marine Corps honorably discharged Schmidt with a 10% separation disability rating and severance pay. *See* 10 U.S.C. §§ 1203, 1212.

Schmidt challenged his rating under 10 U.S.C. § 1552(a) (1988). That statute provided that a military secretary, through a civilian board for correction, "may correct any military record … when he considers it necessary to correct an error or remove an injustice." In 1990, Schmidt applied to the Board for Correction of Naval Records for an increase in his disability rating because the Department of Veterans Affairs had awarded him a higher disability rating. In 1992, the Board denied Schmidt's application. It concluded that the VA's rating did not show that the Navy's rating was erroneous. The Board reasoned that "the VA, unlike the military departments, may assign disability ratings without regard to the issue of fitness for military service." J.A. 69.

In 2008, Schmidt asked the Board to reconsider. The governing regulation permits reconsideration "only upon presentation by the applicant of new and material evidence or other matter not previously considered by the Board." 32

C.F.R. § 723.9. Evidence counts as "new" if it was "not previously considered by the Board and not reasonably available to the applicant at the time of the previous application." *Id.* Evidence counts as "material" if it is "likely to have a substantial effect on the outcome." *Id.* In 2011, the Board denied reconsideration on the ground that Schmidt had not presented new material evidence.

Schmidt challenges the denial under the Administrative Procedure Act. The district court granted summary judgment to the government, and we affirm.

In reviewing a decision of a military corrections board under the APA, the courts employ "an unusually deferential application of the arbitrary or capricious standard." *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (quotation marks omitted). Here, the Board's decision was not arbitrary.

In seeking reconsideration, Schmidt showed that in 1994 the VA rated him 60% disabled, backdated to 1989, based on a degenerative spinal condition, shoulder injury, foot injury, and hypertensive heart disease. Moreover, by 2007, the VA had rated him 100% disabled based on the same ailments plus post-traumatic stress disorder. Schmidt argues that these high disability ratings from the VA show the Navy erred in assigning him a 10% separation disability rating in 1989.

Schmidt misapprehends the difference between military and civilian disability ratings. The

Navy and the VA both use the Veterans Affairs Schedule for Rating Disabilities, "but for different purposes." *Stine v. United States*, 92 Fed. Cl. 776, 795 (2010), *aff'd*, 417 F. App'x 979 (Fed. Cir. 2011). The Navy uses the VA schedule to decide "whether or not the service member is fit to perform the duties of office, grade, rank or rating." *Id.* (quotation marks omitted); *see* 10 U.S.C. § 1203. The VA uses the schedule to "determine disability ratings based on an evaluation of the individual's capacity to function and perform tasks in the civilian world." *Stine*, 92 Fed. Cl. at 795 (quotation marks omitted); *see* 38 U.S.C. § 1155. Furthermore, the Navy assigns disability percentages only to conditions found to be "unfitting" for military service. SECNAV Instruction 1850.4E § 3801(a); *see also* 10 U.S.C. § 1203. And the Navy "takes a snapshot of the service member's condition at the time of separation from the service," while the VA "evaluates and adjusts disability ratings throughout the individual's lifetime." *Stine*, 92 Fed. Cl. at 795. For these reasons, disparities between military and VA disability ratings are commonplace, and courts often uphold refusals to correct military records to reflect higher VA disability ratings. *See*, *e.g.*, *Gay v. United States*, 116 Fed. Cl. 22, 32 (2014); *Zappley v. United States*, 135 Fed. Cl. 272, 277–78 (2012); *Stine*, 92 Fed. Cl. at 795–98; *Pomory v. United States*, 39 Fed. Cl. 213, 218–20 (1997).

Given these differences, the Board permissibly concluded that Schmidt's evidence did not warrant reconsideration. According to Schmidt, the VA's backdated disability rating shows that he had latent disabling conditions at the time of his separation in

1989. But as noted above, the Navy's separation inquiry is limited to conditions that are actually unfitting, not ones that are only potentially so. And Schmidt provided no reason to think that the VA's 1994 assessment of his condition in 1989 was more persuasive evidence of that condition than the contemporaneous physical evaluation performed by the Navy.

When the Navy evaluated Schmidt at separation, it found only one unfitting condition—back pain. Schmidt contends that what the Navy called back pain was actually a much more serious degenerative spinal condition, but he provides no evidence that the Navy's thorough examination of his back simply missed a disabling spinal condition. In addition, the Navy specifically found that Schmidt's shoulder and foot conditions did not render him unfit for military service in 1989, and Schmidt offers no basis for setting aside those findings. Schmidt likewise presents no evidence that his heart condition rendered him unfit in 1989. And there is no evidence that Schmidt was suffering from PTSD at all in 1989, much less that the condition made him unfit at that time.

For these reasons, the district court's judgment is affirmed. The Clerk is directed to withhold the issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(B); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

[ENTERED: August 8, 2018]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY A. SCHMIDT,

Plaintiff,

v.

RICHARD V. SPENCER,
Secretary,
U.S. Department of the Navy,

Defendant.

Civil Action
No. 14-1055
(DLF)

ORDER

For the reasons stated in the accompanying memorandum opinion, it is

ORDERED that the Secretary of the Navy's Motion for Summary Judgment, Dkt. 33, is **GRANTED**. It is further

ORDERED that judgment is entered in favor of the Secretary of the Navy. The Clerk of Court shall close this case.

SO ORDERED.

Dabney L. Friedrich

DABNEY L. FRIEDRICH
United States District Judge

Date: August 8, 2018

[ENTERED: August 8, 2018]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY A. SCHMIDT, *Plaintiff*, v. RICHARD V. SPENCER, Secretary, U.S. Department of the Navy, *Defendant*.	Civil Action No. 14-1055 (DLF)

MEMORANDUM OPINION

Jeffrey Schmidt challenges a 2011 decision by the Board for Correction of Naval Records. The Board declined to reconsider a decision it made nineteen years earlier. In that 1992 decision, the Board refused to change the separations disability rating assigned by the Navy when Schmidt was discharged in 1989. Before the Court is the Secretary of the Navy's Motion for Summary Judgment. Dkt. 33. For the reasons that follow, the Court will grant the motion.

I. BACKGROUND

A member of the military "may be separated" from the military if a military secretary, such as the Secretary of the Navy, determines that the member is "unfit to perform [his or her] duties" due to physical disability. 10 U.S.C. § 1203(a). The secretary assesses whether the member can perform his or her duties through a physical evaluation board. *See* Disability Evaluation System, Department of Defense Instruction No. 1332.18 at 16–19 (Aug. 5, 2014). The physical evaluation board may recommend separation and certain disability ratings that affect pay and benefits upon separation. *See* 10 U.S.C. §§ 1203(b), 1212(a); Department of Defense Instruction No. 1332.18 at 18; Navy Disability Evaluation Manual, SECNAVINST 1850.4E § 3801. The "sole standard" for separations disability ratings is fitness to perform military duties. SECNAVINST 1850.4E §§ 3301, 3306. This suit arises from Jeffrey Schmidt's encounter with a physical evaluation board.

Schmidt enlisted in the United States Marine Corps in 1983. Administrative Record (AR) 18, Dkt. 30. During his time in service, he served as a field radio operator, rose to the rank of corporal, and was awarded the Good Conduct Medal and the Sea Service Deployment Ribbon. *Id.* In December 1988, a Navy physical evaluation board found that Schmidt had suffered from non-combat-related lower back pain for several years, and a water-skiing incident had caused the pain to increase in the months before the evaluation board. AR 76, 80. Due to the pain, Schmidt had been unable to run for the prior two

and a half years, AR 80, and according to his commanding officer, Schmidt's injuries "ke[pt] him from participating in physical fitness tests, field duty, troop marches, any prolonged walking or standing and other activities required of the basic Marine," AR 83. The physical evaluation board concluded that Schmidt was unfit for full duty and would not be fit for full duty within a reasonable period of time. AR 76, 81. The board also rated Schmidt's lower back condition as 10% disabling. AR 76. After receiving counseling on the board's findings from a Disability Evaluation System counselor, Schmidt signed a certification stating that he accepted the findings of the physical evaluation board. AR 78.

The next month, after the Navy Judge Advocate General performed a legal review, the physical evaluation board notified the Commandant of the Marine Corps of its finding that Schmidt was unfit for duty and recommended that Schmidt be separated from the Marine Corps under 10 U.S.C. § 1203. AR 74, 77. On March 1, 1989, the Marine Corps honorably discharged Schmidt with a 10% separations disability rating and severance pay. AR 18.[1]

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[1] At times, the parties refer to medical "retirement," which is generally governed by 10 U.S.C. § 1201(a). *See, e.g.*, Def.'s Mot. at 14, Dkt. 33; Pl.'s Opp'n at 10, Dkt. 37. To be medically retired when discharged, however, Schmidt needed to be at least 30% disabled, which he was not. 10 U.S.C. § 1201(b)(3)(B) (1988); *accord* 10 U.S.C. § 1201(3)(B) (current code). Accordingly, Schmidt was "separated" under 10 U.S.C. § 1203(a), not medically retired. *See* AR 74, 77.

Such decisions, however, are not always final. A military secretary "may correct any military record"—including records related to separations—"when the [s]ecretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). A secretary makes such corrections through civilian boards for correction, established under procedures promulgated by the secretary. *Id.* § 1552(a)(1), (a)(3)(A). Relevant here, the Secretary of the Navy's Board for Correction of Naval Records "determin[es] the existence of error or injustice in the naval records of current and former members of the Navy and Marine Corps" and "take[s] corrective action on the Secretary's behalf when authorized." 32 C.F.R. § 723.2(b). Also, the Board for Correction may reconsider its prior decisions in certain narrow circumstances: "After final adjudication, further consideration will be granted only upon presentation by the applicant of new and material evidence or other matter not previously considered by the Board." *Id.* § 723.9. New evidence is "evidence not previously considered by the Board and not reasonably available to the applicant at the time of the previous application." *Id.* To be material, evidence must be "likely to have a substantial effect on the outcome." *Id.*

Schmidt first availed himself of this review process when he submitted an application to the Board for Correction in 1990. AR 58. The application requested that the Board for Correction increase his 10% disability rating because the physical evaluation board's rating was "unjust" and his "medical evaluations were incomplete and unjust." *Id.* In support, the application noted that the

Department of Veterans Affairs (VA) had assigned him a 34% disability rating, "with an upgrade pending, effective date 04-01-89." *Id.* The Board for Correction ultimately denied Schmidt's application in 1992, explaining that the higher VA rating was "insufficient to demonstrate that [Schmidt's] discharge from the Marine Corps was erroneous, because the VA, unlike the military departments, may assign disability ratings without regard to the issue of fitness for military service." AR 39.

Sixteen years later, in 2008, Schmidt asked the Board for Correction to reconsider its 1992 decision. AR 11–41; *see also* Def.'s Mot. at 3 n.1, Dkt. 33. Schmidt again challenged the physical evaluation board's 10% separations disability rating by pointing to the higher rating assigned by the VA. AR 14–16. He attached a 2007 VA letter showing that his total VA rating had increased to 100%, including a 70% disability rating for "major depressive disorder/PTSD," 40% for "degenerative arthritis of the spine," 30% for "hypertensive heart disease," and 10% for both clavicle/scapula impairment and "residuals of foot injury." AR 17. According to Schmidt, "[t]o go from a 10% service-connected military medical discharge to a 100% service-connected VA disability evaluation offends common sense." AR 15. The Board for Correction's Acting Executive Director rejected Schmidt's request for reconsideration, AR 7, but this decision was later set aside voluntarily and the request was remanded to the Correction Board for further consideration, AR 9–10.

On remand, the Board for Correction denied Schmidt's request for reconsideration in 2011. AR 1–4. The Board for Correction stated that Schmidt's request was untimely and did not present new material evidence. *Id.* The Board therefore refused to reconsider its 1992 decision. AR 3.

In 2014, Schmidt filed this action against the Secretary of the Navy, asserting that the Board for Correction's 2011 decision was arbitrary and capricious, unsupported by substantial evidence, and contrary to law. Compl. at 7, ¶¶ 2, 5, Dkt. 1.[2] The Court dismissed the action for lack of jurisdiction, Dkt. 19, but on appeal, the Secretary's counsel noted that the Court's decision may have conflicted with D.C. Circuit precedent. Therefore, the Secretary moved to vacate the Court's decision and remand for further proceedings, which the D.C. Circuit did in late 2016. *See* Dkt. 22-1; *see also Schmidt v. Mabus*, No. 15-5298 (D.C. Cir.), Doc. 1643066 (Secretary's motion), Doc. 1648618 (per curiam order). Following the remand, the Secretary moved for summary judgment in April 2017, Dkt. 33, and the case was reassigned to the undersigned judge on December 5, 2017.

II. LEGAL STANDARDS

A court grants summary judgment if the moving party "shows that there is no genuine dispute as to any material fact and the movant is

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[2] When Schmidt filed his complaint, Ray Mabus was the Secretary of the Navy, but Richard Spencer has since taken that position and is automatically substituted as the defendant. *See* Fed. R. Civ. P. 25(d).

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A "material" fact is one with potential to change the substantive outcome of the litigation. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. When a plaintiff seeks review of an agency decision under the Administrative Procedure Act (APA), summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). "[T]he entire case . . . is a question of law" and the district court "sits as an appellate tribunal." *Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (quotation marks and footnote omitted).

The APA requires courts to set aside agency decisions that are arbitrary and capricious, not in accordance with law, or unsupported by substantial evidence. 5 U.S.C. § 706(2).[3] When the agency

[3] The arbitrary and capricious standard of § 706(2)(A) is a "catchall" that generally subsumes the "substantial evidence" standard of § 706(2)(E). *See Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984) ("When the arbitrary or capricious standard is performing that function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a

decision was made by a military correction board, judicial review proceeds "under an 'unusually deferential application of the arbitrary or capricious standard.'" *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (quoting *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989)). This "unusual deference" arises from the statute permitting the Secretary of a military department—acting through correction boards—to correct military records "when the Secretary considers it necessary . . . ." 10 U.S.C. § 1552(a)(1); *see also Roberts v. Harvey*, 441 F. Supp. 2d 111, 119 (D.D.C. 2006). Due to that language, "[i]t is simply more difficult to say that the Secretary has acted arbitrarily . . . than it is if he is required to act whenever a court determines that certain objective conditions are met, *i.e.*, that there has been an error or injustice." *Kreis*, 866 F.2d at 1514.

Accordingly, "[t]he question is not what [the court] would have done, nor whether [the court] agree[s] with the agency action. Rather, the question is whether the agency action was reasonable and reasonably explained." *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency."). The court must determine "only whether the Secretary's decision making process was deficient, not whether his decision was correct," and

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'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense . . . ."); *accord Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

"[p]erhaps only the most egregious decisions may be prevented under such a deferential standard of review." *Kreis*, 866 F.2d at 1511, 1515. "This deferential standard is calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings, a result that would destabilize military command and take the judiciary far afield of its area of competence." *Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000). Indeed, "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." *Id.* (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

III. ANALYSIS

To begin, a brief word about the scope of review. "It is black-letter administrative law that in an [APA] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (internal quotation marks omitted). Therefore, this Court reviews only the record before the Board for Correction in 2011 when it refused to reconsider its 1992 decision. Review is not based on extra-record documents submitted with Schmidt's opposition brief, such as an affidavit signed by Schmidt in 2017 and documents concerning the VA's disability decisions. *See* Dkt. 37-1; Dkt. 37-2.

Turning to the Board's 2011 decision refusing to reconsider its 1992 decision, the inquiry is: "Did

the Board reasonably conclude that [Schmidt] had not come forward with any new and material evidence, or other matter not previously considered by the Board, that would support amendment of his record?" *Jackson*, 808 F.3d at 936; *see also* 32 C.F.R. § 723.9. The Board for Correction denied Schmidt's request for reconsideration because the request was not timely filed and was not accompanied by new material evidence. AR 1–4. Schmidt's counsel "acknowledged that [the] request was not timely," but "argued that the Board should consider it because [it] raised unspecified 'new facts, arguments and evidence.'" AR 1. The Board for Correction responded:

> The Board found your new argument to be little more than a reiteration of your previous argument, *i.e.*, that the conditions rated by the Department of Veterans Affairs (VA) after you were discharged from the Marine Corps rendered you unfit for military duty prior to your discharge, and that the Department of the Navy should have assigned the same disability ratings assigned by the VA. The Board concluded that in view of your unexplained fifteen-year delay in submitting your request for further consideration of your application, and your failure to submit significant new evidence or argument in support of that request, you have not demonstrated that it would be in the interest of justice

> for the Board to excuse your failure to submit the request in a timely manner.

AR 1–2. Schmidt submitted some new information, the Board continued, but the information was not material:

> Although you contend that you were unfit for duty by reason of physical disability in 1989 due to a mental disorder, cardiovascular disease, and conditions of a toe, ankle and shoulder, in addition to the unfitting back condition, you did not submit any new material evidence in support of that contention. . . . The [new] documents . . . mostly pertain to your condition after you were separated from the Navy and/or contain recitations of subjective reports concerning your military and medical history that you presented to the authors of those documents. There is no credible evidence that the findings made by the Physical Evaluation Board in your case represent anything other than fair and impartial assessments of your fitness for duty and determination of an appropriate disability rating for the condition that it determined was unfitting.

AR 2–3.

The Board's conclusion was reasonable. When requesting reconsideration, Schmidt offered evidence

of VA rating upgrades that occurred after his 1989 discharge. In particular, he attached a 2007 VA letter showing that his total VA rating had increased to 100%. AR 17. He also attached letters describing his conditions, sent from private physicians to the VA in 1991, 1992, 1993, 1996, 1998, and 1999. AR 21–38. While acknowledging that the submissions were new, the Board reasonably concluded that it was not material. In other words, the new material was unlikely to substantially affect the Board's 1992 decision that the Navy did not err or inflict injustice when assigning Schmidt's separations disability rating in 1989. *See* 10 U.S.C. § 1552(a)(1); 32 C.F.R. §§ 723.2(b), 723.9. Critically, separations disability ratings require different assessments than VA disability ratings: the military and the VA use the same disability rating schedule (the VA Schedule for Rating Disabilities), but in entirely different ways. *See Stine v. United States*, 92 Fed. Cl. 776, 795 (Fed. Cl. 2010), *aff'd*, 417 F. App'x 979 (Fed. Cir. 2011); *Gay v. United States*, 116 Fed. Cl. 22, 32 & n.9 (Fed. Cl. 2014); *see also* Pl.'s Opp'n at 8, Dkt. 37 ("Granted, the Board is correct by stating that VA medical treatment is not controlling over [physical evaluation board] matters."). Separations hinge on whether a servicemember is "unfit to perform" his or her specific military duties. 10 U.S.C. § 1203(a). Thus, separations disability ratings assess a servicemember's fitness for service based on a "snapshot of the service member's condition at the time of separation from the service," and the ratings "determine what compensation the service member is due for the interruption of his military career." *Stine*, 92 Fed. Cl. at 795; *accord Jardon v. United*

States, No. 10-738C, 2013 WL 677028, at *18 (Fed. Cl. Feb. 14, 2013).

In contrast, the VA "determine[s] disability ratings based on an evaluation of the individual's capacity to function and perform tasks in the civilian world." *Stine*, 92 Fed. Cl. at 795; *see also Gay*, 116 Fed. Cl. at 32. The VA "holistically examin[es] the individual's ability to engage in civilian employment" and "evaluates and adjusts disability ratings throughout the individual's lifetime." *Stine*, 92 Fed. Cl. at 795. Due to the differences between separations disability ratings and VA disability ratings, "the rating systems . . . often produce disparate results," *Gay*, 116 Fed. Cl. at 32, and "a comparison for the sake of finding error [is] of little value," *Pomory v. United States*, 39 Fed. Cl. 213, 219 (Fed. Cl. 1997); *see also Zappley v. United States*, 135 Fed. Cl. 272, 277–78 (Fed. Cl. 2012) ("Ordinarily, then, the []VA's ratings are not particularly helpful to the [Board for Correction] in assessing whether the [physical evaluation board] made a correct rating."); SECNAVINST 1850.4E § 3802 ("Because of differences between military department and []VA applications of rating policies for specific cases, differences in ratings may result."). Accordingly, Schmidt's submissions indicating that the VA increased his VA disability rating in the decades *after* his separation do not establish that the Navy erred by assigning him a lower separations disability rating in 1989. "The military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff*, 345 U.S. at 94, and when assigning separations ratings, "the Navy may—and routinely does—find that the []VA's

higher rating is not probative due to that agency's distinct rating standard, namely the []VA's focus on the effect of the disability on the veteran's civilian employment," *Stine*, 92 Fed. Cl. at 796.

Even when examined in greater detail, Schmidt's new submissions to the Board for Correction appear no more material. *See* 32 C.F.R. § 723.9. First of all, the Board for Correction reasonably discounted the many letters sent by private physicians to the VA in the 1990s because the letters "contain recitations of subjective reports concerning [Schmidt's] military and medical history that [Schmidt] presented to the authors of those documents." AR 2; *see Stine*, 92 Fed. Cl. at 796–97.

Second, the new submissions do not show that the Navy erred when evaluating Schmidt's fitness for duty. Navy physical evaluation boards assign disability percentages only to conditions found "unfitting." *See* SECNAVINST 1850.4E § 3301. Here, the physical evaluation board found one condition unfitting at the time of separation: Schmidt's back pain, rated as a separations disability of 10%. AR 76. The physical evaluation board explicitly considered two other conditions—scapulothoracic bursitis and bilateral metatarsophalangeal joint arthralgia— but found that those shoulder and foot conditions "are not separately unfitting and do not contribute to the unfitting conditions." *Id.* After being counseled on these findings, Schmidt accepted them in 1989. AR 78.

Schmidt's new submissions document that he experienced further back pain (his one unfitting

condition) as a civilian in the 1990s and 2000s, but they do not demonstrate that the physical evaluation board erred. The physical evaluation board specifically considered how back pain affected Schmidt's fitness for military duty and assigned a disability rating accordingly. Moreover, some of Schmidt's new submissions actually undercut his request. A 1992 letter noted that Schmidt suffered injuries in the Marine Corps, but the letter was prompted by neck, hand, back, and hip pain experienced by Schmidt "since a work accident suffered on February 28, 1992," three years *after* Schmidt's discharge from the Marine Corps. AR 36.

The new submissions also document that Schmidt experienced conditions in addition to back pain in the decades after separation, specifically clavicle/scapula impairment, residuals of a foot injury, a degenerative spine condition, hypertensive heart disease, depressive disorder, and PTSD. AR 2, 17. As to the first two conditions, the physical evaluation board specifically considered shoulder and foot issues, but found that they "do not contribute to the unfitting conditions." AR 76. And Schmidt offers no evidence that the physical evaluation board should have found any of the conditions unfitting in 1989. As the Board for Correction explained to Schmidt, "[t]hat you now suffer from a degenerative condition of your spine which severely limits its range of motion is not material evidence of the severity of your back condition" at separation. AR 2. At that time, rather, the physical evaluation board "found that you were able to flex forward to a point where your fingertips were within six inches from the floor before

producing low back pain, which indicates you had a range of motion in excess of ninety degrees of forward flexion." *Id.* (citation omitted). The Board for Correction acknowledged that Schmidt's VA rating of 10% for hypertension increased to a 30% rating for hypertensive heart disease, and that Schmidt was "entitled to VA disability ratings for major depressive disorder and posttraumatic stress disorder on 26 April 2007." *Id.* But as the Board for Correction explained to Schmidt, these facts "do not even suggest that you suffered from heart disease and/or a ratable mental disorder in 1989, or that the hypertension rendered you unfit for duty at the time of your discharge." *Id.*; *see also Stine*, 92 Fed. Cl. at 795 (stating that it "would be erroneous" to equate a Navy rating of 10% for major depressive disorder and anxiety disorder—the two conditions found unfitting—with a VA rating of 70% for anxiety disorder/major depressive disorder/PTSD, which was assigned in part for conditions not found unfitting). Based on this explanation, the Board for Correction reasonably concluded that Schmidt's new submissions did not materially support amending his records. Because the Board's decision was reasonable and reasonably explained, the Court will not disturb it. *See Jackson*, 808 F.3d at 936.

CONCLUSION

For the foregoing reasons, the Court grants the Secretary of the Navy's Motion for Summary Judgment. Dkt. 33. A separate order consistent with this decision accompanies this memorandum opinion.

DABNEY L. FRIEDRICH
United States District Judge

Date: August 8, 2018

[ENTERED: July 7, 2020]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5304 **September Term, 2019**

1:14-cv-01055-DLF

Filed On: July 7, 2020

Jeffry Schmidt,

Appellant

v.

James E. McPherson, Acting Secretary, U.S. Navy,

Appellee

BEFORE: Srinivasan, Chief Judge; and Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Administrative Procedure Act (APA)

5 U.S.C.S. § 706 (2)(A):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

Correction of military records
10 U.S. Code § 1552

(a)

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

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

(3)

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

(B) If a board makes a preliminary determination that a claim under this section lacks sufficient information or documents to support the claim, the board shall

notify the claimant, in writing, indicating the specific information or documents necessary to make the claim complete and reviewable by the board.

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

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

(4)

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

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

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

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

(c)

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

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

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

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

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

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

(4) If the correction of military records under this section involves setting aside a conviction by court-martial, the payment of a claim under this subsection in connection with the correction of the records shall include interest at a rate to be determined by the Secretary concerned, unless the Secretary determines that the payment of interest is inappropriate under the circumstances. If the payment of the claim is to include interest, the interest shall be calculated on an annual basis, and compounded, using the amount of the lost pay, allowances, compensation, emoluments, or other pecuniary benefits involved, and the amount of any fine or forfeiture paid, beginning from the date of the conviction through the date on which the payment is made.

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

appoint or reappoint him to, the grade to which payments under this section relate.

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

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

(g)

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

(2) If a board established under subsection (a)(1) is reviewing a claim described in subsection (h), the board shall seek advice and counsel in the review from a psychiatrist, psychologist, or social worker with training on mental health issues associated with post-traumatic stress disorder or traumatic brain injury or

other trauma as specified in the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

(3) If a board established under subsection (a)(1) is reviewing a claim in which sexual trauma, intimate partner violence, or spousal abuse is claimed, the board shall seek advice and counsel in the review from an expert in trauma specific to sexual assault, intimate partner violence, or spousal abuse, as applicable.

(h)

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

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

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

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

or to the original characterization of the claimant's discharge or dismissal.

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

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

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

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

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

characterization of the discharge or release of the former member.

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