No. 21-

IN THE

Supreme Court of the United States

HUGH CAMPBELL MCKINNEY,

Petitioner,

v.

CHRISTINE WORMUTH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Administrative Procedure Act subjects all reviewable agency actions—regardless of which agency acts—to the same standards of judicial review. Neither the legislative history nor the text of the Act itself favors any reviewable agency action, or any agency, with special judicial treatment in the form of super-heightened deference as compared to run-of-the-mill deference.

The question presented is:

Whether a civilian board's administrative decisions concerning the correction of military records pursuant to 10 U.S.C. § 1552(a)(1) are properly reviewable subject to an "unusually deferential application" of the arbitrary and capricious standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Hugh Campbell McKinney. Respondent is Christine Wormuth, in her official capacity as Secretary of the United States Army. No party is a corporation.

STATEMENT OF RELATED CASES

Pursuant to SCR 14.1(b)(iii), all proceedings in the lower courts directly related to this case are:

- *McKinney v. Wormuth*, No. 20-5189 (D.C. Cir.) (judgment dated July 20, 2021); and

- *McKinney v. Esper*, No. 1:18-cv-00371 (TSC) (D.D.C.) (final appealable order dated May 26, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hugh Campbell McKinney ("McKinney") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered July 20, 2021 affirming the district court's final appealable order dated May 26, 2020.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-11a) is published at 5 F.4th 42 (D.C. Cir. 2021). The decision of the district court (App. 12a-23a) is not published but is available at 2020 U.S. Dist. LEXIS 92401, 2020 WL 2735571 (D.D.C. May 26, 2020). The January 24, 2017 opinion of the Department of the Army, Army Board for Correction of Military Records (App. 24a-38a), is not published.

JURISDICTION

The court of appeals issued its opinion and judgment on July 20, 2021 (App. 1a-11a). On October 13, 2021, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 17, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent parts of 5 U.S.C. § 706 and 10 U.S.C. § 1552 are as follows:

5 U.S.C. § 706. Scope of review

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—

* * * * *

(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;

* * * * *

10 U.S.C. § 1552. Correction of military records: Claims incident thereto

(a)

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

department. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard.

* * * * *

INTRODUCTION AND STATEMENT OF THE CASE

McKinney Is Injured as a Result of Hostile Action

On June 29, 2004, Army Sergeant First Class McKinney (since retired)—married with five children—was ordered to active duty in the Idaho Army National Guard in support of Operation Iraqi Freedom. In late November 2004, he was deployed to Iraq, where he was assigned to Company B, 2nd Battalion, 116th Cavalry Division. He subsequently served as a platoon sergeant during close combat incidents and infantry operations.

While leading a night-time, mounted patrol in Kirkuk, Iraq on October 9, 2005, an improvised explosive device ("IED") detonated 15-20 meters from McKinney's Humvee. The IED had been placed near a bridge and attached to a light pole using barbed wire. When the blast occurred, McKinney was in the left, rear seat of the vehicle, the same side of the vehicle as the explosion from the roadside bomb. In an unrebutted, sworn statement, the Tactical Commander in the vehicle stated that McKinney "took the brunt of the blast," "seemed to not realize that the blast had come and gone," was "shaken up," and "really dazed." The Tactical Commander also stated that McKinney's "mind was [i]n a loop [from] the blast for a few minutes"; in other words, he was briefly in-and-out

of consciousness. The concussive force of the explosion must have been tremendous; the Tactical Commander characterized the IED as consisting of either a 120mm or 155mm artillery round, i.e. high explosive armament.

McKinney was the senior-most individual in charge of all the vehicles and soldiers on the October 9, 2005 patrol. Despite the stun of the concussive force to McKinney's body, causing a brief loss of consciousness, he remained with the men under his command. He did not seek medical attention at the time, which would have required him to leave his command and travel to a field hospital at a "forward operating base" in a different area of Iraq from his "firebase" in Kirkuk.[1] His firebase did not have a medical clinic or doctor. At that time and then in the final days of his deployment, McKinney's work ethic and commitment to the men under his command was such that he continued his duty without reporting to a medical facility at the forward operating base. McKinney didn't want "to put men's lives in jeopardy going on a mission to [that base] as a medical concussive injury request."

McKinney was not medically evaluated in the field, after the blast, for a mild to moderate traumatic brain injury ("TBI"). There simply was no medic accompanying McKinney's mounted patrol. Regardless,

1. In lay terms, a "firebase" is positioned close to the enemy, with a reasonably small number of individuals (e.g., 100-150) and very limited supplies and facilities, whereas a "Forward Operating Base" is a main outpost, further away from the enemy, with a large number of individuals (e.g., 4000) with supply, logistics, mechanics, dining facilities, etc. The Forward Operating Base had a medical unit akin to a Mobile Army Surgical Hospital or "MASH" in the public's vernacular.

any such evaluation—had one occurred—would have been unreliable and thus futile as not being based on a TBI screening tool approved by the military at the time. Indeed, in October 2005, the Army had no protocol for conducting such a medical evaluation in a military operational setting. Specifically, there was no protocol at that time for identifying potential mild traumatic brain injuries arising from exposure to concussive forces. It was not until 2006 that a TBI screening tool called the Military Acute Concussion Evaluation was developed by the military's Defense and Veterans Brain Injury Center. And it was not until December 22, 2006 that the Center released a "Clinical Practice Guideline and Recommendations" in which mild TBI screening of service members with the tool was recommended in military operational settings, *i.e.* in theatre. The screening assessment emerged with the realization that "[t]raumatic brain injury (TBI), in both times of peace and times of war is a significant public health issue for the military."

Although the explosion sprayed McKinney's Humvee with shrapnel, dirt, and rocks, the debris did not directly impact his body. Rather, the external force of the explosion, *i.e.,* the concussive force, impacted his body due to his close proximity to the blast. It is clear from McKinney's service records and his subsequent evaluations and treatments by the VA, and private doctors, that McKinney suffered a TBI from the blast.

The timing of the blast was particularly challenging, given the pressing circumstances inherent with a "transfer [of] the reigns" of responsibilities, then occurring, from the 116th Cavalry Division in which McKinney was assigned to the 101st Airborne Division. McKinney penned

a formalistic description of the incident the next day when his patrol returned to base.

Just a couple weeks following the October 9, 2005 explosion, McKinney's deployment to Iraq ended. On his post-deployment service medical record, DD Form 2796 Post-Deployment Health Assessment dated November 1, 2005 and signed by McKinney and a physician's assistant, he indicated that he developed the following symptoms during deployment: "muscle aches," "numbness or tingling in hands or feet," and "ringing of the ears." McKinney also indicated that during his deployment, he was "often" exposed to "loud noises" and "excessive vibration" and that he had concerns that events during his deployment may affect his health.[2] These problems persisted, and McKinney continued to show myriad signs of medical distress.

While still in the Army National Guard Mobilized Service, on June 10, 2006, McKinney completed a DA Form 2173 Statement of Medical Examination and Duty Status and a DD Form 2900 Post-Deployment Health *Reassessment*—signed by McKinney and a physician's

2. It was not until October 2006—after McKinney had left Iraq and both his post-deployment health assessment and reassessment were completed—that a law was passed requiring the Department of Defense ("DOD"), and thus Army, to implement TBI screening (within six months of enactment of the law) as part of the routine post-deployment health assessments of service members returning from Iraq. *See* Pub. L. No. 109–364, 120 Stat. 2303, 2304 (Oct. 17, 2006). It was not until January 2008 that DOD added TBI screening—in particular, questions inquiring about blast exposures—to the Post-Deployment Health Assessment (PDHA) form.

assistant—with much more detail about his medical problems from his service in Iraq. McKinney reiterated his previously-identified symptoms and added more. Indicating that he was "wounded, injured, assaulted or otherwise physically hurt" during his deployment, McKinney reported "weakness," "headaches," "dimming of vision, like the lights were going out," "dizziness, fainting, light headedness," "difficulty remembering," and increased irritability." The provider who signed the reassessment characterized McKinney's physical symptoms as a "major concern" and made referrals to "primary care, family practice," "Mental Health Specialty Care," "Military OneSource," "VA Medical Center or Community Clinic," and "Vet Center."

McKinney was honorably discharged effective January 8, 2007.

Less than two years after being exposed to the IED blast, on July 21, 2007 at the age of 46, McKinney suffered a left hemispheric, ischemic stroke event, known as a cerebrovascular accident (CVA).

McKinney's health prior to his tours of duty in Iraq was assessed *by Army* to be "excellent." But the IED blast on October 9, 2005 permanently altered his life. Indeed, a Rating Decision from the Department of Veterans Affairs ("VA"), dated May 15, 2014, states that "the evidence shows [McKinney] currently has a total service-connected disability, permanent in nature" and "the evidence documents [McKinney is] permanently and totally disabled." The VA concluded that "[a]n overall 100 percent evaluation is assigned for [McKinney's] traumatic brain injury residuals based on the highest level of severity of 'Total'."

Among the many medical records documenting McKinney's TBI is one from a VA doctor who served in the Army Medical Corp. On March 20, 2008, Dr. DeLeon wrote:

> The purpose of this note is to outline the injuries of [McKinney] and provide an opinion on etiology.
>
> There are three major injuries affecting the patient
>
> 1) ***Traumatic Brain Injury from multiple Improvised Explosive Devi[c]es with the most severe being several meters from [applicant] with associated amnesia*** and subsequent concentration problems and headaches.
>
> 2) . . . ***Stroke*** with further injury to an already damage[d] brain complicated by insight deficits.
>
> 3) right C6 radiculopathy . . .
>
> It is frequent that mild to moderate TBI's go undiagnosed initially as the service member has no outward physical injury, but the difficulty in performing at a higher cognitive level shows up later, most often [noticed] by family members post deployment.
>
> In conversations with Neurologist, ***there is no clear cause of his stroke as he has no identifiable risk factors that would cause one***

> ***at his age. It is possible the IED exposures increased his risk. It is my belief that it did.***
>
> Overall, ***I feel that all three conditions are connected to the IED exposures*** and should be service connected.

(Court of Appeals JA413 (emphasis added)).

Finally, and potentially most importantly, another VA medical record authored by Dr. DeLeon, dated December 31, 2013, provided the following medical evaluation and opinions concerning McKinney:

> During his deployment to Iraq he suffered at least three exposures to explosions with 3 docume[nt]ed in my H&P [(History & Physical Examination)]. The first two did not have the features of suffering a TBI as he did not report either losing consciousness or having post traumatic amnesia. ***[H]owever the third event [] occur[r]ed during October 2005 when a roadside IED exploded about 20 meter[s] away. [T]his event is associated with post traumatic amnesia of less than one day duration. The event is supported by the sworn statement of [the Tactical Commander present in the B9 Humvee with McKinney]*** . . .
>
> * * *
>
> Post returning home, he suffered a CVA. The risks of CVA in such a young man is not expected . . .

* * *

> ***My overall asses[s]ment is TBI from deployment related concussion due to IED exposure in 2005 . . . The TBI opinion is further supported by a third party description of [applicant's] actions/mental state immediately following the blast.***
>
> ***Under current medical protocols i[t] would be expected that [applicant] be removed from duty and immediately report to a medical facility for further eval[ua]tion and treatment. He would not return to duty till cleared by medical providers. The [Military Acute Concussion Evaluation (MACE)] exami[na]tion, however, did not exist on the battlefield in 2005.*** The VA system did not formally recognize mild to modera[t]e TBI till 2006 when it launched the TBI/polytr[au]ma program and did not start formal TBI second level evalua[ti]ons till 2007.
>
> ***I support recognition of [applicant's] TBI injury as service, specifically, combat related.***

(Court of Appeals JA462-466 (emphasis added)).

McKinney Seeks the Purple Heart and Is Denied

In May 6, 2008, the Headquarters of the Multi-National Corps-Iraq (the so-called "coalition" forces) issued a memorandum "to all medical personnel in the Iraq Theater of Operations who [were] directly or indirectly

involved in the provision of healthcare to patients with confirmed or suspected concussive injuries." The memorandum "provide[d] theater-specific guidance for the medical evaluation, management and documentation of mild traumatic brain injury (mTBI)/concussion" and stated:

> For Army forces, a diagnosis of concussion must include the military operational definition of [mild TBI] and must have evidence and medical record documentation of an alteration of consciousness. In many cases [mild TBI] with minimum medical intervention will not warrant this award. Providers should not discuss Purple Heart criteria with patients.

(Court of Appeals JA233 at § 6.b.(12)).

Army subsequently issued a clarifying Directive 2011-07 on April 29, 2011, later incorporated into Army Regulation 600-8-22 (Military Awards).

"The [Purple Heart] is awarded to any Service member who is killed or wounded, to an extent requiring treatment by a medical officer, under [certain circumstances]. The [Purple Heart] differs from other [personal military decorations] in that an individual is entitled to the decoration upon the awarding authority determining that the specified award criteria have been met." DoD Manual 1348.33, Volume 3, *Manual of Military Decorations and Awards: DoD-Wide Personal Performance and Valor Decorations* (Dec. 21, 2016), at § 3.7(a).

Before the Army Board for Correction of Military Records ("ABCMR"), an "applicant has the burden of proving an error or injustice by a preponderance of the evidence." 32 C.F.R. § 581.3(e)(2); Army Regulation 15–185 at § 2–9. Proof under this standard requires "evidence which as a whole shows that the fact sought to be provided is more probable than not." *United States v. Montague*, 40 F.3d 1251, 1254 (D.C. Cir. 1994) (citation and quotation marks omitted).

Pursuant to 10 U.S.C. § 1552(a)(1), "[t]he 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."

McKinney initially sought award of the Purple Heart in 2011, but his request to Army Human Resources Command ("HRC") was "returned without action due to the lack of required supporting documentation."

McKinney resubmitted his request that he be awarded the Purple Heart to Army HRC by letter, with accompanying explanations and evidence, which Army HRC has indicated it received on February 6, 2013. A letter from McKinney's wife, Jeanette L. McKinney, dated January 21, 2013, accompanied the request and stated in part:

> Hugh has tried to put the paperwork together for over a year to resubmit for his [P]urple [H]eart but he is unable to do the necessary paperwork without my assistance. I have contacted all the soldiers we were able to find to gather sworn statements . . .

Army HRC subsequently disapproved the request by letter dated October 22, 2013:

> [McKinney] is not authorized award of the Purple Heart; therefore, this request is disapproved. Based on the information provided, [McKinney] was injured as a result of traumatic brain injury (TBI). However, per Army Directive 2011-07 and MILPER Message 11-125, both diagnostic and treatment factors must be present and documented in the medical record by a Medical Officer at or near the time the injury occurred. In the medical documentation provided, it is obvious that [McKinney] was exposed to concussive forces, however lack of medical documentation linking the dates of 24 June 2005 and 9 October 2005 for TBI and treatment were not provided. While we sympathize with [McKinney], we are bound by Army Regulation. The medical documentation does not justify award of the Purple Heart.

McKinney filed an "appeal" to Army HRC providing further explanations and evidence—again with the assistance of his wife—which Army HRC has indicated it received on March 24, 2014. By letter dated June 19, 2014, Army HRC again disapproved award of the Purple Heart:

> After careful review it has been determined that your request does not meet the criteria for the Purple Heart award; therefore, this request is disapproved. Based on the information provided, your injury was a result of traumatic brain injury (TBI). However, per Army

> Directive 2011-07and MILPER Message 11-125, both diagnosis and treatment factors must be present and documented in the medical record by a Medical Officer at or near the time the injury occurred. In the medical documentation provided, it is obvious that you were exposed to concussive forces, however lack of medical documentation linking the dates of 9 October 2005 for TBI and treatment were not provided. Veterans Affairs documents or diagnosis are not sufficient in itself to determine the award of the Purple Heart. While we sympathize with you, we are bound by Army Regulation. The medical documentation provided does not justify award of the Purple Heart.
>
> If you believe this determination to be unjust, you have the right to appeal to the [ABCMR], the highest appellate authority on personnel matters. . . .

After acting *pro se* with the assistance of his wife from 2011-14, McKinney engaged *pro bono* counsel. By letter dated August 7, 2015, with supporting evidence, and received by the Board on August 10, 2015, McKinney, through counsel, appealed the disapproval of the Purple Heart award.

Despite the evidence he submitted, McKinney received a response letter from the Board almost eighteen months later, dated January 25, 2017, again denying the award. App 24a. The Board's Record of Proceedings, dated January 24, 2017 and attached to the Board's letter, states:

> The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

App. 27a. ABCMR's Record of Proceedings further states:

> [] In letters dated 22 October 2013 and 19 June 2014, the applicant was notified by the Department of the Army (DA), Awards and Decorations Branch, that his requests for the Purple Heart were denied. Prior to making its determination, the Awards and Decorations Branch requested a medical advisory opinion from a medical doctor assigned to the Physical Review Board. The doctor certified he had reviewed the applicant's medical records and supporting documentation. . . . ***The doctor concludes the applicant was exposed to concussive forces; however, his TBI appears to be a cumulative effect as opposed to being caused by a specific event.*** In conclusion, the doctor points out that a diagnosis of TBI by the VA is different than those required for the Purple Heart.
>
> * * *
>
> [] ***There is no evidence in the available record, and neither the applicant nor his counsel submitted sufficient evidence showing he was treated by medical personnel for an injury/***

> ***wound he received as a result of hostile action on or near 9 October 2005.*** According to the applicable regulation, to qualify for award of the Purple Heart, substantiating medical evidence at the time or near the time of the incident must be provided to verify that the wound was the result of hostile action, the wound must have required treatment by medical personnel, and the medical treatment must have been made a matter of official record. For concussion, a Soldier must be removed from full duty due to persistent signs, symptoms or clinical finding, or impaired brain function for a period greater than 48 hours.

App. 34a-37a (emphasis added).

An applicant to ABCMR has the burden of proving an error or injustice by a preponderance of the evidence, *see* 32 C.F.R. § 581.3(e)(2), yet the District Court split hairs between the meaning of the words "expected" and "required" in Dr. DeLeon's December 31, 2013 medical opinion, holding that "[w]hile it is a close case, . . . [ABCMR's] conclusion was neither arbitrary nor capricious." App. 16a, 18a-19a. Following circuit precedent, the district court's review of ABCMR's denial applied a standard in which "[m]ilitary board decisions are entitled to even greater deference than other agency actions." App. 14a. The district court emphasized that it was bound by extreme deference:

> [T]his court must evaluate its decision "under an unusually deferential application of the arbitrary or capricious standard of the [APA]."

> *Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000) (quoting *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989) (internal quotation marks omitted).

App. 20a.

In affirming, the court of appeals relied on the same controlling circuit precedent:

> Our review of Board decisions involves "an unusually deferential application of the 'arbitrary or capricious' standard." *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989). Because of the Secretary's broad statutory discretion, "[i]t is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act '*when he considers it necessary* to correct an error or remove an injustice.'" *Id.* (quoting 10 U.S.C. § 1552(a)) (emphasis in original). . . .

App. 7a-8a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's "unusually deferential application of the 'arbitrary or capricious' standard" under the APA to decisions of civilian corrections boards effectively renders those decisions untouchable. The chilling effect of this super-heightened deference cannot be overemphasized. There are few challenges to the thousands of adverse

decisions issued by the corrections boards each year.[3] Those rebuffed by the corrections boards, and their counsel, face a nearly insurmountable deference under the D.C. Circuit's controlling precedents, *Kreis* and *Cone*. In practical effect, the court of appeals has strongly discouraged service members from seeking the justice they believe they were denied by the civilian boards, acknowledging that "[p]erhaps only the most egregious decisions may be prevented under such a deferential standard of review." *Kreis*, 866 F.2d at 1515.

The low burden of proof that applicants to the corrections boards must meet—preponderance of the evidence—is rendered meaningless when a court must accord "unusual" super-deference to the boards' decisions. The deference has the perverse result that when an applicant for correction, such as McKinney, presents evidence that clearly satisfies the preponderance of the evidence standard, *see, e.g.*, 32 C.F.R. § 581.3(e)(2), the corrections board nevertheless can flout that standard without any consequential checks on its decision-making.

Congress simply never intended for agency decisions subject to the APA's "arbitrary and capricious" standard to receive special deference. Neither the text of the statute nor the legislative history of its enactment favor any agency over another with greater deference accorded to its administrative decisions. This Court has recognized that where "[t]he Act mentions no such heightened standard," none should be applied. *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009).

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3. It is a fact that the corrections boards grant no relief in connection with thousands of applications for correction each year. *See* https://boards.law.af.mil/stats.htm.

The earliest bill proposing to subject agency action to judicial review exempted "the conduct of military or naval operations in time of war or civil insurrection." Special Comm. on Admin. Law, American Bar Association, Report of the Special Comm. on Admin. Law 850 (1937). The final "Walter-Logan bill," passed in 1940 but vetoed by President Roosevelt, sought an even broader military exemption for "any matter concerning or relating to the conduct of the military or naval establishments." H.R. 6324, 76th Cong. § 7(b) (3d Sess. 1940); 86 Cong. Rec. 13,942–43 (1940). Congress continued to show interest in administrative law and the bill that eventually became the APA dropped exemptions for particular agencies. Indeed, the Senate Judiciary Committee's report in 1945 included exemptions for "functional classifications" but not "administrative agencies by name." S. Comm. on the Judiciary, Administrative Procedure Act, S. Rep. No. 79-752 (1945), reprinted in Administrative Procedure Act: Legislative History (1946), at 191, 302. "No agency has been favored by special treatment." H.R. Comm. on the Judiciary, Administrative Procedure Act, H.R. Rep. No. 79-1980 (1946), reprinted in Administrative Procedure Act: Legislative History (1946), at 250. In other words, no agency's decisions were subject to a special, "unusually deferential application" of the arbitrary and capricious standard. Any perceived gap in legislative intent would be improperly exploited to support super-deference here. *See, e.g.*, *Burns v. United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

The text of the APA also fails to support the D.C. Circuit's special treatment of the services' civilian

corrections boards. "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Act simply makes no mention of "extra" deference to be accorded to the decision of one agency, e.g., the Army, as compared to another agency, e.g., the Department of Veterans Affairs. It is clear that super-deference to the corrections boards is outside the boundaries set by the very text of the APA. Nowhere does the APA provide for a special category of "arbitrary and capricious" evaluations, under special deference, for military-related matters.

It needs scarcely to be emphasized that receipt of a Purple Heart is an entitlement once certain criteria are satisfied. DoD Manual 1348.33, Volume 3, *Manual of Military Decorations and Awards: DoD-Wide Personal Performance and Valor Decorations* (Dec. 21, 2016), at § 3.7(a) ("an individual is entitled to the decoration upon the awarding authority determining that the specified award criteria have been met"). It is not awarded based on whim or "discretion." Thus, any argument that the failure to award a Purple Heart "may" be corrected "when the Secretary," acting through delegated authority to his or her corrections board, "considers it necessary," *see* 10 U.S.C. § 1552(a), completely misses the point of the decoration.

According to *Cone*,

> [t]his deferential standard is calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his

> or her [outcome], a result that would destabilize military command and take the judiciary far afield of its area of competence.

223 F.3d at 793. The chilling effect of this policy consideration renders it misguided. Moreover, it needs scarcely to be emphasized that the corrections boards are comprised of civilians, who need not have any legal background, and are not even subject to oversight by an administrative law judge in the first instance.

The arbitrary and capricious standard is a deferential one regardless of agency. Affording the administrative decisions of a particular agency (e.g., Army) an "unusually deferential application" of that standard frustrates the very objectives that the APA sought to achieve. Special treatment does not align with the goal of realizing uniformity in the application of administrative law to the expansive executive branch. Nor does special deference promote the important purpose of the APA in expanding access to judicial review of agency action.

"The Department of Defense is America's largest government agency. With our military tracing its roots back to pre-Revolutionary times, the department has grown and evolved with our nation." *See* https://www.defense.gov/about/. Given such a massive and consequential role of our military, the civilian corrections boards of the military services must be held accountable in an even-handed manner. The very consequential nature of arbitrary and capricious decisions—which, for example, may fail to adhere to the preponderance of evidence burden of proof to which applicants for correction are held—should not be rendered inconsequential by super-deference applied by the judiciary.

McKinney's service was important to the nation. He satisfied the criteria for award of the Purple Heart, yet the judiciary was ineffective at addressing the Army Board's failure to right a wrong. The district court's hands were tied by controlling circuit precedent requiring an unusually deferential application of the arbitrary or capricious standard. And the D.C. Circuit panel's hands were similarly tied by this 30-year old, misguided precedent. This Court should discard the special deference that the D.C. Circuit applies to decisions of the corrections boards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 20, 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5189

HUGH CAMPBELL MCKINNEY,

Appellant,

v.

CHRISTINE WORMUTH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES ARMY,

Appellee.

Argued May 3, 2021
Decided July 20, 2021

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-00371)

Before: SRINIVASAN, *Chief Judge*, RAO, *Circuit Judge*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed PER CURIAM:

Appendix A

PER CURIAM: Sergeant First Class (Retired) Hugh McKinney served honorably in the armed forces for more than twenty years. Several years after his retirement, he applied to the Army for a Purple Heart on the ground that he suffered a traumatic brain injury when a roadside bomb exploded near his patrol vehicle in Iraq. The Army denied him a Purple Heart because it found the evidence insufficient to establish that this particular attack caused McKinney to suffer injuries that would qualify for the award. The court recognizes McKinney's years of service and regrets the injuries he sustained during that service. With respect to the award of a Purple Heart, however, we are required to review the Army's decision under a deferential standard. Because the Army did not act arbitrarily or capriciously when it denied McKinney the Purple Heart, we affirm.

I.

The Purple Heart is America's oldest military award. General George Washington established the Purple Heart near the end of the Revolutionary War. *See* U.S. Dep't of Army, Reg. 600-8-22, Military Awards ¶ 2-8*a* (2015) (hereinafter "Army Reg. 600-8-22"). During World War II, the medal became exclusively a recognition of combat injuries and deaths. *See* Decorations, Medals, Ribbons, and Similar Devices, 7 Fed. Reg. 7,477 (Sept. 23, 1942). The Purple Heart "differs from all other decorations" in one aspect: "[A]n individual is not 'recommended' for the decoration; rather, he or she is entitled to it upon meeting specific criteria." Army Reg. 600-8-22 ¶ 2-8*c*. To be eligible for a Purple Heart, a soldier must have suffered an injury

resulting from an enemy or hostile act; the injury must have required treatment; and the treatment of the injury by a medical officer must be documented in the soldier's medical record. *See id.* ¶ 2-8*k*.

Most commonly, an injured soldier is submitted for the award by his chain of command. A soldier who "believes that [he is] eligible for the [Purple Heart] but, through unusual circumstances no award was made," may also apply to the Army Human Resources Command. *Id.* ¶ 2-8*j*(2). This application must include corroborating documentation, such as a "narrative describing the qualifying incident" and statements from witnesses "who were personally present, observed the incident, and have direct knowledge of the event." *Id.* ¶ 2-8*j*(2)(*e*) & (*f*). If the soldier's application is denied, he may appeal to the Army Board for Correction of Military Records (the "Board"), which has been delegated the Secretary of the Army's statutory authority to decide when it is "necessary to correct an error or remove an injustice" in any military record. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 207, 60 Stat. 812, 837 (codified as amended at 10 U.S.C. § 1552(a)(1)).

McKinney applied for a Purple Heart on the basis that while serving in Iraq he suffered a traumatic brain injury ("TBI"). A TBI is "an injury to the brain resulting from an external force and/or acceleration/deceleration mechanism from an event such as a blast, ... which causes an alteration in mental status." J.A. 213. In October 2005, McKinney was on patrol in a Humvee when an improvised explosive device exploded about fifteen to twenty meters

away on McKinney's side of the vehicle. The blast struck the Humvee with shrapnel, dirt, and rocks, though none hit McKinney. The vehicle's tactical commander, David Gehrig, believed that McKinney "took the brunt of the blast." J.A. 398. Although everyone in the vehicle "was shaken up and dazed," Gehrig thought that McKinney "was really dazed" and "seemed to not realize [that] the blast had come and gone." J.A. 398. Gehrig later described McKinney as having his "mind ... on a loop of the blast for a few minutes." J.A. 398. Despite this initial confusion, McKinney focused on ensuring the safety of his gunner, whose position in the gun turret left him more exposed to the concussive force of the blast.

After the explosion, McKinney and his fellow soldiers searched for but did not find the insurgents who had placed the bomb. They returned to their base, where McKinney gave a sworn statement regarding the explosion. Military physicians were unavailable at McKinney's base, and McKinney, concerned about putting fellow soldiers in jeopardy on the journey, did not seek to travel to a nearby base for medical attention. McKinney therefore never sought or received a medical evaluation while in Iraq. He completed his deployment and returned to the United States with his unit approximately three weeks later. This October 2005 incident was neither McKinney's first combat mission nor his first encounter with improvised explosive devices: A veteran of more than two hundred combat missions, he had previously been in the vicinity of two other detonations during his deployment.

McKinney retired from the Army in 2007. A few months later, he suffered a stroke at the age of forty-six. A Department of Veterans Affairs doctor, Dr. Robin DeLeon, evaluated McKinney to determine whether his medical conditions were service-connected, which means they were directly caused or made worse by the veteran's military service. Dr. DeLeon concluded that they were. Although he found no clear cause of McKinney's stroke, Dr. DeLeon believed that it was "connected to the [improvised explosive device] exposures." J.A. 413. He later opined that of McKinney's reported exposures, only the October 2005 blast was consistent with causing a TBI. Veterans Affairs affirmed that McKinney had a total disability that was service-connected and permanent, which entitled him to lifetime free medical care and other benefits for 100% disabled veterans.

After receiving these evaluations, McKinney applied to the Army Human Resources Command for a Purple Heart in connection with the October 2005 blast. His attached statement recounted that he "lost consciousness for about 5–10 seconds" after the explosion. J.A. 380. McKinney also relied on the statement from Gehrig, particularly for his description of McKinney's mind being "on a loop" after the blast. J.A. 398. McKinney submitted several medical opinions finding that he had suffered a TBI, though only Dr. DeLeon's tied it definitively to the October 2005 attack.

Human Resources Command requested that an Army doctor, Dr. Michael Sullivan, review McKinney's medical records. Dr. Sullivan concluded that, although

"[t]here is no doubt ... that [McKinney] was exposed to concussive forces, his TBI appears to be a cumulative [e]ffect as opposed to being caused by a specific event." J.A. 370. Human Resources Command denied the application, explaining that McKinney failed to provide sufficient documentation that he received treatment in connection with a TBI caused by the October 2005 attack. McKinney requested reconsideration, and Human Resources Command again denied his request.

McKinney appealed to the Board. As the applicant, McKinney had the burden of overcoming a "presumption of administrative regularity" by "proving an error or injustice by a preponderance of the evidence." 32 C.F.R. § 581.3(e)(2). The Board must deny an application "when the alleged error or injustice is not adequately supported by the evidence." *Id.* § 581.3(b)(4)(iv).

The Board determined that McKinney did not qualify for a Purple Heart. It found there was no evidence that McKinney "was treated by medical personnel for an injury/wound he received as a result of hostile action on or near 9 October 2005." J.A. 347. Neither McKinney's statement made a few days after the blast nor Gehrig's statement indicated that McKinney was wounded; Gehrig indicated only that McKinney was dazed. The Board also relied upon Dr. Sullivan's conclusion that McKinney's TBI was caused by the cumulative effect of "multiple concussive forces," not a specific event. J.A. 348.

McKinney filed a claim under the Administrative Procedure Act ("APA") in the District Court for the

District of Columbia, alleging the Board's action was arbitrary and capricious. The court granted summary judgment to the Army. After assessing the medical evidence, the district court held it was not arbitrary or capricious for the Army to deny the award because McKinney failed to establish that his injury would have required treatment by a medical officer. McKinney timely appealed.

II.

This court has exercised jurisdiction to review a denial of a Purple Heart award. *Cf. Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014). Under the APA, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. The Board's decision to deny an application constitutes final agency action. 32 C.F.R. § 581.3(g)(2)(i)(A).

Several principles guide the relevant standard of review. First, we review the district court's grant of summary judgment de novo. *See Kidwell v. Dep't of the Army*, 56 F.3d 279, 286 (D.C. Cir. 1995). Second, the Board's actions in correcting military records will be set aside "if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Haselwander*, 774 F.3d at 996 (quoting 5 U.S.C. § 706(2)(A)). Third, the Board's decision must demonstrate reasoned decisionmaking. *See id.*

Our review of Board decisions involves "an unusually deferential application of the 'arbitrary or capricious'

standard." *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989). Because of the Secretary's broad statutory discretion, "[i]t is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act '*when he considers it necessary* to correct an error or remove an injustice.' " *Id.* (quoting 10 U.S.C. § 1552(a)) (emphasis in original). Moreover, we cannot lose sight of the fact that " '[j]udges are not given the task of running the Army,'" so our review asks only if the Board's decisionmaking "process was *deficient*, not whether [its] decision was *correct*." *Id.* at 1511 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S.Ct. 534, 97 L.Ed. 842 (1953)) (emphasis added).

The parties suggest that the Board's decision here must also be supported by substantial evidence. But that standard of review applies only to formal adjudications. 5 U.S.C. § 706(2)(E); *Phoenix Herpetological Soc'y v. U.S. Fish & Wildlife Serv.*, 998 F.3d 999, 1005 (D.C. Cir. 2021). The Board's adjudication of a denial of a Purple Heart is informal and so that standard does not apply here.[1] We review the Board's informal adjudication under the arbitrary and capricious standard.

1. Congress sometimes specifies by statute that a particular informal adjudicatory decision be supported by substantial evidence. Adjudications to correct a military record must be supported by substantial evidence if the Board adjudicating the claim has been "designated as a special board by the Secretary." 10 U.S.C. § 1558(b)(1)(A) & (B); *id.* § 1558(f)(3)(B). The record contains no evidence that the Secretary designated the Board reviewing McKinney's application as a special board, nor do the parties suggest that such a designation was made.

Appendix A

III.

To qualify for a Purple Heart, McKinney had to establish three elements: (1) that he received a qualifying injury; (2) that the injury required treatment by a medical officer; and (3) that the medical treatment was documented in his records. Army Reg. 600-8-22 ¶ 2-8*k*.

Not all injuries received during military service qualify for a Purple Heart. As relevant here, a "[m]ild traumatic brain injury or concussion" qualifies only if it was "severe enough to cause either loss of consciousness or restriction from full duty due to persistent signs, symptoms, or clinical finding, or impaired brain function for a period greater than 48 hours from the time of the concussive incident." *Id.* ¶ 2-8*g*(6). But a mild TBI that "do[es] not either result in loss of consciousness or restriction from full duty for a period greater than 48 hours due to persistent signs ... of impaired brain function" does not qualify for the Purple Heart. *Id.* ¶ 2-8*h*(13).

Although it is undisputed that McKinney suffered a TBI because of his military service, the Board reasonably determined that McKinney did not demonstrate a qualifying injury caused by the October 2005 attack. It relied on McKinney's thorough statement from the day after the explosion, in which he did not state that he lost consciousness, report any symptoms of impaired brain function, or indicate he was otherwise injured in the blast. Crediting this contemporaneous statement, rather than McKinney's later recollections, was neither arbitrary nor capricious. Moreover, Gehrig, McKinney's only witness,

did not indicate that McKinney was injured following the incident, only dazed. Being dazed would not qualify for a Purple Heart.

In the same vein, we think the Board's determination that McKinney's TBI resulted from a cumulative effect, as opposed to the October 2005 attack, was reasonable. McKinney relies on Dr. DeLeon's assessment that the October 2005 attack caused McKinney's TBI and led to his subsequent stroke. The Board's decision takes account of that assessment, but it credited Dr. Sullivan's subsequent opinion that cumulative exposures caused his TBI. The Board therefore "reasonably reflect[ed] upon the information contained in the record and grapple[d] with contrary evidence." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). Because the Board complied with these standards, we cannot second-guess its decision. The Board permissibly found the evidence lacking that McKinney received a qualifying injury in the October 2005 attack, so we need not address McKinney's arguments as to the second and third requirements.

McKinney also faults the Board for its brief analysis. The analysis, however, has sufficient clarity for us to discern the Board's rationale. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) ("[A]n agency's decision [need not] be a model of analytic precision to survive a challenge."). This is not a case in which the Board simply inserted "boilerplate language" or "parrot[ed] the language" of the governing regulation "without providing an account of how it reached its results." *Id.* at 1405. On the contrary, the Board's decision here, while concise, satisfies

the APA's requirement to "minimally contain a rational connection between the facts found and the choice made." *Id.* at 1404 (cleaned up). The Board's decision meets that minimal standard.

* * *

Sergeant First Class (Retired) McKinney sacrificed a great deal in service to the Nation. This decision in no way detracts from his honorable service or discounts the severity of his medical problems in the years since his retirement. In deciding this case, however, the court is limited to considering the reasonableness of the Board's decision. Under these standards we affirm the judgment of the district court.

So ordered.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MAY 26, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 18-cv-371 (TSC)

HUGH C. MCKINNEY

Plaintiff,

v.

MARK T. ESPER

Defendant.

MEMORANDUM OPINION

While deployed in Iraq, Plaintiff Hugh McKinney's National Guard unit experienced an improvised explosive device (IED) attack in 2005. (ECF No. 1 (Compl.) ¶ 9.) Plaintiff requested a Purple Heart for injuries sustained during this attack, but his request was denied three times by the U.S. Army Human Resources Command, and a fourth time on appeal before the Army Board for Correction of Military Records (Board). (*Id.* ¶¶ 35-41, 45.) Plaintiff sued the Secretary of the Army, David Esper, under the Administrative Procedure Act, 5 U.S.C. §§ 701-

06 (APA), arguing that the Board's denial was arbitrary, capricious, and unlawful. 5 U.S.C. § 706(2)(A).

Defendant has moved to dismiss Count II for lack of jurisdiction, and for summary judgment on Counts I and III. (ECF No. 8 (Def. MTD/MSJ).) Plaintiff has cross-moved for summary judgment on all counts. (ECF No. 11 (Pl. MSJ).) Having considered the entire record, and for the reasons stated below, Defendant's motions will be GRANTED, and Plaintiff's motion will be DENIED.

I. STANDARD

A. Summary Judgment

"[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083, 348 U.S. App. D.C. 77 (D.C. Cir. 2001); *see also Richards v. INS*, 554 F.2d 1173, 1177, 180 U.S. App. D.C. 314 & n.28 (D.C. Cir. 1977). If the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it shall be set aside. 5 U.S.C. § 706(2)(A). Review under the arbitrary and capricious standard, however, is "highly deferential" and "presumes the agency's action to be valid." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283, 211 U.S. App. D.C. 313 (D.C. Cir. 1981); *see also Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) ("[A] reviewing court may not set aside an agency [decision] that is rational, based on

consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute.")

Military board decisions are entitled to even greater deference than other agency actions. *Piersall v. Winter*, 435 F.3d 319, 324, 369 U.S. App. D.C. 207 (D.C. Cir. 2006). The court need only find that the Board's decision "minimally contain a rational connection between the facts found and the choice made." *Frizelle v. Slater*, 111 F.3d 172, 176, 324 U.S. App. D.C. 130 (D.C. Cir.1997) (internal quotation marks and citations omitted). This does not, however, dispense with the mandate that the Board's action "be supported by reasoned decisionmaking," *Haselwander v. McHugh*, 774 F.3d 990, 990, 413 U.S. App. D.C. 302 (D.C. Cir. 2014), and respond to all of Plaintiff's non-frivolous arguments. *Frizelle*, 111 F. 3d at 177.

B. Motion to Dismiss

In assessing standing on a motion to dismiss, a court must "accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Arpaio v. Obama*, 797 F.3d 11, 19, 418 U.S. App. D.C. 163 (D.C. Cir. 2015) (internal quotation marks and citations omitted). A complaint may be dismissed "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." *Totten v. Norton*, 421 F. Supp. 2d 115, 119 (D.D.C. 2006) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (internal quotation marks omitted). A court has discretion to consider materials outside the pleadings to determine

its jurisdiction. *See Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107, 368 U.S. App. D.C. 297 (D.C. Cir. 2005).

II. ANALYSIS

A. Count II

Count II alleges that the Board violated the APA in refusing to unconditionally excuse any alleged untimeliness of Plaintiff's Purple Heart request. (Compl. ¶¶ 59-67.) It is true that the Board did not "unconditionally" excuse any alleged untimeliness. (ECF No. 19-1, Administrative Record (AR) at 8.) It is also true, however, that notwithstanding any timeliness issue, the Board nonetheless "elected to conduct a substantive review," of the request and dismissed the application on the merits, not due to untimeliness. (*Id.*)

Defendant argues that Plaintiff suffered no injury in fact, and therefore lacks Article III standing. (Def. MTD/MSJ at 12.) *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (requiring for standing, *inter alia*, a judicially cognizable injury that is "concrete and particularized" and "actual and imminent, not conjectural or hypothetical.") The court agrees with Defendant; neither the Complaint nor Plaintiff's briefing claim that the failure to "unconditionally" excuse alleged untimeliness injured Plaintiff in any way. (Compl. ¶¶ 59-67; Pl. MSJ at 27-28; ECF No. 17 (Pl. Reply).) To the contrary, because the Board reached the merits of Plaintiff's request, any failure to unconditionally excuse alleged untimeliness played no role in its decision to deny Plaintiff

the Purple Heart. Therefore, the court finds that even if the Board violated the APA by failing to unconditionally excuse any alleged untimeliness, Plaintiff has no standing because he suffered no judicially cognizable injury. Defendant's motion to dismiss Count II will be granted.

B. Counts I & III

Counts I and III allege that the Board's denial of Plaintiff's application for a Purple Heart was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of the APA. 5 U.S.C. § 706(2)(A). The Board "may correct any military record" when it "considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). "The applicant has the burden of proving an error or injustice by a preponderance of the evidence." 32 C.F.R. § 581.3(e)(2). Here, the Board found that "there is no evidence in the available record, and neither the applicant nor his counsel submitted sufficient evidence" indicating that Plaintiff qualifies for a Purple Heart. (AR at 12.)

While it is a close case, the court finds that the Board's conclusion was neither arbitrary nor capricious. Pursuant to Army Regulation 600-8-22, a Purple Heart shall be awarded if the service member was (1) wounded, injured, or killed in hostile action, terrorist attack, or friendly fire; (2) the wound or injury required medical treatment; and (3) "the records of medical treatment . . . have been made a matter of official Army records." Army Reg. 600-8-22 §§ 2-8(c), 2-8(l)(3) (2019).

This case turns on the second element, that the injury "required" medical treatment. Army Reg. 600-8-22 § 2-8(c). The term "treatment" is not all-encompassing. First, it must be "treatment, not merely examination." *Id.* The regulation also provides that "mandating rest periods, light duty, or 'down time' and/or the administration of pain medication . . . in the absence of persistent symptoms of impairment following concussive incidents do not constitute qualifying treatment for a concussive injury." Army Reg. 600-8-22 § 2-8(j)(2). The regulation also provides a nonexclusive list of treatments that do not qualify as treatment:

> (a) Referral to neurologist or neuropsychologist to treat the diagnosed mTBI or concussion.
>
> (b) Rehabilitation (such as occupational therapy, physical therapy, and so forth) to treat the mTBI or concussion.
>
> (c) Restriction from full duty for a period of greater than 48 hours due to persistent signs, symptoms, or physical finding of impaired brain function due to the mTBI or concussion.

Army Reg. 600-8-22 §§ 2-8(j)(1)(a)-(c). The treatment must normally be rendered by a "medical officer."[1] Army Reg. 600-8-22 § 2-8(c). If, however, a medical officer was unavailable, the Purple Heart may still be awarded if "a

1. A medical officer is defined as a physician with officer rank. Army Reg. 600-8-22 § 2-8(c)(4).

medical professional other than a medical officer" provided the treatment and "a medical officer" states in writing that "the extent of the wounds were such that they would have required treatment by a medical officer if one had been available." Army Reg. 600-8-22 § 2-8(c)(2) .

As the Board correctly determined, Plaintiff's evidence does not meet these requirements. Plaintiff admits that he "did not seek medical attention at the time" from a medical officer or a medical professional. (Pl. MSJ at 4-5.) Instead, he asserts that he meets the required treatment element by virtue of a letter written over eight years after the incident by Dr. Robin J. DeLeon stating that:

> Under current medical protocols is [sic] would be expected that [applicant] be removed from duty and immediately report to a medical facility for further evalaution [sic] and treatment. He would not return to duty till cleared by medical providers. The [Military Acute Concussion Evaluation] examination [sic], however, did not exist on the battlefield in 2005.

(AR at 27; AR at 130.) Dr. DeLeon's conclusion, though coming close to satisfying the Army Regulation requirements, nonetheless falls short. He states that treatment would be "expected," but a Purple Heart can only be awarded if the wound or injury "required" treatment. Army Reg. 600-8-22 § 2-8(c). The letter also does not specify what type of treatment, if required, would have been given; but not all treatments qualify,

and Plaintiff bears the burden of showing that his injury required qualifying treatment. (AR at 130.) Finally, the regulation requires that the statement be from a medical officer, *see* Army Reg. 600-8-22 § 2-8(c), and though Dr. DeLeon was once a medical officer, he was not one when he wrote the letter. (AR 78-80.) For these reasons, Dr. DeLeon's letter does not remedy the absence of actual required treatment by a medical officer, and no other evidence in the record fills that essential gap.[2] Therefore, the Board's decision to not award a Purple Heart is supported by the record.

Moreover, though brief, the Board's decision is "supported by reasoned decisionmaking," *Haselwander*, 774 F. 3d at 990, and, as required, responds to all of Plaintiff's non-frivolous arguments. *Frizelle*, 111 F.3d at 177. In reaching its conclusion, the Board properly framed Plaintiff's argument about the required treatment as follows: "The applicant states that although a medical officer was not present at the time of the blast, his subsequent medical record does include the required statements that the extent of his wounds was such that they would have required treatment by a medical officer if one had been available to treat him." (AR at 8.) The Board then concluded, however, that neither the record nor Plaintiff's submissions provided sufficient evidence. The Board also cited to the provision specifying the required

2. Plaintiff cites to portions of the Administrative Record as evidence that treatment was or would have been required. (Pl. MSJ at 33 (citing AR at 28; AR at 78; AR at 88).) While this evidence describes his injury, it does not establish the required treatment element.

treatment level. *Id.* at 12 (citing Army Regulation 600-8-22 § 2-8 for the proposition that "limited duty following the incident and pain medication to treat headaches" does not qualify as treatment for purposes of the Purple Heart.) And, though the Board's opinion did not specifically respond to Dr. DeLeon's letter, it did respond to the broader argument regarding the required treatment element. *Id.* That was sufficient because the Board must respond to all non-frivolous arguments; not to every item of evidence. *Frizelle*, 111 F.3d at 177.

While the Board's reasoning could certainly be clearer and more thorough, this court must evaluate its decision "under an unusually deferential application of the arbitrary or capricious standard of the [APA]." *Cone v. Caldera*, 223 F.3d 789, 793, 343 U.S. App. D.C. 117 (D.C. Cir. 2000) (quoting *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514, 275 U.S. App. D.C. 390 (D.C. Cir. 1989) (internal quotation marks omitted). The Board's decision need only "minimally contain 'a rational connection between the facts found and the choice made." *Frizelle*, 111 F.3d at 176. Under that standard, the court will uphold the Board's reasoning.

Plaintiff also argues that the Board's decision was arbitrary and capricious because it "fashioned a requirement nowhere found" in the controlling regulation, namely that substantiating medical evidence "at the time or near the time of the incident must be provided." (Pl. Reply at 1, 7.) Plaintiff is correct that the Board recited this requirement, and that it is not in the controlling regulation. (*See* AR at 12; Army Reg. 600-8-22 § 2-8.) But

Plaintiff omits the last portion of the Board's description of the requirement, which makes clear that the Board, at most, only applied that temporal requirement to substantiation of the injury itself, *not* to the issue of whether treatment was required. (Pl. Reply at 1; AR at 12.) The Board's description states:

> According to the applicable regulation, to qualify for an award of Purple Heart, substantiating medical evidence at the time or near the time of the incident must be provided to verify that the wound was the result of hostile action, the wound must have required treatment by medical personnel, and the medical treatment must have been made a matter of official record."

(AR at 12.) Thus, even if the addition of "at the time" is improper, the full sentence illustrates that the Board did not apply that language to the dispositive element: that "the wound must have required treatment." *Id.*

Plaintiff also argues that the Board applied the wrong evidentiary standard, pointing out—correctly—that the proper standard is preponderance of the evidence, and that at one point, the Board used the term "conclusive evidence." (AR at 13.) Though the Board's use of that term is confusing and unhelpful, it was used in passing and does not purport to describe the evidentiary standard that the Board actually applied. The Board specifically stated elsewhere that there was "no evidence" in the record to establish that the required treatment element was met. (AR at 12.) That conclusion makes clear that the Board did

not apply a hybrid standard of preponderance of evidence and conclusive evidence; indeed it found no evidence. *Id.* "[A]n agency's decision [need not] be a model of analytic precision to survive a challenge," and a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Frizelle*, 111 F. 3d at 176 (quoting *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404, 314 U.S. App. D.C. 345 (D.C. Cir. 1995) (internal quotation marks omitted). Though the Board's use of the word "conclusive" is not explained, its analysis supports its conclusion, and for that reason its decision will be upheld.

Plaintiff also argues that the Board overlooked the fact that he lost consciousness. (Pl. Reply at 9.) But loss of consciousness is only relevant to proving an eligible injury; it has no bearing on whether Plaintiff's injury required treatment. According to the regulation, if an individual *neither* loses consciousness nor experiences impaired brain function for greater than 48 hours, then his "injury" does "not justify eligibility for the [Purple Heart]." Army Reg. 600-8-22 § 2-8(g). Plaintiff argues that because the Board highlighted the 48-hour rule without mentioning the loss of consciousness component, it ignored the facts suggesting he lost his consciousness. (Pl. Reply at 9.) Even if true, this portion of the regulation has nothing to do with the critical element of required treatment. Army Reg. 600-8-22 § 2-8(g). It deals only with what does or does not constitute a qualifying injury. *Id.* Therefore, the Board's incomplete statement of this rule did not undermine its finding that the required treatment element was not met.

Appendix B

III. CONCLUSION

There is no doubt that Plaintiff was injured while serving his country. But based on the evidence provided to the Board and to this court, the Board's decision that Plaintiff did not meet the specific requirements for a Purple Heart is supported by the record. Therefore, out of deference to the Army's efforts to administer the Purple Heart award, and in accordance with Army Regulation 600-8-22, this court must uphold the Board's decision. Defendant's motion to dismiss Count II and for summary judgment on Counts I and III will be granted, and Plaintiff's Motion for Summary Judgment will be denied. A corresponding order will be issued simultaneously.

Date: May 26, 2020

/s/ *Tanya S. Chutkan*
TANYA S. CHUTKAN
United States District Judge

APPENDIX C — OPINION OF THE DEPARTMENT OF THE ARMY, DATED JANUARY 25, 2017

DEPARTMENT OF THE ARMY
ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS
251 18TH STREET SOUTH, SUITE 385
ARLINGTON, VA 22202-3531

January 25, 2017

AR20150013596, McKinney, Hugh C.

Mr. Hugh C. McKinney
5985 S 45th East
Idaho Falls ID 83406

Dear Mr. McKinney:

I regret to inform you that the Army Board for Correction of Military Records denied your application.

The Board considered your application under procedures established by the Secretary of the Army. I have enclosed a copy of the Board's Record of Proceedings. This decision explains the Board's reasons for denying your application.

This decision in your case is final. You may request reconsideration of this decision by letter to the above address only if you can present new evidence or argument that was not considered by the Board when it denied your original application.

Appendix C

A copy of the Board's decision and proceedings has been furnished to the Honorable Michael K. Simpson, Representative in Congress, 275 South 5th Avenue Suite 275, Pocatello, ID 83201, and to the counsel you listed on your application, Mr. Seth Watkins, Adduci Mastriani & Schaumberg LLP, 1133 Connecticut Avenue Northwest, Washington, DC 20036.

Sincerely,

Signed

Dennis W. Dingle
Director, Army Board for Correction
of Military Records

Enclosure

Appendix C

ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS
RECORD OF PROCEEDINGS

IN THE CASE OF: MCKINNEY, HUGH C.

BOARD DATE: JAN 24 2017

DOCKET NUMBER: AR20150013596

BOARD VOTE:

_____ _____ _____ GRANT FULL RELIEF

_____ _____ _____ GRANT PARTIAL RELIEF

_____ _____ _____ GRANT FORMAL HEARING

/s/ /s/ /s/ DENY APPLICATION

2 Enclosures

1. Board Determination/Recommendation

2. Evidence and Consideration

Appendix C

ENCLOSURE 1

ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS
RECORD OF PROCEEDINGS

IN THE CASE OF: MCKINNEY, HUGH C.

BOARD DATE: JAN 24 2017

DOCKET NUMBER: AR20150013596

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

/s/_____
CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

Appendix C

ENCLOSURE 2

ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS
RECORD OF PROCEEDINGS

IN THE CASE OF: MCKINNEY, HUGH C.
BOARD DATE: JAN 24 2017

DOCKET NUMBER: AR20150013596

THE BOARD CONSIDERED THE FOLLOWING EVIDENCE:

1. Application for correction of military records (with supporting documents provided, if any).

2. Military Personnel Records and advisory opinions (if any).

THE APPLICANT'S REQUEST, STATEMENT, AND EVIDENCE:

1. The applicant requests the Purple Heart.

2. The applicant states he should receive the Purple Heart for the reasons explained in the letter from his counsel.

3. The applicant provides a letter from his counsel, dated 7 August 2015, with 32 exhibits as listed in his counsel's "Table of Exhibits" on page 14.

Appendix C

COUNSEL'S REQUEST, STATEMENT, AND EVIDENCE:

1. Counsel is appealing the U.S. Army Human Resources Command (HRC), Award and Decorations Branch, Purple Heart denial decision.

2. Counsel states:

a. The applicant is eligible to receive the Purple Heart because he sustained a traumatic brain injury (TBI) from residuals of an improvised explosive device (IED) incurred in Iraq on 9 October 2005.

b. The 19 June 2014 disapproval memorandum states "medical documentation linking the date of 9 October 2005 for TBI and treatment were not provided."

c. The Awards and Decorations Branch unjustly denied the Purple Heart for an injury the applicant incurred in Iraq from an enemy explosion.

d. According to the applicant and his doctors, the concussive force of an IED blast caused him to sustain a TBI, which meets the intent of Army Regulation 600-8-22 (Military Awards) for award of the Purple Heart.

e. The applicant states that although a medical officer was not present at the time of the blast, his subsequent medical record does include the required statements that the extent of his wounds was such that they would have required treatment by a medical officer if one had been available to treat him.

f. The applicant relies on Army Regulation 600-8-22, which specifically permits the award in these circumstances.

g. Counsel states the Army's Purple Heart denial decision conflicts with a Department of Veterans Affairs (VA) award of a 100 percent disability rating due to service connected disability based on the same enemy explosion and subsequent head trauma.

3. Counsel provides 32 exhibits provided to him by the applicant.

CONSIDERATION OF EVIDENCE:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the Army Board for Correction of Military Records (ABCMR) to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so. While it appears the applicant did not file within the time frame provided in the statute of limitations, the ABCMR has elected to conduct a substantive review of this case and, only to the extent relief, if any, is granted, has determined it is in the interest of justice to excuse the applicant's failure to timely file. In all other respects, there are insufficient bases to waive the statute of limitations for timely filing.

2. With prior service in the United States Marine Corps and the United States Marine Corps Reserve, the applicant enlisted in the Idaho Army National Guard (IDARNG) for 6 years on 27 July 1998. He was awarded a cannon crewmember military occupational specialty. He extended his enlistment for 1 year on 16 April 2004.

3. State of Idaho Orders 125-032 were published on 29 June 2004 ordering the applicant to active duty for support of Operation Iraqi Freedom. He arrived in Iraq on or about 27 November 2004. He was assigned to Company B, 2nd Battalion, 116th Cavalry Division.

4. On 28 February 2005, the applicant extended his enlistment for 1 year.

5. The applicant's official record contains a self-authored sworn statement with diagrams dated 10 October 2005. In his sworn statement, he states:

a. On the night of 9 October 2005, he was riding in High Mobility Multipurpose Wheeled Vehicle (HMMWV) B9 sitting in the rear left seat behind the driver.

b. An IED exploded about 20 meters to his left front.

c. The IED was located on the edge of the left side of the road (his side of the HUMMV) at the base of a round metal light/power pole.

d. The bomb was strapped onto the light pole with barbed wire and the explosion sent shrapnel and debris

into another HMMWV. The blast also splintered and broke up the base of the light pole.

e. The other HMMWV was covered in a cloud of blast fragments and then drove forward with the other vehicles. Shrapnal, dirt, rocks and debris hit the ballistic plates around the gunner position of HMMWV B9. He and another Soldier immediately asked the gunner if he was alright, he was a little stunned from the concussion of the blast.

f. The gunner maneuvered the gun turret to the left and scanned the direction from the explosion and surrounding sectors for any sign of gunfire from buildings, the surrounding fields and stream beds near the center of the explosion. The bomb was located approximately 10 meters from the bridge.

g. The gunner did not see any identifiable targets to fire at so he did not deploy his weapon. The driver of HMMWV B9 immediately stopped the vehicle and backed up about 50 meters putting them about 70 meters from the center point of the IED blast. They cordoned off the bombsite on the south end of the explosion and the rest of the patrol pushed through and went north of the impact area and cordoned off the north side.

6. The applicant departed Iraq en-route to the United States on 30 October 2005. On 18 November 2005, he was released from active duty at the completion of his required active service. Among the awards listed on his DD Form 214 (Certificate of Release or Discharge from Active Duty) are the:

- Combat Action Badge
- Global War on Terrorism Service Medal
- Iraq Campaign Medal

7. On 8 January 2007 the applicant was honorably discharged from the IDARNG and transferred to the Retired Reserve.

8 The applicant provides a Green 27-Patrol/Convoy Debrief Form, 116th Brigade Combat Team, which states that on 9 October 2005, the 3rd Squad conducted a joint mounted patrol. It states "during the patrol they did a ... operation...During the patrol approximately 2020 hours the convoy was traveling northbound along Central Park Avenue West... when an IED detonated next to the 3rd vehicle in the patrol convoy."

9. He provides a sworn statement, dated 30 September 2011, from a master sergeant who states, in pertinent part:

a. He was the tactical commander of HMMWV B9, which was the last vehicle of a three vehicle patrol.

b. The patrol experienced an IED containing shrapnel, dirt and rocks. The applicant took the brunt of the blast and he seemed to not have realized that the blast had come and gone.

c. The applicant was dazed. It seemed that his mind was "on a loop" of the blast for a few minutes.

d. The applicant was in the left rear seat of HMMWV B9 which was the same side as the IED blast.

10. A review of the applicant's official military record fails to show that he was immediately treated by medical personnel for an injury he incurred as a result of hostile action by enemy forces.

11. In letters dated 22 October 2013 and 19 June 2014, the applicant was notified by the Department of the Army (DA), Awards and Decorations Branch, that his requests for the Purple Heart were denied. Prior to making its determination, the Awards and Decorations Branch requested a medical advisory opinion from a medical doctor assigned to the Physical Review Board. The doctor certified he had reviewed the applicant's medical records and supporting documentation. It is his opinion that the applicant's TBI condition is not related to combat actions of 9 October 2005. Both diagnostic and treatment factors must be present and documented in the medical record by a medical officer at or near the time of injury. The applicant's military medical treatment record contains no diagnosis of TBI and no treatment was recorded at or near the date in question. The doctor points out the applicant did not require medical treatment and continued with the mission by caring for other Soldiers. The incident reports noted no Soldiers were injured during or after the impact of the IED. The doctor concludes the applicant was exposed to concussive forces; however, his TBI appears to be a cumulative effect as opposed to being caused by a specific event. In conclusion, the doctor points out that a diagnosis of TBI by the VA is different than those required for the Purple Heart.

12. The applicant provides copies of numerous documents contained in his official record along with medical references pertaining to post-traumatic stress disorder and TBI. He provides copies of medical records, hospital progress notes, clinical evaluations and other references dated 2008 and later pertaining to injuries and illnesses incurred while he was in the service. He provides a Department of Veterans Affairs (VA) Rating Decision dated 15 May 2014, notifying him that his 10 percent service connected disability rating for TBI had been increased to 100 percent service-connected. In pertinent part,

a. prior to his deployment he had no medical issues.

b. a VA medical treatment progress note, dated 1 April 2008, states a medical doctor listed three major injuries: TBI from multiple IED incidents including amnesia, concentration problems, and headaches; right temporal stroke with further injury to an already damaged brain; and right C6 radiculopathy from a combination of IED, Kevlar use and frequent movement in HUMMVs.

c. a VA medical treatment progress note, dated 29 October 2008, states the applicant experienced four possible concussions in Iraq including 9 October 2005 wherein the applicant stated he lost consciousness for approximately five seconds. The medical provider states the applicant appears to endorse symptoms of PTSD related to TBI.

d. a VA medical treatment progress note, dated 31 December 2013, states the applicant experienced three exposures to explosions. The first two did not have the features of suffering from TBI because he did not report loss of consciousness or post traumatic amnesia. The third event in October 2005 is associated with post traumatic amnesia of less than one day duration.

e. in 2006, a TBI screening tool called the Military Acute Concussions Evaluation (MACE) was developed by the Department of Defense and the VA Brain Injury Center. At that time clinical practice guides were developed for use in the field during military operations. (This tool was not available during the applicant's deployment in 2005.)

REFERENCES:

1. Army Regulation 600-8-22, effective 25 June 2015, supersedes Army Directive 2011-07, 2012-05, and 2013-23. It states the Purple Heart is awarded for a wound sustained while in action against an enemy or as a result of hostile action. Substantiating evidence must be provided to verify that the wound was the result of hostile action, the wound must have required treatment by medical personnel, and the medical treatment must have been made a matter of official record. When considering this award, the key issue for commanders is the degree to which the enemy caused the injury. The regulation states mild TBI or a concussion severe enough to cause either loss of consciousness or restriction from full duty due to persistent signs, symptoms or clinical finding, or impaired

brain function for a period greater than 48 hours from the time of the concussive incident. In addition, a nonexclusive list of medical treatment for concussion that do not meet the standard of medical treatment for award of the Purple Heart includes limited duty following the incident and pain medication to treat headaches.

2. Military Personnel (MILPER) Message Number 11-125, issued by the U.S. Army Human Resources Command, dated 29 April 2011, stated the Secretary of the Army had approved Army Directive 2011-07 (Awarding the Purple Heart). This message expired with the publication of a new Army Regulation 600-8-22.

DISCUSSION:

1. There is no evidence in the available record, and neither the applicant nor his counsel submitted sufficient evidence showing he was treated by medical personnel for an injury/wound he received as a result of hostile action on or near 9 October 2005. According to the applicable regulation, to qualify for award of the Purple Heart, substantiating medical evidence at the time or near the time of the incident must be provided to verify that the wound was the result of hostile action, the wound must have required treatment by medical personnel, and the medical treatment must have been made a matter of official record. For concussion, a Soldier must be removed from full duty due to persistent signs, symptoms or clinical finding, or impaired brain function for a period greater than 48 hours.

2. In the sworn statement provided by the applicant dated

10 October 2005, he does not state he was wounded on 9 October 2005. In the sworn statement prepared by a master sergeant near the time of the incident, who does not identify himself as a medical provider, indicates the applicant was not injured only dazed.

3. In the processing of his Purple Heart request at HRC, an Army medical doctor reviewed all available evidence to include the applicant's medical records. He determined the applicant sustained multiple concussive forces with TBI appearing to be a result of a cumulative effect as opposed to being caused by a specific event.

4. A finding by the VA and award of service connected disabling ratings is insufficient evidence to award the Purple Heart unless the VA record contains conclusive evidence showing a Veteran received medical treatment by military medical personal at the time of the wounding.

//NOTHING FOLLOWS//