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## APPENDIX A

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### **United States Court of Appeals for the District of Columbia Circuit**

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Filed March 31, 2022 Decided March 31, 2022

No. 21-5230

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LYNN BROWN, as appointed successor and representative of now-deceased Plaintiff Howard M. Berry,

Plaintiff-Appellant

v.

CHRISTINE WORMUTH, in her official capacity as Secretary of the Army and LLOYD J. AUSTIN III, in his official capacity as Secretary of Defense,

Defendants-Appellees

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Before: HENDERSON, ROGERS and TATEL, *Circuit Judges*.

Order of the Court filed Per Curiam.

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

**ORDERED** that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The Army's decisions regarding correction of military records are entitled to an "unusually deferential application of the arbitrary or capricious standard of the Administrative Procedure Act." *Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000) (internal quotation marks omitted). Applying that standard, the district court correctly concluded that the Secretary of the Army's designee (the "Army") sufficiently articulated the reasons for denying appellant relief and that the decision was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *See Coburn v. Murphy*, 827 F.3d 1122, 1124 (D.C. Cir. 2016); *see also* 5 U.S.C. § 706(2)(A).

Under the Army's regulations, the "key issue" to be taken into consideration when contemplating an award of the Purple Heart "is the degree to which the enemy caused the [servicemember's] injury." Army Reg. 600-8-22, § 2-8(f), *Military Awards* (Dec. 11, 2006). In this case, the Army concluded that the causal connection between Nidal Malik Hasan's attack at Fort Hood and the shoulder injury sustained by Army Staff Sergeant Joshua Berry was insufficient to award Berry the Purple Heart. The Army's decisionmaking process, which relied on findings that Berry had not been "in the heat of the battle" and had

been struck by neither Hasan’s bullets nor “material propelled by the fired bullets (e.g., glass, concrete, wood, or plaster fragments),” was not deficient. *See McKinney v. Wormuth*, 5 F.4th 42, 46 (D.C. Cir. 2021) (“[W]e cannot lose sight of the fact that judges are not given the task of running the Army, so our review asks only if the [Army]’s decisionmaking process was deficient, not whether its decision was correct.”) (internal quotation marks and citation omitted), *cert. denied*, No. 21-915, 2022 WL 515965 (U.S. Feb. 22, 2022).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

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## APPENDIX B

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### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**Civil Case No. 17-2112**

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Lynn Brown,	)
	)
Plaintiff,	)
	)
v.	)
	)
Christine Wormuth,	)
Secretary of the Army, <sup>1</sup> et al.,	)
	)
Defendants.	)
	)

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### **MEMORANDUM ORDER**

For the past six years, the family of the late Army Staff Sergeant Joshua Berry (“SSG Berry”) has been trying to convince the Army to posthumously award him the Purple Heart. SSG Berry was stationed at the Fort Hood Army base on November 5, 2009, when Major Nidal Hasan opened fire on fellow

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<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 25(d), Secretary of the Army Christine E. Wormuth is automatically substituted for former Secretary Ryan D. McCarthy.

servicemembers and civilian law enforcement. SSG Berry leaped over a desk to take cover from multiple rounds fired at a set of metal doors behind which he was standing and, in doing so, dislocated his left shoulder. He was released from active duty following the attack and later died by suicide. Following SSG Berry's death, the late Howard M. Berry, SSG Berry's father and the original plaintiff in the action, petitioned the U.S. Army Decorations Board to award his son the Purple Heart. The Decorations Board denied the request in March 2015. Mr. Berry sought review of the denial and in April 2016, the U.S. Army Board for the Correction of Military Records ("ABCMR") recommended that SSG Berry be given the award. This conclusion was reversed six months later, however, when the Deputy Assistant Secretary of the Army ("DASA") rejected the ABCMR's recommendation. Mr. Berry then filed suit in this Court challenging the DASA's decision under the Administrative Procedure Act ("APA").

This Court has now twice remanded the DASA's determination to the Army for further explanation of its decision to deny SSG Berry the Purple Heart. The DASA has thus provided a third explanation of that determination, which is currently before the Court on the parties' cross-motions for summary judgment. The Army seeks affirmance of the DASA's decision not to award SSG Berry the Purple Heart, while SSG Berry's aunt, Lynn Brown, who was substituted as the plaintiff in this case following Howard Berry's death in June 2020, asks the Court to set the decision aside as arbitrary and capricious. For the following reasons, the Court sides with the Army.

## I. Background

SSG Berry was assigned to Fort Hood following a year-long deployment to Afghanistan. Am. Compl. ¶ 7. On November 5, 2009, Nidal Malik Hasan, an Army medical officer, perpetrated a mass shooting at Fort Hood that killed thirteen people and injured thirty others. *Berry v. Esper*, 322 F. Supp. 3d 88, 89 (D.D.C. 2018) (Cooper, J.). On the day of the shooting, SSG Berry was in a briefing room inside Building 42004, one of the buildings Hasan targeted. *Id.*; Administrative Record (“A.R.”) 223.<sup>2</sup> Next door was Building 42003, where most of the casualties occurred. Am. Compl. ¶ 8. SSG Berry heard shots fired outside of the room he was in and told the others in the room to take cover on the floor. *Berry*, 322 F. Supp. 3d at 89. He then heard bullets strike the room’s exterior metal doors and, in leaping over a desk to take cover, dislocated his shoulder. *Id.*

On April 25, 2011, an Army medical board found SSG Berry unfit for continued military service due to post-traumatic stress disorder, the shoulder injury received in the Fort Hood shooting, and degenerative arthritis of the spine. *See* A.R. 12–14. He was released from active duty the following month and placed on

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<sup>2</sup> There has been uncertainty throughout this case as to whether SSG Berry’s building was targeted in the attack. *See* Tr. Hrg Mot. at 8:03–11:12 (summarizing conflicting evidence). But as explained in more detail below, the DASA clarified in his May 2020 decision “that the greater weight of the evidence indicates that *the assailant did fire shots at the building*” that SSG Berry occupied. A.R. 223 (emphasis added).

the temporary disability retired list. *Id.* at 89. On February 13, 2013, SSG Berry died by suicide. *Id.* at 82.

Following the Army's announcement that servicemembers injured in the Fort Hood shooting were eligible for the Purple Heart, SSG Berry's father, the late Howard Berry, applied for the award to be given to his son posthumously. Am. Compl. ¶ 32; A.R. 6, 76.<sup>3</sup> The U.S. Army Decorations Board unanimously denied award of the Purple Heart on the grounds that SSG Berry's injury was not the result of enemy action and he was not in direct contact with the shooter. A.R. 6. By letter, the Decorations Board notified Mr. Berry of its decision and invited him to "apply to the [ABCMR] if he felt the decision was unjust or unfair." *Id.*

Taking the Decorations Board up on this offer, Mr. Berry filed an application with the ABCMR on December 6, 2015, requesting that SSG Berry's military records be corrected to reflect a posthumous award of the Purple Heart. Am. Compl. ¶ 37. The

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<sup>3</sup> Army regulations provide that a servicemember is entitled to the Purple Heart if wounded as the result of a terrorist attack committed by a foreign terrorist organization. 10 U.S.C. § 1129a; Army Reg. 600-8-22, ¶ 2-8(b)(1). In 2015, Congress clarified that servicemembers injured during attacks inspired by foreign terrorist organizations and committed by individuals who were in communication with such organizations could qualify for the award. *See* 10 U.S.C. § 1129a(b); Army Reg. 600-8-22, ¶ 2-8(b)(10)(b). In turn, the Secretary of the Army determined that servicemembers injured or killed in the Fort Hood shooting were eligible for the Purple Heart if they met the other regulatory criteria. *See* A.R. 78-79.

ABCMR recommended by a two-to-one vote that SSG Berry be given the award. A.R. 10. The ABCMR found that SSG Berry's shoulder injury constituted a qualifying "wound" from the attack. *Id.* at 9; *see* Army Reg. 600-8-22, ¶ 2.8(e) (2006). The ABCMR then considered "the degree to which the enemy (i.e., the terrorist) caused his injury," A.R. 9, which is a factor in the Army's Purple Heart regulations, Army Reg. 600-8-22, ¶ 2.8(f) (2006). Additionally, the ABCMR evaluated examples cited in the regulations as injuries that are Purple Heart-eligible, including those incurred "while making a parachute landing from an aircraft that had been brought down by enemy fire" or "as a result of a vehicle accident caused by enemy fire." A.R. 9. The ABCMR differentiated SSG Berry's injury from these examples on the ground that SSG Berry was injured as the result of his own decision to take cover rather than enemy force. *Id.* Yet, the ABCMR was persuaded that SSG Berry would not have sought cover if not for the shots fired outside of Building 42004. *Id.* The ABCMR thus recommended that the Army award SSG Berry the Purple Heart. *Id.* at 10.

A few months later, the then-DASA, Honorable Francine C. Blackmon, exercised her authority to override the ABCMR's recommendation. *Id.* at 2. The DASA supported her decision with a single-paragraph letter, stating:

I have reviewed the findings, conclusions, and Board member recommendations. I find there is not sufficient evidence to grant relief.

Therefore, under the authority of [10 U.S.C. § 1552], I have determined that the facts do not support a conclusion that [SSG Berry's] injury met the criteria for a Purple Heart.

*Id.*

In October 2017, Mr. Berry responded with this action for review of the DASA's decision under the APA. *See* Compl. The following August, this Court ruled in Berry's favor. The Court reasoned that it was unable to "meaningfully evaluate" the Army's denial of the Purple Heart to SSG Berry because the DASA "summarily disagreed" with the eight-page ABCMR recommendation without any obvious support in the Administrative Record. *Berry*, 322 F. Supp. 3d at 91. The Court therefore remanded the case to the Army to explain why the DASA's "cursory denial" of the Purple Heart was not arbitrary and capricious. *Id.* The Court specifically requested clarification on the causation of SSG Berry's injury and the evidence relied upon by the DASA in reversing the ABCMR. *Id.* at 92.

On December 19, 2018, the DASA issued a new letter again finding that SSG Berry did not qualify for the Purple Heart. A.R. 199–201. Expanding on the limited reasoning of her first letter, the DASA explained that even severe injuries "sustained in a kinetic combat environment" do not qualify for the Purple Heart if not directly caused by the enemy. *Id.* at 200. Although the DASA concluded that SSG Berry would not have dove for cover and injured his

shoulder if it weren't for the assailant's gunfire, she nonetheless concluded that there was an insufficient causal connection between Hasan's actions and SSG Berry's injuries to qualify him for the Purple Heart. *Id.* Additionally, the DASA noted that the regulations specifically exclude "self-inflicted wounds" from consideration for the Award, with an exception for those wounds sustained in the "heat of battle." *Id.* at 200–01 (citing Army Reg., 600-8-2 ¶ 2.8(h)(9)). But the DASA found that the exception did not apply to SSG Berry, who, in her view, had not entered the heat of battle when he was injured. *Id.* at 201. The DASA further noted that the phrase "self-inflicted wounds" implies an accidental discharge of one's weapon." *Id.* (quoting Army Reg. 600-8-2 ¶ 2.8(h)(9)). Accordingly, the DASA concluded that because "SSG Berry's injury was not the result of an outside force or agent," there was "an insufficient causal connection" between the injury and the attack to make him eligible for the Purple Heart. *Id.*

Mr. Berry then amended his complaint to request judicial review of the DASA's December 19, 2018, decision. *See* Am. Compl. Following a second round of summary judgment briefing, the Court held a hearing on the cross-motions. Ruling from the bench, the Court again sided with Mr. Berry. The Court reasoned that the DASA's latest decision did not attempt to reconcile the competing evidence on whether SSG Berry heard gunshots outside the building and dove for cover, or whether he took cover because the perpetrator shot directly at the building. Tr. Mot. Hr'g at 10:01–10:07. Additionally, the Court could not adequately discern the reason for the

DASA's conclusions regarding causation and the inapplicability of the heat-of battle exception. *Id.* at 11:20–11:23. The Court thus once again remanded the case to the Army for further explanation of its decision. *See* Feb. 20, 2020, Min. Order.

On May 12, 2020, the Honorable Alexander Conyers (who had since succeeded Ms. Blackmon as DASA) issued a five-page letter to “address the Court’s concerns” by clarifying the factual findings and more fully explaining the decision to deny SSG Berry the Purple Heart. A.R. 222–26 (hereinafter, the “May 2020 Letter”). That letter is the basis for today’s decision, so the Court will describe it in some detail.

DASA Conyers began by noting that he “fully concur[red] with [his] predecessor’s decision, and, with some exceptions, fully incorporate[d] . . . her reasons and rationale” into his decision. *Id.* at 222. He proceeded to make the following factual findings: (1) that the greater weight of the evidence indicates that the assailant used a handgun to fire shots at the building in which SSG Berry was located, *id.* at 223; (2) that the assailant did not enter the room SSG Berry was occupying, *id.*; (3) that SSG Berry was “[s]heltering in place” at the time of the shooting, *id.* at 225; (4) that “[t]he causal force of [SSG Berry’s] injury was far more attributable to [his] decision to dive to the floor than it was to the assailant’s gunfire[,]” *id.* at 224; and (5) that his injury did not fall into the “heat of battle” self-inflicted wound exception, *id.* at 225.

The Army subsequently moved for summary

judgment, arguing that DASA Conyers' May 2020 denial was adequately explained and supported by the record, and therefore must be upheld under the APA. Ms. Brown, who had since succeeded the late Mr. Berry as plaintiff, see Consent Mot. to Sub. Party, opposed the motion and cross-moved for summary judgment, arguing that the May 2020 letter is, like the ones before it, arbitrary and capricious. Rather than remand the decision to the Army for a third time, Brown asks that the Court order the Army to award SSG Berry the Purple Heart. Pl. Mot. for Summ. J. at 14 (hereinafter, "Pl. MSJ"). The parties' motions are ripe for the Court's resolution.

## II. Legal Standards

### A. Summary Judgment Under the Administrative Procedure Act

Summary judgment is the proper stage for determining whether, as a matter of law, an agency action is supported by the administrative record and otherwise complies with the APA. *Richards v. Immigr. & Naturalization Serv.*, 554 F.2d 1173, 1177 (D.C. Cir. 1977). Under the APA, 5 U.S.C. § 706(2)(A), "[a] court shall set aside the [agency's] action, findings, and conclusions regarding the correction of military records if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014) (cleaned up). The court must determine whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational

connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). If the agency action is reasonable, the court must accept it. *Roberts v. Harvey*, 441 F. Supp. 2d 111, 118 (D.D.C. 2006).

### B. Military Deference

The Secretary of the Army, acting through the ABCMR, may correct any military record of the Secretary’s department when the Secretary considers it necessary to correct an error or remove an injustice. 10 U.S.C. § 1552(a)(1). An application for correction of a military record is considered by a panel of at least three ABCMR members. 32 C.F.R. § 581.3(e)(3)(i). The ABCMR members are charged with the responsibility to “[r]eview all applications that are properly before them to determine the existence of error or injustice.” *Id.* § 581.3(b)(4)(i). The ABCMR will recommend a correction if it determines that “the preponderance of the evidence shows that an error or injustice exists” in an applicant’s records. *Id.* § 581.3(e)(3)(iii)(A).

The Secretary has “broad discretion in administering the correction of military records.” *Haselwander*, 774 F.3d at 996. Still, the action must be supported by “reasoned decisionmaking.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (cleaned up).

As a military review board, the ABCMR is entitled to even greater deference than civilian

administrative agencies. *Coe v. McHugh*, 968 F. Supp. 2d 237, 240 (D.D.C. 2013) (citing *Calloway v. Brownlee*, 366 F. Supp. 2d 43, 53 (D.D.C. 2005)). Accordingly, courts reviewing an ABCMR decision adhere to an “unusually deferential application of the arbitrary and capricious standard.” *Kreis*, 866 F.2d at 1514. The reviewing court’s role is limited to determining whether “the decision making process was deficient, not whether [the] decision was correct.” *Dickinson v. Sec’y of Def.*, 68 F.3d 1396, 1405–06 (D.C. Cir. 1995) (quoting *Kreis*, 866 F.2d at 1511). Courts must uphold the ABCMR’s decisions so long as they “minimally contain[] a rational connection between the facts found and the choice made.” *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997) (cleaned up). “[A] party seeking review of a board decision bears the burden of overcoming the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully and in good faith.” *Roberts v. Geren*, 530 F. Supp. 2d 24, 33 (D.D.C. 2007) (quoting *Frizelle*, 111 F.3d at 177).

## II. Analysis

Ms. Brown claims that DASA Conyers’ May 12, 2020, decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law because it is unsupported by the administrative record. In so doing, Brown renews her prior arguments that the Army distorted the applicable legal standards and failed to consider relevant evidence regarding the cause of SSG Berry’s injuries. The Army disagrees, insisting that the DASA examined the relevant

evidence and adequately explained his conclusion that the Purple Heart criteria were not satisfied. Mindful of the heightened deference accorded to the Army's decision in this case, the Court's analysis proceeds in two parts. First, the Court evaluates whether the factual findings made by DASA Conyers in the May 2020 letter have adequate support in the record. Second, the Court considers whether the DASA provided a rational connection between those findings and his conclusion.

#### A. Factual Findings

Courts reviewing agency determinations under the APA "adopt the agency's factual findings as conclusive if supported by substantial evidence." *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009); *see also Kight v. United States*, 850 F. Supp. 2d 165, 170 (D.D.C. 2012) (applying "substantial evidence" test to military decision). The "substantial evidence" standard may be satisfied "even though a plausible alternative interpretation of the evidence would support a contrary view." *Dillmon*, 588 F.3d at 1089. In determining whether this standard has been met, the court is not to function as a "super correction board" by reweighing the evidence. *Kight*, 850 F. Supp. 2d at 170 (quoting *Charette v. Walker*, 996 F. Supp. 43, 50 (D.D.C. 1998)).

DASA Conyers made several factual findings, only one of which Brown contests. Before turning to that dispute, the Court will briefly recount the relevant findings upon which both parties agree. First, the DASA found that Hasan fired shots at the building in

which SSG Berry was located. A.R. 223. Relatedly, the DASA found that while some of the shots hit the building, Hasan never entered the room that SSG Berry occupied. *Id.* Additionally, the DASA found that SSG Berry’s “shoulder separation occurred when [he] deliberately (and quite advisedly) dove to the floor after apprehending the assailant’s actions near his building.” *Id.* at 224. These findings are both undisputed and supported by extensive evidence in the record. *See* Pl. MSJ at 2–3; see, e.g., A.R. 5–7, 12, 40–43, 50, 52–53, 55, 58, 72.

Turning to the lone disputed finding, DASA Conyers concluded that SSG Berry was “[s]heltering in place” when he was wounded. A.R. 225. Brown contests this characterization, arguing that the evidence “shows that [SSG Berry] dove for cover when Hasan fired three rounds at the doors behind which [he] was standing, attempting to kill him.” Pl. MSJ at 11.<sup>4</sup> The Army does not dispute the fact that Hasan

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<sup>4</sup> Relatedly, Brown argues that DASA Conyers failed to consider evidence indicating that Hasan shot at SSG Berry specifically and that “[s]hooting at a building is obviously different from shooting at and attempting [to] kill someone inside a building.” *See* Pl. MSJ at 7. Brown asserts that “[t]he latter is far more purposeful, direct and potentially deadly.” *Id.* at 7–8. Brown fails to explain how this distinction might affect DASA Conyers’ analysis. As explained in more detail below, DASA Conyers concluded that SSG Berry’s shoulder injury was attributable to his decision to dive to the floor to avoid Hasan’s gunfire and that the heat-of-battle exception did not apply to an injury sustained while “temporarily seek[ing] cover.” A.R. 223. Neither conclusion is implicated by the purported distinction between shooting at SSG Berry’s location versus shooting at SSG Berry. Indeed, the government does not contest that Hasan “did shoot at” SSG Berry. Def. MSJ at 3.

was shooting at SSG Berry's location when he dove for cover. And, as Brown points out, *id.* at 10, the DASA acknowledged that SSG Berry's decision to "shelter[] in place" rather than engage the shooter was "the smart thing, and probably what he was trained to do[.]" A.R. 225. The wisdom of SSG Berry's judgment, however, is irrelevant to whether, as a factual matter, he was injured while sheltering in place. Substantial and uncontested evidence shows that, rather than exit the building and engage with Hasan, SSG Berry dove for cover inside a building secured by metal doors and concrete walls. *See Am. Compl.* ¶ 10; A.R. 5, 40–43, 52, 225. Other than Brown's assertion that the DASA's characterization of that evidence is mistaken, the Court finds no reason to disturb the finding that SSG Berry was sheltering in place when he dislocated his shoulder. The Court therefore credits this factual finding as well.

In sum, the Court is satisfied that the DASA's factual findings are supported by substantial evidence and adopts them as conclusive for the remainder of its analysis.

## B. Application

The Court next considers whether DASA Conyers' May 2020 letter "minimally contains a rational connection between the facts found and the choice made." *Frizelle*, 111 F.3d at 176. According to Brown, the Army fails to clear this low bar because the DASA inadequately explained his determination regarding (1) the causation requirement, and (2) the heat-of-battle exception for self-inflicted wounds. The Court

addresses these issues in turn.

### 1. Causation

A member of the Army is eligible for the Purple Heart if he or she was (1) wounded, injured, or killed in hostile action, terrorist attack, or friendly fire; (2) the wound or injury required medical treatment; and (3) “[t]he 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) (2006). This case turns on the first factor: the degree to which the enemy or hostile force caused the wound. In his May 2020 letter, DASA Conyers concluded that SSG Berry’s injury was not sufficiently caused by a hostile force because the injury was “more attributable to [SSG Berry’s] decision to dive to the floor” than to the gunfire. A.R. 224. In reaching this conclusion, the DASA acknowledged that Hasan shot at the building in which SSG Berry was located and that the shooting prompted SSG Berry to dive for the floor. *Id.* at 223–24. Nonetheless, the DASA reasoned that the shoulder injury was more attributable to his decision to “deliberately (and quite advisedly) [dive] to the floor after apprehending the assailant’s actions near his building” than to the shooting itself. *Id.* at 224. The DASA noted that the causation requirement would be satisfied for “wounds sustained from bullet fragments and material propelled by the fired bullets (e.g., glass, concrete, wood, or plaster fragments).” *Id.* Here, by contrast, the DASA reasoned that the injury “was not caused by a fired bullet or by one or more propelled fragments” but instead by SSG Berry’s deliberate decision to dive for cover due to the shots

fired. *Id.* The DASA thus concluded that SSG Berry is ineligible for the Purple Heart.

Brown contests this conclusion, arguing that Hasan “plainly caused SSG Berry’s injury in any ordinary sense[.]” Pl. MSJ at 9–10. But regardless of what Brown (or, for that matter, the Court) may believe about causation “in any ordinary sense,” the Court’s “inquiry focuses not on whether the Army was substantively correct,” *Coe*, 968 F. Supp. 2d at 240 (cleaned up), but rather on whether the decision “minimally contains a rational connection between the facts found and the choice made,” *Frizelle*, 111 F.3d at 176 (cleaned up). Given that the DASA supplied such a connection here, the Court declines to opine on whether the conclusion was correct.

Relatedly, Brown argues that DASA Conyers failed to explain “why an injury sustained taking evasive action in response to direct enemy gunfire cannot be proximately caused by gunfire.” Pl. MSJ at 8–9. But the DASA’s decision did, in fact, respond to this question. He explained:

One might assert that any injury connected to the assaultive actions of an enemy should qualify for the Purple Heart, including injuries resulting from evasive actions intended to avoid the enemy’s assault. But Army and other DOD regulations specifically exclude injuries primarily attributable to a Soldier’s own efforts to avoid enemy fire. For instance, the Army regulation

excludes parachute jump injuries not caused by enemy action. The Navy Purple Heart regulation excludes “injuries sustained while seeking shelter, escaping, or evading.” The Marine Corps regulation provides that injuries “on the battlefield that are not caused either directly or indirectly by the effects of an enemy weapon do not meet eligibility requirements for the award even if they occur during an engagement with the enemy (e.g., a vehicle moving to a new firing position overturns in a ditch or a Marine falls while running for cover from a sniper).”

A.R. 224 (cleaned up). This explanation is based on a reasonable application of the relevant regulations to facts in the record. As such, it survives arbitrary and capricious review.

Brown’s arguments to the contrary are unavailing. First, Brown contends that the DASA’s decision is arbitrary and capricious because it improperly relied on Navy and Marine Corps regulations when interpreting the Army’s causation requirement. See Pl. MSJ at 12, 14. Granted, the DASA noted that the Navy deems evasive injuries ineligible for the award and the Marine Corps considers injuries eligible only if caused “by the effects of an enemy weapon[.]” A.R. 224 (cleaned up). But the DASA did not erroneously construe these regulations to be binding on his determination as to SSG Berry. In fact, the DASA expressly noted that these

provisions were “*not controlling on [his] decision*,” and merely “inform[ed]” the DASA that his causation finding was “not anomalous . . . to how the U.S. Armed Forces generally view and apply the Purple Heart criteria.” *Id.* (emphasis added). The Army’s decision to look to other services’ regulations for guidance when interpreting its own regulations is well within its discretion.

Brown also takes issue with the DASA’s reliance on the regulations’ examples of nonqualifying injuries. Again, the DASA reasoned that “Army and other DOD regulations specifically exclude injuries primarily attributable to a Soldier’s own efforts to avoid enemy fire,” including, for example, “the Army regulation exclud[ing] parachute jump injuries not caused by enemy action.” A.R. 224. According to Brown, the DASA improperly relied on “parachute/jump injuries not caused by enemy action” because “[p]arachute jump injuries are not subject to a blanket exclusion.” Pl. MSJ at 11–12. But whether parachute jump injuries are subject to a blanket exclusion is beside the point. The DASA cited to the exclusion of parachute jumps “*not caused by enemy action*” to illustrate the point that not all injuries merely “connected to the assaultive actions of an enemy” qualify for the Purple Heart. A.R. 224 (emphasis added). This logic holds regardless of whether all injuries involving parachute jumps are excluded from receiving the award.<sup>5</sup>

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<sup>5</sup> Brown also argues that the lack of a blanket prohibition on parachute jump injuries suggests that “[i]t is the facts and circumstances” of the injury that matter when applying the regulations. Pl. MSJ at 12. This argument misses the mark

## 2. Heat of battle

Among the examples of non-qualifying injuries listed in the Army's Purple Heart regulations are "[s]elf-inflicted wounds, except when in the heat of battle and not involving gross negligence." Army Reg. § 2-8(h)(8) (2006). Like his predecessor, DASA Conyers concluded that the heat-of-battle exception was inapplicable to SSG Berry's injuries. He explained:

[T]he phrase 'self-inflicted wound' connotes an accidental discharge of one's own weapon. I therefore find that SSG Berry's wound does not meet this criterion. I also find that SSG Berry had not entered the heat of battle, despite my earlier finding that the assailant fired shots at the building; that some shots hit the building; and that SSG Berry apprehended that shots were fired at the building. Sheltering in place behind concrete and metal walls and doors does not, in my estimation, constitute engagement in battle. To the extent there was a "battle" it was either completely one-sided in that the assailant was unilaterally firing his

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because DASA Conyers' May 2020 letter did, in fact, provide an extensive survey of the facts and circumstances surrounding SSG Berry's injury before concluding that "the *circumstances of this case* do not match" the criteria for the Purple Heart. A.R. 225 (emphasis added).

handgun, or it involved the assailant engaging in a firefight with civilian law enforcement outside the building. In my assessment, SSG Berry had not yet engaged in that battle at the relevant time. Instead, being unarmed, he did the smart thing . . . temporarily seek cover and assist his teammates.

A.R. 225.

Brown asks that the Court set aside this conclusion as contrary to Army Reg. 600-8-22, § 2-8(i), which provides: “It is not intended that such a strict interpretation of the requirement for the wound or injury to be caused by direct result of hostile action be taken that it would preclude the award being made to deserving personnel.” Pl. MSJ at 10. The Army rejoins that § 2-8(i) merely underscores the Army’s discretion to either award or deny the Purple Heart given the circumstances. Def. Opp. to Pl. Cross-Mot. at 6–7. The Army has the better of this argument. To be sure, the cited provision of § 2-8(i) cautions against draconian readings of the regulations that would deny the award to a servicemember that the Army finds deserving. But the provision does not thereby compel the Army to award the Purple Heart to a servicemember it deems ineligible. As the Army points out, immediately following the language cited by plaintiffs, § 2-8(i) continues: “Commanders must also take into consideration the circumstances surrounding an injury, *even if it appears to meet the criteria.*” *Id.* (emphasis added). In other words, § 2-8(i) highlights the Army’s discretionary authority to

apply the regulations to the particular circumstances of any given injury. DASA Conyers' May 2020 letter reflects a valid exercise of that authority.

### III. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Summary Judgment. A separate Order shall accompany this Memorandum Opinion

Date: August 31, 2021

/s/ Christopher R. Cooper  
Christopher R. Cooper  
United States District Judge

## **APPENDIX C**

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### **RELEVANT REGULATIONS**

#### **Army Regulation, AR 600-8-22, 2-8**

##### **2-8. Purple Heart**

a. The Purple Heart was established by General George Washington at Newburgh, New York, on 7 August 1782, during the Revolutionary War. It was reestablished by the President of the United States per War Department General Orders 3, 1932 and is currently awarded pursuant to Executive Order 11016, 25 April 1962; Executive Order 12464, 23 February 1984; Public Law 98-525, 19 October 1984 amended by Public Law 100-48, 1 June 19871; Public Law 103-160, 30 November 1993; Public Law 104-106, 10 February 1996; and Public Law 105-85, 18 November 1997.

b. The Purple Heart is awarded in the name of the President of the United States and per 10 USC 1131, effective 19 May 1998, is limited to members of the Armed Forces of the United States who, while serving under component authority in any capacity with one of the U.S. Armed Services after 5 April 1917, has been wounded or killed, or who has died or may hereafter die after being wounded—

(1) In any action against an enemy of the United States.

(2) In any action with an opposing armed force of a foreign country in which the Armed Forces of the United States are or have been engaged.

(3) While serving with friendly foreign forces engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party.

(4) As the result of an act of any such enemy of opposing Armed Forces.

(5) As the result of an act of any hostile foreign force.

(6) After 28 March 1973, as the result of an international terrorist attack against the United States or a foreign nation friendly to the United States, recognized as such an attack by the Secretary of Army, or jointly by the Secretaries of the separate armed services concerned if persons from more than one service are wounded in the attack.

(7) After 28 March 1973, as the result of military operations while serving outside the territory of the United States as part of a peacekeeping force.

(8) Members killed or wounded in action by friendly fire. In accordance with 10 USC 1129 for award of the Purple Heart, the Secretary of the Army will treat a member of the Armed Forces described in (a), below, in the same manner as a member who is killed or wounded in action as the result of an act of an enemy of the United States.

(a) A member described in this subsection is a member who is killed or wounded in action by weapon fire while directly engaged in armed conflict, other than as the result of an act of an enemy of the United States, unless (in the case of a wound) the

wound is the result of willful misconduct of the member.

(b) This section applies to members of the Armed Forces who are killed or wounded on or after 7 December 1941. In the case of a member killed or wounded, as described in paragraph 2-8b above, on or after 7 December 1941 and before 30 November 1993, the Secretary of the Army will award the Purple Heart under provisions of paragraph 2-8a above in each case which is known to the Secretary before such date or for which an application is made to the Secretary in such manner as the Secretary requires.

c. While clearly an individual decoration, the Purple Heart differs from all other decorations in that an individual is not "recommended" for the decoration; rather he or she is entitled to it upon meeting specific criteria.

d. A Purple Heart is authorized for the first wound suffered under conditions indicated above, but for each subsequent award an Oak Leaf Cluster will be awarded to be worn on the medal or ribbon. Not more than one award will be made for more than one wound or injury received at the same instant or from the same missile, force, explosion, or agent.

e. A wound is defined as an injury to any part of the body from an outside force or agent sustained under one or more of the conditions listed above. A physical lesion is not required, however, the wound for which the award is made must have required treatment by medical personnel and records of medical treatment for wounds or injuries received in action must have been made a matter of official record.

f. When contemplating an award of this decoration, the key issue that commanders must take into consideration is the degree to which the enemy caused the injury. The fact that the proposed recipient was participating in direct or indirect combat operations is a necessary prerequisite, but is not sole justification for award.

g. Examples of enemy-related injuries which clearly justify award of the Purple Heart are as follows:

- (1) Injury caused by enemy bullet, shrapnel, or other projectile created by enemy action.
- (2) Injury caused by enemy placed mine or trap.
- (3) Injury caused by enemy released chemical, biological, or nuclear agent.
- (4) Injury caused by vehicle or aircraft accident resulting from enemy fire.
- (5) Concussion injuries caused as a result of enemy generated explosions.

h. Examples of injuries or wounds which clearly do not justify award of the Purple Heart are as follows:

- (1) Frostbite or trench foot injuries.
- (2) Heat stroke.
- (3) Food poisoning not caused by enemy agents.
- (4) Chemical, biological, or nuclear agents not released by the enemy.
- (5) Battle fatigue.
- (6) Disease not directly caused by enemy agents.
- (7) Accidents, to include explosive, aircraft, vehicular, and other accidental wounding not related to or caused by enemy action.
- (8) Self-inflicted wounds, except when in the heat of battle and not involving gross negligence.

(9) Post traumatic stress disorders.

(10) Jump injuries not caused by enemy action.

i. It is not intended that such a strict interpretation of the requirement for the wound or injury to be caused by direct result of hostile action be taken that it would preclude the award being made to deserving personnel. Commanders must also take into consideration the circumstances surrounding an injury, even if it appears to meet the criteria. Note the following examples:

(1) In a case such as an individual injured while making a parachute landing from an aircraft that had been brought down by enemy fire; or, an individual injured as a result of a vehicle accident caused by enemy fire, the decision will be made in favor of the individual and the award will be made.

(2) Individuals injured as a result of their own negligence; for example, driving or walking through an unauthorized area known to have been mined or placed off limits or searching for or picking up unexploded munitions as war souvenirs, will not be awarded the Purple Heart as they clearly were not injured as a result of enemy action, but rather by their own negligence.

j. During wartime the senior Army commander in the combat theater can award the Purple Heart as approval authority when delegated by the Secretary of the Army. The National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132-5100, awards the Purple Heart to any member of the Army, who during World War I, was awarded a Meritorious Service Citation Certificate signed by the Commander in Chief, American Expeditionary Forces, or who was authorized to wear wound

chevrons, upon written application. Approval authority for the Purple Heart for Army personnel wounded or killed as the result of an international terrorist attack is the Secretary of the Army. All other requests for award of the Purple Heart are processed by the Commander, USA HRC (AHRC-PDO-PA). The following types of requests for award of the Purple Heart will be forwarded to the Commander, USA HRC, ATTN: AHRC-PDO-PA, 200 Stovall Street, Alexandria, VA 22332-0471:

- (1) Any member of the Army who was awarded the Purple Heart for meritorious achievement or service, as opposed to wounds received in action, between 7 December 1941 and 22 September 1943, may apply for award of an appropriate decoration instead of the Purple Heart.
- (2) For those who became Prisoners of War during World War II, the Korean War and before and after 25 April 1962, the Purple Heart will be awarded to individuals wounded while prisoners of foreign forces, upon submission by the individual to the Department of the U.S. Army of an affidavit that is supported by a statement from a witness, if this is possible.
- (3) Any member of the U.S. Army who believes that he or she is eligible for the Purple Heart, but through unusual circumstances no award was made, may submit an application through military channels, to the Commander, USA HRC, ATTN: AHRC-PDO-PA. The application will include complete documentation, to include evidence of medical treatment, pertaining to the wound.

k. The following rules apply for processing award of the Purple Heart:

(1) The statutory time limits pertaining to award of military decorations does not apply to the Purple Heart. The Purple Heart may be awarded at anytime after submission of documented proof that criteria have been met.

(2) Approved awards of the Purple Heart require the publication of permanent orders according to AR 600-8-105, citing each recipient. A DA Form 4980-10 (The Purple Heart Medal Certificate) will include the following information: The recipient's name and grade, date wounded in action, and date certificate is signed. All Purple Heart Medal certificates will bear the signature and signature block of the Secretary of the Army on the right side. During wartime, the signature and signature block of the commander authorized to award the Purple Heart will be on the left side. All other Purple Hearts awarded will bear the signature and signature block of The Adjutant General of the Army.

(3) Each approved award of the Purple Heart must exhibit all of the following factors: wound, injury or death must have been the result of enemy or hostile act; international terrorist attack; or friendly fire (as defined in paragraph b(8) above) the wound or injury must have required treatment by medical officials; and the records of medical treatment must have been made a matter of official Army records.

(4) Recommendations for award of the Purple Heart based on alleged international terrorist attacks must be accompanied by a written evaluation from the MACOM security and intelligence staff officer indicating that international terrorist activity was involved. Should any

enclosures be classified the prescribed security measures will be followed. This requirement is in addition to the other eligibility criteria. HQ, USA HRC (AHRC-PDO-PA) will confirm the international terrorist report with the Office of the Deputy Chief of Staff, G-2 (ODCS, G-2) prior to forwarding the Purple Heart recommendations to the Secretary of the Army for final decision.

1. The Defense of Freedom Medal (DOFM), established on 4 October 2001, is the civilian equivalent to the Purple Heart awarded to U.S. military personnel. Refer to AR 672-20 for criteria and requirements for the DOFM.

(December 11, 2006)