No. _____

In The

Supreme Court of the United States

BLAIR COLEMAN,

Petitioner,

v.

FRANK KENDALL, SECRETARY OF THE AIR FORCE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Fourth Circuit held that a veteran who was constructively and retroactively placed on the Temporary Disability Retired List ("TDRL") at a 50% disability rating was not entitled to a medical examination prior to removal from the TDRL and medical separation at a 10% disability rating. The court also found that the decision of the Physical Disability Board of Review ("PDBR") to separate the veteran at a 10% disability rating was not arbitrary and capricious.

Does 10 U.S.C. § 1210 or 38 C.F.R. § 4.129 require a medical examination prior to removal from the TDRL or the reduction of a disability rating? If not, was the PDBR's determination of a 10% disability rating arbitrary and capricious?

RELATED CASES

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Coleman v. Wilson*, 2022 U.S. Dist. LEXIS 58806, 2022 WL 966857 (W.D.N.C. Mar. 30, 2022).
- *Coleman v. Kendall*, 74 F.4th 610 (2023) (judgment entered July 26, 2022; petition for rehearing en banc denied September 22, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Blair Coleman respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit (Pet. App. 1) is reported at 74 F.4th 610 (2023). An earlier opinion from the U.S. District Court for the Western District of North Carolina (Pet. App. 21), entitled *Coleman v. Wilson*, is reported at 2022 U.S. Dist. LEXIS 58806, 2022 WL 966857 (W.D.N.C. Mar. 30, 2022).

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit entered its judgment on July 26, 2023. The U.S. Court of Appeals for the Fourth Circuit denied a petition for rehearing en banc on September 22, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Coleman enlisted in the Air Force on March 2, 1997. During a deployment in Iraq, Mr. Coleman was involved in a rocket attack in which he witnessed the dismemberment of a fellow airman, whom he tried to

assist. In 2005, the Air Force decided that Mr. Coleman's severe anxiety rendered him unfit for further military service. There were seven major pertinent events which followed:

> (1) August 12, 2005: The Medical Evaluation Board Narrative Summary ("NARSUM") was issued, detailing Plaintiff's post-combat mental health condition which warranted separation from the military;
>
> (2) September 8, 2005: The Informal Physical Evaluation Board ("IPEB") convened and recommended discharge with severance pay and a disability rating of 10% for his anxiety disorder, utilizing the U.S. Department of Veterans Affairs ("VA") schedule for Rating Disabilities ("VASRD");
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> (3) October 24, 2005: The Air Force initially medically separated Mr. Coleman with severance pay and a 10% disability rating, utilizing the VASRD;
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> (4) February 22, 2006: Mr. Coleman underwent a VA Compensation and Pension Examination ("VA C&P Examination");
>
> (5) March 15, 2006: VA rated Mr. Coleman's anxiety disorder at 30%, applying the VASRD to the VA C&P Examination;
>
> (6) April 24, 2006: The new date of separation designated by the Physical Disability Board of Review ("PDBR") (following a constructive and retroactive placement on the

Temporary Disability Retired List ("TDRL") as described below); and

(7) May 17, 2012: The PDBR found the Air Force's decision to separate Mr. Coleman on October 24, 2005, was erroneous. Mr. Coleman was constructively and retroactively placed on the TDRL with a disability rating of 50% effective October 24, 2005. He was then constructively and retroactively separated on April 24, 2006, with a disability rating of 10%, despite the Air Force having never conducted a new examination as required by 38 U.S.C. § 1210 and 38 C.F.R. § 4.129. The PDBR also determined that a 10% disability rating was proper despite VA concluding that a 30% rating was proper. A 30% rating from the Air Force would make Mr. Coleman entitled to military retirement benefits pursuant to 10 U.S.C. § 1201.

On June 8, 2017, Plaintiff brought a claim for injunctive relief in the U.S. District Court for the Western District of North Carolina against Defendant for only event number seven listed above—when on May 17, 2012, the PDBR decided that Mr. Coleman's disability rating should remain 10%—pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. Mr. Coleman believes a rating that would entitle him to military retirement benefits is required.

On August 11, 2017, Defendant filed a motion to dismiss. On April 1, 2018, the District Court adopted the Magistrate Judge's Memorandum and Recommendation and granted the Defendant's motion to dismiss.

On May 30, 2018, Plaintiff filed a notice of appeal from the District Court's Order granting the motion to dismiss. On December 21, 2018, the U.S. Court of Appeals for the Fourth Circuit remanded the matter back to the District Court. On February 22, 2021, Defendant filed a renewed Motion to Dismiss and a Motion for Summary Judgment. On March 29, 2021, Plaintiff filed a Memorandum of Law in Opposition to Defendant's Motion. On April 5, 2021, the Defendant filed a Reply. On March 30, 2022, the District Court adopted the Magistrate Judge's Memorandum and Recommendation, denying the Motion to Dismiss and granting the Motion for Summary Judgment.

On May 28, 2022, Plaintiff filed a timely notice of appeal with the U.S. Court of Appeals for the Fourth Circuit. The U.S. Court of Appeals for the Fourth Circuit decided the case on July 26, 2023, denying Mr. Coleman relief. The court found that Mr. Coleman was not required to undergo a physical examination prior to being removed from the TDRL and being given a 10% disability rating. The court also found that the PDBR's decision to separate Mr. Coleman with a 10% disability rating was not arbitrary and capricious. On September 8, 2023, Plaintiff filed a petition for rehearing en banc. On September 22, 2023, the U.S. Court of Appeals for the Fourth Circuit denied Mr. Coleman's petition for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. This case is one of exceptional importance because it improperly denies benefits to disabled veterans who were separated because of a trauma-based mental health condition but who do not have a diagnosis of Posttraumatic Stress Disorder (PTSD) by not applying the required statutory protections.

At a hearing before the Committee on Veterans' Affairs of the U.S. House of Representatives on October 10, 2007, members of the Veterans Disability Commission (established pursuant to Public Law 108-136) presented findings and recommendations that, in part, led to the Wounded Warrior Act of 2008 and the creation of the Physical Disability Board of Review (PDBR). Findings of the Veterans' Disability Benefits Commission: Hearing Before the Committee on Veterans' Affairs, 110 Cong. 52 (Oct. 10, 2007). As one of its eight underlying principles, the Commission stated, "Benefits to our Nation's service-disabled veterans must be delivered in a consistent, fair, equitable, and timely manner." *Id*. (Statement of Lieutenant General James Scott Terry, USA (Ret.), Chairman, Veterans' Disability Commission). This petition is of exceptional importance because it is critical to ensure that this Court upholds its role in enforcing applicable laws that Congress passed in order take care of disabled veterans like Mr. Coleman, as such laws result in ensuring that this inarguable ideal is met.

While there is not yet a Circuit Court split on the issues presented in this case, it is important for this Court to consider why such a split likely does not exist. The class action settlement in *Sabo v. U.S.*, 102 Fed. Cl. 619 (2011), obviated any need for many of those separated because of PTSD to ever seek further relief. According to the approved settlement, a majority of the 2,176 disabled veterans who were separated at least in part for Posttraumatic Stress Disorder (PTSD) and who fell into the class received at least the option to receive a disability rating that resulted in placement on the Permanent Disability Retired List (PDRL). *See id.* at 624-25; Joint Motion for Final Approval of Class Action Settlement Agreement, 3-6, *Sabo v. U.S.*, Case No. 08-899 C (Dec. 1, 2011). All 792 class members who were similarly situated to Mr. Coleman, which includes "Class Members separated with severance pay without first being placed on the TDRL, but who had received a disability rating from VA," pursuant to the same disability rating section as Mr. Coleman received a medical retirement. *See Sabo*, 102 Fed. Cl. at 625*;* Joint Motion for Final Approval of Class Action Settlement Agreement, 3, *Sabo v. U.S.*, Case No. 08-899 C (Dec. 1, 2011).

As a result, Mr. Coleman and any other similarly situated disabled veterans who were medically separated for a mental health other than Posttraumatic Stress Disorder (PTSD) that was induced by traumatic stress have been treated differently by the military branches than those who were medically separated because of PTSD. While this disparity is not a traditional

circuit split, it is an arbitrary, capricious, and illogical practical split based on a legally and medically irrelevant difference in the nature of the mental health diagnosis.

If Mr. Coleman had been diagnosed with PTSD instead of Generalized Anxiety Disorder (GAD), he would have been a part of the class in the settlement in *Sabo* and been medically retired by the Department of the Air Force. *See Sabo*, 102 Fed. Cl. at 624-25; Joint Motion for Final Approval of Class Action Settlement Agreement, 3, *Sabo v. U.S.*, Case No. 08-899 C (Dec. 1, 2011). Further, if Mr. Coleman had been separated using the Integrated Disability Evaluation System (IDES) that came into being just a few years following his separation, he would have been medically retired. *See* U.S. DEP'T OF DEF., INSTR. 1332.18, DISABILITY EVALUATION SYSTEM, para. 8.1d(3) (Nov. 10, 2022); *Keltner v. U.S.*, 165 Fed. Cl. 484, 488-94 (2023) (providing an outline of the Disability Evaluation System Processes). Given that both the U.S. Department of Veterans Affairs (VA) and Department of Defense (DoD) rate all mental health conditions, to include PTSD and GAD, using the same rating schedule found at 38 C.F.R. § 4.130, any distinction between PTSD and GAD is arbitrary and capricious, and improperly values one diagnosis over another.

Any differentiation between PTSD and other mental health disorders is also factually groundless. Although the Commission recommended separate rating criteria for those with PTSD, finding that "there is a disparity in earnings of those with PTSD and other

mental disorders" and PTSD claims would be rated more effectively if a separate rating schedule existed for PTSD, no separate rating criteria have ever been developed. Findings of the Veterans' Disability Benefits Commission: Hearing Before the Committee on Veterans Affairs, 110 Cong. 52 (Oct. 10, 2007) (Statement of Lieutenant General James Scott Terry, USA (Ret.), Chairman, Veterans' Disability Commission). Further, the Commission Report found that veterans like Mr. Coleman and those similarly situated are typically not compensated adequately for their disabilities. The Commission states:

> The amount of compensation is generally sufficient to offset loss of earnings except for three groups of veterans, those whose primary disability is PTSD or Post Traumatic Stress Disorder and other mental disorders, and those who are severely disabled at a young age, and those who are granted maximum benefits because their disabilities make them unemployable.

Id.

While solving the problems of disability compensation systems is not the mission of this Court, this quote demonstrates that there is no practical difference between those who were separated for PTSD and those like Mr. Coleman who were separated for a mental health condition other than PTSD. Given that all branches of DoD have agreed to a settlement providing benefits to thousands of veterans who were similarly situated to Mr. Coleman prior to the settlement in

Sabo, this Court should not preclude review because there is a lack of uniformity in decisions.

The wisdom of this Court is necessary given that the U.S. Court of Appeals for the Fourth Circuit's ("Fourth Circuit") decision upholds this untenable practical split by finding that the protections set forth in 10 U.S.C. § 1210 do not apply to those placed on the TDRL constructively and retroactively despite such an exception not existing anywhere in the text of the statute. Further, there is an actual split at the trial court level between *Cook v. U.S.*, 123 Fed. Cl. 277 (2015), and others, to include *Petri v. U.S.*, 104 Fed. Cl. 537 (2012) and *Keltner v. U.S.*, 165 Fed. Cl. 484 (2023). Given the unique and complex nature of this case, and the fact that the U.S. Government has potentially prevented inconsistencies in judicial opinions by settling a class action lawsuit in a manner that grants the relief that Mr. Coleman seeks to those who fell into the class, this Court should consider Mr. Coleman's case to ensure that the lower court's decision to not apply statutes that appear to cover Mr. Coleman and his fellow disabled veterans is proper.

While the Fourth Circuit is accurate in stating, "Coleman pushes for an interpretation that would effectively grant a retroactive 50% rating for years to all individuals whose disabilities are reviewed by the Board and fall under § 4.129," Pet. App. 17, such a result is not inconsistent with 10 U.S.C. § 1554a, as given that the entire purpose of 10 U.S.C. § 1554a is to review potentially low disability ratings, applying the protections of the facially applicable 10 U.S.C. § 1210 in a

way that results in a higher rating is completely consistent with 10 U.S.C. § 1554a.

The PDBR's determination that 38 C.F.R. § 4.129 must be applied in a case, in and of itself, satisfies the purposes of 10 U.S.C. § 1554a. The fact that this court's enforcement of protections of 10 U.S.C. § 1210 may result in a higher disability rating compared to what may have occurred had the Air Force examined Mr. Coleman as required by 10 U.S.C. § 1210(a) is completely irrelevant, as the entire purpose of the PDBR is to examine potentially low disability ratings. *See* 10 U.S.C. § 1554a(b) (setting forth who may apply for relief); 10 U.S.C. § 1554a(d)(3) (not permitting reductions of prior ratings). Nowhere does 10 U.S.C. § 1554a require that a disability be reevaluated on a particular date such as the end of a constructive and retroactive placement on the TDRL. In effect, the Fourth Circuit's decision has written such a requirement into 10 U.S.C. § 1554a, which thereby creates a practical split between the benefits that Mr. Coleman receives and those diagnosed with PTSD who were covered by the *Sabo* settlement. This difference makes the question of how to apply 10 U.S.C. § 1210 one of exceptional importance.

The Fourth Circuit distinguishes between Mr. Coleman and others placed on the TDRL in real time, stating, "But a plaintiff like Coleman was not actually temporarily retired—only constructively and retroactively." Pet. App. 16. This distinction, however, results in a judicially-created pseudo-TDRL placement that is grounded nowhere in statute or the Code of Federal

Regulations. This Court should decide whether Mr. Coleman and similarly situated veterans will be forever denied the statutory protections of having been placed on the TDRL, as there is no dispute that Mr. Coleman was placed on the TDRL.

The Court should also determine whether the Fourth Circuit was correct in holding that the Air Force was not required to conduct the physical examination set forth in 38 C.F.R. § 4.129, as 10 U.S.C. § 1216a(a) states that all disability determinations "shall, to the extent feasible, utilize the schedule for rating disabilities in use by the Department of Veterans Affairs. . . ." 10 U.S.C. § 1216a(a). 38 C.F.R. § 4.129 is a part of the VA Schedule for Rating Disabilities ("VASRD"). Relatedly, given that 10 U.S.C. § 1216a(a) requires use of the same schedule "to the extent feasible," this Court should also take the opportunity to evaluate the Fourth Circuit's irrelevant differentiation between Air Force and VA ratings. The court states:

> While both the Air Force and VA use the Veterans Affairs Schedule for Rating Disabilities ("Rating Schedule"), they calculate disability ratings in different ways. The Air Force looks only to the disability at the time of separation, while the VA may consider how it develops over time. Or, in other words, the Air Force "uses the [Rating Schedule] to determine what compensation the service member is due for the interruption of his military career, while the [VA] is more holistically examining the individual's ability to engage in civilian employment."

Pet. App. 4 (quoting *Stine v. U.S.*, 92 Fed. Cl. 776, 795 (2010)).

The Fourth Circuit's assertion that the ratings are for different purposes is illogical given that 10 U.S.C. § 1216a(a) requires use of the VA Schedule for Rating Disabilities located at 38 C.F.R. Part 4, and no difference between ratings for DoD and VA exist in that Schedule.

Finally, given that the *Sabo* settlement resulted in many disabled veterans diagnosed with PTSD receiving medical retirement benefits, this Court's decision will impact those veterans who (1) had a mental health condition other than PTSD that disqualifies them from service; and (2) the condition was the result of traumatic stress requiring the application of 38 C.F.R. § 4.129. As a result, these overlooked disabled Veterans who had non-PTSD mental health disabilities at the time of their separation deserve the full wisdom of this Court given that the Fourth Circuit has held that the statutory and regulatory protections that apply to protect and assist disabled veterans should not apply because systemic military malfeasance was recognized only after their cases were initially decided.

II. The U.S. Court of Appeals for the Fourth Circuit failed to apply applicable statutes and regulations, to include 10 U.S.C. § 1210(a), 10 U.S.C. § 1216(a), and 38 C.F.R. § 4.129.

The Fourth Circuit states:

> [T]here is no authority indicating that the physical-examination requirements of [10

> U.S.C. § 1210] apply to retroactive reviews. Rather, placement on the Temporary Disability Retirement List is simply how the military opted to abide by § 4.129's requirement of a temporary 50% rating. And § 1210, by its very terms, does not apply to members like Coleman. Section 1210 refers to physical examinations "to determine whether there has been a change in the disability for which [a member] was temporarily retired." 10 U.S.C. § 1210(a) (emphasis added). But a plaintiff like Coleman was not actually temporarily retired—only constructively and retroactively.

Pet. App. 15-16.

There is no statutory difference between being temporarily retired in real time and being constructively and retroactively temporarily retired. Both require placement upon the TDRL and therefore both are subject to the TDRL's controlling statute. Despite the legislative history, the sole legal reason Coleman was placed retroactively upon the TDRL for a six-month period and then reevaluated was to determine whether there has been a change in the severity of the disability for which he was temporarily retired. With 10 U.S.C. § 1210, Congress provides just two ways for the removal of a service member from the TDRL. First, a service member may be removed from the TDRL after a physical exam where it has been determined their disability "is of a permanent nature and stable." 10 U.S.C. § 1210(a), (c), (d), (f). Second, a service member may be removed from the TDRL upon the expiration of 5 years after the date of placement on the TDRL. 10 U.S.C.

§ 1210(b), (c). In other words, Congress created an explicit time-based catch-all provision that removes a service member from the TDRL if the first method to remove the service member from the TDRL, which is following a physical exam, is not possible. If Congress had wanted to include a third method for the PDBR to remove a veteran who was constructively or retroactively placed upon the TDRL, it would have done so.

A judicially-created method of removing a service member from the TDRL is improper and is precisely why *Petri* and *Keltner* should not be followed. These courts overlook 10 U.S.C. § 1210, and plainly fail to apply the 10 U.S.C. § 1210(b) catch-all provision for removal of a service member from the TDRL without a physical exam. *See*, *e.g.*, *Petri v. United States*, 104 Fed. Cl. 537 (2012).

Recognizably, the retroactive placement of a veteran on the TDRL creates an obvious dilemma because a retroactive physical examination at the end of TDRL placement is potentially impossible. However, DoD created this dilemma by promulgating its 2009 Memorandum and using the TDRL as the mechanism to apply 38 C.F.R. § 4.129. *See* Office of the Under Secretary of Defense for Personnel and Readiness, Memorandum for Secretary of the Army et al., Requests for Correction of Military Records Relating to Disability Ratings for Post Traumatic Stress Disorder (July 17, 2009). The impossibility of a retroactive physical examination between Mr. Coleman's placement on the TDRL and the subsequent five years from that date does not overcome Mr. Coleman's entitlement to the application of

10 U.S.C. § 1210. The fact that Mr. Coleman's placement onto the TDRL was constructive and retroactive is irrelevant.

It was never Congress's intent to have a disabled veteran like the appellant shoulder the burden of a government-created dilemma. The Government cannot "disregard the statutory and regulatory requirements that govern the administration of the TDRL." *Cook v. United States*, 123 Fed. Cl. 277, 308. Allowing an unauthorized constructive removal of a service member from the TDRL is "tantamount to rewarding the [government] for its own error." *Id*.

Separate from the physical examination requirement to remove someone from the TDRL pursuant to 10 U.S.C. § 1210(a), Mr. Coleman was entitled to a physical examination requirement pursuant to 38 C.F.R. § 4.129 prior to the reduction of his disability rating from 50% to a lower rating. This regulation, which requires the agency to "assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted," was applicable to Mr. Coleman's case not only because the PDBR stated that it applied, but also by operation of 10 U.S.C. § 1216a(a)(1)(A). The fact that the Air Force could not conduct a retroactive examination does not mean that it is infeasible or impossible to apply 38 C.F.R. § 4.129. If an exam is not possible because the Air Force failed to apply this provision in 2005 and 2006 and schedule the examination at that time, the provisions of 38 C.F.R. § 4.129 are still

satisfied if Mr. Coleman's disability rating isn't lowered below 50%. Quite simply, the Air Force was required to conduct an examination to determine whether a change in evaluation was warranted. The Air Force failed to do that, therefore any subsequent reduction in disability rating is arbitrary and capricious because it violates 38 C.F.R. § 4.129, which was applicable by operation of 10 U.S.C. § 1216a(1)(A). As stated above, the resulting increase in a disabled veteran's DoD disability rating is wholly consistent with 10 U.S.C. § 1554a. Nowhere does 10 U.S.C. § 1554a require that a disability be reevaluated on a particular date.

III. The disability rating of 10% was arbitrary and capricious.

In upholding Mr. Coleman's 10% disability rating, the Fourth Circuit states:

> Coleman primarily argues that the Board erred by placing more weight on the August 2005 evaluation, rather than the evaluation that was closer to his retroactive discharge date. But the Board's decision is not arbitrary and capricious simply because it considered all recent evidence in its evaluation. And ultimately, we conclude that its decision was supported by substantial evidence, with a "rational connection between the facts found and the choice made."

Pet. App. 20 (citing *Ohio Valley Env't Coal., Inc. v. Aracoma Coal Co.*, 556 F.3d 188, 192 (4th Cir. 2009)).

Admittedly, review of agency decisions pursuant to the Administrative Procedures Act, 5 U.S.C. § 706, is "highly deferential, with a presumption in favor of finding the agency action valid." *Ohio Valley Env't Coal., Inc. v. Aracoma Coal Co.*, 556 F.3d 188, 192 (4th Cir. 2009). Nonetheless, in this case, the Fourth Circuit made the same mistake as the PDBR by failing to consider the fact that outdated evidence related to a patently unstable condition such as Mr. Coleman's was unreliable. Accordingly, the PDBR decision was arbitrary and capricious, and the Fourth Circuit's holding is improper.

When upholding the PDBR's decision, the Fourth Circuit failed to address the fact that servicemembers like Mr. Coleman are placed on the TDRL only when their condition is unstable. 10 U.S.C. § 1202 states:

> Upon a determination by the Secretary concerned that a member described in section 1201(c) of this title would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature and stable, the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title.

While the PDBR was not precluded from examining all available medical evidence, undermining reliable medical findings of increased disability severity

generated following placement on the TDRL with evidence of a disability's lesser severity generated prior to one's placement on the TDRL is medically and legally baseless, particularly given the purpose of the TDRL and the reexamination requirements set forth in 10 U.S.C. § 1210 and 38 C.F.R. § 4.129.

The Fourth Circuit permitted just that by upholding the PDBR's rationale, which impermissibly permitted the equal weighting of all evidence of the severity of Mr. Coleman's disability, regardless of when it was produced. Given that Mr. Coleman was placed on the TDRL, the PDBR cannot be legally permitted to give equal weight to all evidence regardless of when it was generated, as the evidence that led to a legal and medical determination that the condition was unstable and worthy of TDRL referral cannot be on par with a subsequent medical evaluation that is significantly closer to the date of separation that documents a worsening of symptoms. Permitting the evidence that led to the instability determination to be weighted equally with a subsequent reevaluation that documents a worsening of the condition directly contradicts the fundamental purpose of the TDRL as codified in 10 U.S.C. § 1210, as well as 38 C.F.R. § 4.129 (as required to be applied by 10 U.S.C. § 1216a), as both provisions require reevaluation of the disability.

In this case, the Fourth Circuit specifically endorsed the fact that the PDBR considered evidence about the severity of Mr. Coleman's condition before the time it was determined to be unstable by his placement on the TDRL, stating, "Then, in determining

Coleman's permanent rating at the time of his discharge in April 2006, the Board considered the Medical Evaluation Board examination performed in August 2005, a commander's statement from the same month, and the VA evaluation performed in February 2006." Pet. App. 19.

Even assuming the PDBR was permitted to administratively review the medical evidence and determine Mr. Coleman's disability severity effective April 24, 2006, the PDBR must rely upon the reexamination that demonstrated the worsening of Mr. Coleman's condition to make its determination, as the evidence from August 2005 led solely to the legal and medical determination that his condition was unstable. In this case, the Fourth Circuit has impermissibly endorsed a finding that invalidates the entire TDRL and 38 C.F.R. § 4.129, as it has explicitly determined that the evidence of severity from August 2005 when Mr. Coleman's condition was not as serious—evidence that led to a formal determination that the condition must be examined later—can be used to overturn a subsequent reliable medical examination that proved a worsening of the severity of Mr. Coleman's disability.

While evidence generated prior to Mr. Coleman's placement on the TDRL is not blocked from review during a reexamination of any form, to include the PDBR review, 10 U.S.C. § 1210(c) explains that the severity of the disability shall be based on the reexamination, stating:

> If, as the result of a periodic examination under subsection (a), . . . it is determined that the member's physical disability is of a permanent nature and stable and is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of determination . . . , his name shall be removed from the temporary disability retired list and he shall be retired under section 1201 or 1204 of this title, whichever applies.

10 U.S.C. § 1210(c). The statutory requirement to evaluate the severity of the disability upon the periodic physical reexamination is logical given the unstable nature of the condition requiring use of the TDRL. It is also logical given the purpose of 38 C.F.R. § 4.129, which recognizes the typically unstable nature of trauma-based mental health conditions. In this case, the only evidence that could be held to be within the reexamination period is the VA C&P Examination.

Because Mr. Coleman's medical condition was deemed unstable upon his placement on the TDRL on October 24, 2005, it also makes no medical or logical sense to permit evidence prior to that date to overrule the evidence from a subsequent examination, such as the VA C&P Examination that Mr. Coleman underwent on February 22, 2006. Using evidence from August 2005—evidence generated two months prior to when Mr. Coleman's condition was deemed unstable by his placement on the TDRL—undermines the entire purpose of any reevaluation of any type, as it permits the use of evidence that is both medically and legally

stale to rebut more reliable and timely medical evidence obtained during the period of reevaluation contemplated under 10 U.S.C. § 1210 and 38 C.F.R. § 4.129.

Given that the only proper medical evidence related to the severity of Mr. Coleman's disability was from his VA C&P Examination, an examination which led to a 30% VA rating and from which the PDBR itself stated, "Social and occupational impairment consistent with a 30% evaluation ("occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks . . . ") could be surmised from some of the documented symptoms at the time of the post separation C&P examination . . . ," any rating less than 30% is arbitrary and capricious.

Such language from the PDBR itself precludes a 10% rating, particularly when applying the rating principles that the PDBR itself cited. 38 C.F.R. § 4.3 states, "It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant." 38 C.F.R. § 4.3.

The Fourth Circuit expressly endorsed what was legally and medically stale evidence that was generated from prior to the Plaintiff's placement on the

TDRL to serve as the basis for Mr. Coleman's 10% rating. If a 10% final disability rating was possible based on evidence from the VA C&P Examination alone, the PDBR would have been proper in adjudging it and the Fourth Circuit would have been proper in upholding it, but such was not the case here. The Fourth Circuit expressly permitted the 10% rating to be based solely on legally and medically stale evidence, which is fundamentally arbitrary and capricious.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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