APPENDIX TABLE OF CONTENTS

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1591

BLAIR COLEMAN,

Plaintiff—Appellant,

v.

FRANK KENDALL, Secretary of the Air Force,

Defendant—Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Robert J. Conrad, Jr., District Judge. (5:17-cv-00096-RJC-DSC)

Argued: May 5, 2023 Decided: July 26, 2023

Before AGEE and WYNN, Circuit Judges, and Henry E. HUDSON, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Agee and Senior Judge Hudson joined.

ARGUED: Alexandra Lawson, John Wilton Harris, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, Chapel Hill, North Carolina, for Appellant. Caroline B. McLean, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee. **ON BRIEF**: Tod M. Leaven, GRIMES TEICH ANDERSON, LLP, Asheville, North Carolina, for Appellant. Dena J. King, United States Attorney, Julia K. Wood, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

WYNN, Circuit Judge:

Blair Coleman, an Air Force veteran, appeals from a decision of the Physical Disability Board of Review ("Board") declining to increase his disability rating, which would entitle him to greater benefits. The district court rejected Coleman's arguments that the Board was required to conduct a physical examination before making its decision and that its decision was arbitrary and capricious. For the reasons that follow, we affirm.

App. 3

I.

A.

Coleman enlisted in the Air Force in 1997 and served as an active-duty staff sergeant. In September 2004, while deployed in Iraq, Coleman witnessed a rocket attack that severely injured a fellow airman. Following that incident, he began experiencing severe anxiety. In March 2005, the Air Force placed him on duty restriction and referred him to the Medical Evaluation Board. His examiner found that he would "fare exceedingly poorly in the deployed environment," and the Medical Evaluation Board referred him to an Informal Physical Evaluation Board. J.A. 23.[1] In September 2005, the Informal Physical Evaluation Board concluded that Coleman was unfit for military service and recommended discharge with a 10% disability rating. Coleman did not dispute that recommendation, and the Air Force adopted it and honorably discharged him with severance pay on October 24, 2005.

Because Coleman was medically separated after fewer than 20 years in the Air Force with a disability rating under 30%, he was not entitled to retirement benefits, such as healthcare benefits. *See* 10 U.S.C. §§ 1201, 1203. If Coleman had received a 30% rating or higher, he would have been entitled to medical retirement from the Air Force with accompanying benefits. *See id.* § 1201.

---

[1] Citations to the "J.A." refer to the parties' Joint Appendix filed in this appeal.

Shortly after his discharge, Coleman applied for disability benefits through the Department of Veterans Affairs ("VA"). The VA conducted an examination on February 22, 2006, and in March, assigned Coleman a disability rating of 30% for anxiety. The VA then began paying him disability benefits.

Notably, VA disability ratings and associated benefits are distinct from the Air Force's. The VA separately assesses a service member and may determine a disability rating that varies from the Air Force's rating. *See Stine v. United States*, 92 Fed. Cl. 776, 795 (2010). 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." *Id.*

Under the Rating Schedule, mental disorders can be rated at 0%, 10%, 30%, 50%, 70%, or 100%. 38 C.F.R. § 4.130. A 10% rating is appropriate where the mental disorder causes "[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication." *Id.* By contrast, a 30% rating applies where the disorder

causes "[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, [or] mild memory loss (such as forgetting names, directions, [or] recent events)." *Id.*

In 2008, Congress created the Physical Disability Board of Review as part of the Wounded Warrior Act. Wounded Warrior Act, Pub. L. No. 110-181, § 1643(a)(1), 122 Stat. 430, 465–67 (2008) (codified as amended at 10 U. S.C. § 1554a). The Board's purpose was to retroactively review the fairness and accuracy of disability determinations made by military branches for members of the armed forces who were medically separated with a disability rating of 20% or less between September 11, 2001, and December 31, 2009, and who were therefore not eligible for retirement benefits. *See id.* Upon an eligible veteran's request, the Board must conduct a review and make a recommendation about the veteran's disability rating to the Secretary of the applicable branch. 10 U.S.C. § 1554a(c)–(d).

Following the Wounded Warrior Act, the Department of Defense issued guidance for conducting retroactive reviews. Under a 2008 Department of Defense Instruction, the Board must compare a military branch's rating with a veteran's VA rating "and consider any variance in its deliberations and any impact on the final [Physical Evaluation Board] combined

disability rating, particularly" where, as here, the VA rating "was awarded within 12 months" of separation. J.A. 451 (Department of Defense Instruction 6040.44 (June 27, 2008) (amended June 2, 2009)).

Separately, in 2008, the Department of Defense ordered military branches to consider § 4.129 of the Rating Schedule in making *contemporaneous* disability determinations for service members. J.A. 476 (Policy Memorandum from the Office of the Under Secretary of Defense on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (Pub L. 110-181), at E7.2 (Oct. 14, 2008)). Section 4.129, a VA regulation, requires the VA to assign a minimum 50% disability rating to those separated for "a mental disorder that develops in service as a result of a highly stressful event [and] is severe enough to bring about the veteran's release from active military service." 38 C.F.R. § 4.129. The VA must then examine the servicemember within six months "to determine whether a change in evaluation is warranted." *Id.* The Department of Defense instructed that, in applying § 4.129 to current service members, the military branches must place members with disability ratings of less than 80% "on the Temporary Disability Retirement List . . . and re-evaluate[them] within a timeframe that is not less than 90 days, but within 6 months, from the date of [such] placement." J.A. 476 (2008 Policy Memorandum, at E7.2.2).

A 2009 memorandum from the Department of Defense clarified that § 4.129 of the Rating Schedule was also applicable to the Board's *retroactive* reviews of

disability ratings. J.A. 481–82 (Policy Memorandum from the Office of the Under Secretary of Defense on Requests for Correction of Military Records Relating to Disability Ratings for Post Traumatic Stress Disorder (July 17, 2009)). The memorandum instructed the Board that, in applying § 4.129 retroactively, it should assign a minimum 50% rating for a retroactive six-month period after separation, and then determine the appropriate rating "based on the applicable evidence." J.A. 482 (2009 Policy Memorandum).

On April 16, 2011, Coleman filed an application for review with the Board. He asserted that he should have been medically retired at a rating higher than 10% because he still suffered from symptoms and had planned to spend his career in the Air Force.

The Board convened in November 2011 to consider Coleman's case and ultimately issued its decision in May 2012. First, the Board concluded that § 4.129 should apply retroactively in Coleman's case. But the Board nonetheless determined that 10% was the appropriate disability rating at his final discharge, consistent with the original rating from the Air Force. As a result, it recommended retroactively placing Coleman on the Temporary Disability Retirement List at a 50% rating for six months, followed by discharge at a permanent 10% rating on April 24, 2006. The Air Force accepted the Board's recommendation.

B.

In June 2017, Coleman sued the Air Force under the Administrative Procedure Act ("APA"). He sought "an order directing [the Air Force] to increase [his] disability rating," J.A. 8, which would entitle him to additional benefits beyond what he received as a result of his VA disability rating. The Air Force moved to dismiss for lack of jurisdiction. The district court granted the motion, concluding that Coleman's complaint sought monetary, not injunctive, relief and therefore should have been filed in the Court of Federal Claims under the Tucker Act. But on appeal, this Court remanded for consideration of an affidavit that Coleman had filed during the pendency of the appeal, where he waived any right to retirement pay.

On remand, the Air Force again moved to dismiss for lack of jurisdiction, and in the alternative, moved for summary judgment. The magistrate judge recommended denying the motion to dismiss in light of Coleman's waiver and granting the motion for summary judgment because the Board's decision was not arbitrary or capricious. Both parties objected, but the district court adopted the report and recommendation.

II.

On appeal, Coleman presses two main arguments. First, he argues that the Board was required to order a new physical examination in its retroactive review of his disability rating. Second, he argues that the Board's decision was arbitrary and capricious. We

reject both arguments. But before addressing Coleman's merits-based challenges, we take a brief detour to consider this Court's jurisdiction to review Coleman's appeal.

A.

In its briefing before this Court, the Air Force does not challenge the district court's decision finding subject-matter jurisdiction.[2] Nonetheless, this Court must sua sponte evaluate whether jurisdiction is appropriate. *See Randall v. United States*, 95 F.3d 339, 344–45 (4th Cir. 1996). At issue is whether the essence of Coleman's complaint seeks injunctive relief, monetary relief up to $10,000, or monetary relief exceeding $10,000. If the answer is the last, then under the Tucker Act, jurisdiction would be proper only in the Court of Federal Claims, and review of that court's decision would take place in the Federal Circuit.

The APA allows private parties to sue the federal government in district court over final agency actions, so long as they seek relief other than monetary damages "for which there is no other adequate remedy in a court." *Id.* at 346 (quoting 5 U.S.C. § 704). But where "a plaintiff has an adequate remedy by suit under the Tucker Act," they are precluded from review under the APA. *Id.*

---

[2] When pressed about this matter at oral argument, however, the Air Force continued to argue that the Court did *not* have jurisdiction over Coleman's claims.

The Tucker Act "grants jurisdiction to the United States Court of Federal Claims 'to render judgment upon any claim against the United States founded . . . upon . . . any regulation of an executive department, . . . or for liquidated or unliquidated damages in cases not sounding in tort.'" *Id.* (quoting 28 U.S.C. § 1491(a)(1)). Jurisdiction is exclusive in the Court of Federal Claims for claims over $10,000, while district courts have concurrent jurisdiction with the Court of Federal Claims for claims at or under $10,000. *Id.* at 347 (citing 28 U.S.C. § 1346(a)(2)). And notably here, "[a] plaintiff can waive damages in excess of $10,000 to remain in district court." *Id.* at 347 n.8. Typically, the Court of Federal Claims lacks power to grant equitable relief, although the Tucker Act does "authorize courts to award injunctive relief in limited circumstances, when such relief is necessary to provide an entire remedy and when the injunction is 'an incident of and collateral to' an award of monetary relief." *Id.* at 347 (quoting 28 U.S.C. § 1491(a)(2)).

To determine whether a plaintiff seeks primarily injunctive relief such that a district court has jurisdiction over his claim, courts must look to the "essence" of the complaint and whether the relief requested is "not . . . an incident of, or collateral to, a monetary award." *Id.* For example, in *Randall v. United States*, this Court concluded that the district court had jurisdiction over a plaintiff's claims under the APA because the plaintiff primarily sought a retroactive promotion, and his "claim for back pay would only arise if" that injunctive relief were granted. *Id.* at 347 (footnote omitted).

Accordingly, the Court held that the district court had jurisdiction to review the plaintiff's claim "that the Army failed to follow its own regulations" regarding his request for correction of his military records. *Id.* at 348.

In this case, Coleman's complaint seeks an injunction for the Board to "correct [his] discharge records to reflect medical retirement by reason of permanent disability with a physical disability rating of at least 30%." J.A. 20. Although he did not specifically request monetary relief, Coleman's complaint noted that the Board's "refusal to recognize the extent of [his] service-connected disability . . . depriv[ed] him of *military disability retirement pay* and other benefits." J.A. 7 (emphasis added). But later, by affidavit, Coleman stated he "wish[ed] to waive any right to military retirement pay" and identified the other nonmonetary benefits he hoped to receive by virtue of a higher disability rating—participation in TRICARE, the military health insurance program; access to on-base amenities and military vacation destinations; and eligibility for "space available" flights on military aircraft. J.A. 440–41.

Based on Coleman's waiver, the district court properly concluded that it had jurisdiction over Coleman's claims. As noted, plaintiffs may waive damages in excess of $10,000 to remain in district court, *see Randall*, 95 F.3d at 347 n.8, which Coleman has done here by waiving any right to retirement pay.[3]

---

[3] The Air Force argued below that Coleman could not waive retirement pay because if his disability rating were increased, he

Accordingly, we need not reach the question of whether, absent his waiver, the essence of his claim seeks injunctive relief.

B.

Moving to the merits, we first consider whether the district court properly granted summary judgment in this matter by rejecting Coleman's arguments that the Board was required to order a new physical examination prior to its determination of Coleman's disability rating. We review the district court's grant of summary judgment de novo. *Nat'l Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 991 F.3d 577, 583 (4th Cir. 2021). And under the APA, we may set aside agency action of the Board only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

We start with an overview of the applicable law. First, by statute, the Board's retroactive review of a member's disability rating "shall be based on the *records* of the armed force concerned *and such other evidence as may be presented* to the" Board. 10 U.S.C.

---

would be eligible by law for disability retirement pay under 10 U.S.C. § 1201. But veterans generally must opt between VA disability benefits—which Coleman already receives—and military retirement pay. *See* 38 U.S.C. § 5304(a)(1) (veteran cannot receive duplicate benefits); 38 C.F.R. § 3.750(c)(1)(i) (noting that "[a] waiver of military retired pay is necessary in order to receive disability compensation when a veteran is eligible for both military retired pay and disability compensation," with some exceptions not applicable here). As such, we see no issue with Coleman's preemptive waiver of retirement pay here.

§ 1554a(c)(2) (emphases added). Thus, the statute itself does not require a physical examination. And the Department of Defense echoed a records-based review in a separate memorandum, noting that "[e]vidence to be reviewed by the [Board] will be *primarily documentary* in nature" and that the Board "shall review the *complete case record* that served as the basis for the final Military Department" rating "and, *to the extent feasible, collect all the information necessary for competent review and recommendation*." J.A. 451 (2008 Instruction) (emphases added).

The VA regulation on which Coleman relies, in contrast, states that when the *VA* is making a *contemporaneous* disability determination, it must give veterans with certain mental disorders at least a 50% disability rating, and then must "schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted." 38 C.F.R. § 4.129. Of course, § 4.129 does not generally apply to disability determinations by the military branches; however, the Department of Defense ordered the branches to consider the regulation when making contemporaneous disability determinations. J.A. 476 (2008 Policy Memorandum, at E7.2). The Department instructed the branches that members with disability ratings of less than 80% "must be placed on the Temporary Disability Retirement List . . . and re-evaluated within a timeframe that is not less than 90 days, but within 6 months, from the date of placement on" that list. *Id.*

Later, the Department gave guidance on how to also apply § 4.129 in *retroactive* reviews, explaining that the Board should assign a minimum 50% rating for a retroactive six-month period after separation, and then determine the appropriate rating "*based on the applicable evidence*." J.A. 482 (2009 Policy Memorandum) (emphasis added).

None of this requires the Board to order a new physical examination before making its decision. The statute governing retroactive reviews contemplates a review of the applicant's records and other evidence presented to the Board. Only the VA regulation arguably requires a physical examination.[4] But Coleman has not pointed to any authority suggesting that the Board is bound by that portion of § 4.129, which by its terms does not contemplate retroactive reviews by the Board. Only the Department of Defense's memoranda make that regulation at all applicable—and yet those memoranda instruct that in applying § 4.129 retroactively, the Board should place members on the Temporary Disability Retirement List and then make further rating determinations "based on the applicable evidence." *Id.* In other words, the Department of Defense did not indicate that it was importing a physical-examination requirement that appears nowhere in the statute and would contradict the Department's

[4] The Air Force disputes whether § 4.129 requires a *physical* examination, as opposed to solely a records review. For the purposes of our analysis, we assume without deciding that the instruction to "*schedule* an examination" denotes a physical examination. 38 C.F.R. § 4.129 (emphasis added).

guidance elsewhere that suggests the evidence considered will be primarily "documentary." J.A. 451 (2008 Instruction).

Nor was Coleman entitled to the statutory protections associated with contemporaneous placement on the Temporary Disability Retirement List. As background, current service members are placed on the Temporary Disability Retirement List when they would qualify for military retirement but for the fact that their disabilities are not determined to be "of a permanent nature and stable." 10 U.S.C. § 1202. Section 1210 sets out procedures for when a service member is on the List, such as the timing for periodic examinations.

Here, Coleman argues that by retroactively placing him on that List, the Board was then required to abide by 10 U.S.C. § 1210(a), which states that "[a] physical examination shall be given at least once every 18 months to each member of the armed forces whose name is on" the Temporary Disability Retirement List "to determine whether there has been a change in the disability for which he was temporarily retired." Without a physical examination, Coleman contends, the Board could not remove him from the List or lower his 50% rating.

But again, there is no authority indicating that the physical-examination requirements of that statute 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.

Additionally, any such physical examination would have been either impossible or, at best, wholly irrelevant to assessing Coleman's disability. Under Coleman's reasoning, the Board had two options to comply with such a requirement: travel back in time to conduct a physical examination at the time of Coleman's discharge or conduct an examination at the time of the Board's review in 2011—years after the relevant period for assessing any disability. But in suggesting that the Board should have taken one of these routes, Coleman "misunderstands the role of the" Board. *Petri v. United States*, 104 Fed. Cl. 537, 555 (2012). As the Court of Federal Claims noted when rejecting a near-identical argument, an "examination and/or hearing [years later] would not have reflected [the plaintiff]'s state of health six months after his . . . separation, the time period pertinent for the [Board]'s determination of a permanent disability rating."[5] *Id.* at 558.

---

[5] Of course, the VA performed a physical evaluation in February 2006—i.e., during the relevant time period—on which the Board relied in rendering its decision here, and which Coleman concedes "was the functional equivalent of what is required pursuant to 38 C.F.R. § 4.129." Opening Br. at 10. However, he

Coleman's interpretation, taken to its logical end, would swallow up the statutorily defined purpose of the Board's review. By arguing that he could not be taken off the List or have his temporary 50% rating lowered until the Air Force conducted a physical examination—an examination that necessarily could not occur until years after his retroactive placement on the List—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. But that defies the purpose of the Board: to ensure accurate disability determinations at the time of a member's discharge, "based on the records of the armed force concerned and such other evidence as may be presented to the" Board. 10 U.S.C. § 1554a(c)(2). We therefore reject Coleman's argument that the Board was required to order a new physical examination before making its determination.

C.

Finally, we consider whether the Board's decision to recommend that the Air Force discharge Coleman at a 10% disability rating was arbitrary and capricious and not supported by substantial evidence.

Our standard of review renders Coleman's challenge a tall task. Review of agency action under the

---

argues that the Air Force, as the rating agency at issue, was legally required to conduct the examination, even though the regulation undisputedly did not apply to the Air Force in 2006.

APA 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 177, 192 (4th Cir. 2009). We will find an action arbitrary or capricious where "the agency relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Audubon Soc'y*, 991 F.3d at 583 (quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 287–88 (4th Cir. 1999)). "But so long as the agency 'provide[s] an explanation of its decision that includes a rational connection between the facts found and the choice made,' its decision should be sustained." *Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1115 (4th Cir. 2014) (quoting *Ohio Valley*, 556 F.3d at 192).

In reaching its decision here, the Board recognized that the Air Force could only offer compensation "for those medical conditions that cut short a service member's career, and then only to the degree of severity present at the time of final disposition," whereas the VA "is empowered to compensate service connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the veteran's disability rating should the degree of impairment vary over[ ]time." J.A. 21–22. The Board decided to apply § 4.129, noting that although its applicability was questionable, any

reasonable doubt had to be resolved in favor of Coleman pursuant to 38 C.F.R. § 4.3.[6]

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. The August 2005 records noted that Coleman suffered mild anxiety most of the time, but that it hadn't affected his home station duty performance. The February 2006 examination indicated continued anxiety with mild to moderate symptoms, though Coleman was functioning well in his civilian job and doing well overall socially.

The Board ultimately concluded that a 10% rating was appropriate. It recognized that some impairment at the 30% level "could be surmised from some of the documented symptoms at the time of the" February 2006 examination, such as "anxiety, monthly panic attacks, and mild problems with intrusive memories, hypervigilance, exaggerated startle response, and mild avoidance." J.A. 23. Overall, however, the Board concluded that the various sources "documented [Coleman]'s generally intact interpersonal and occupational functioning with treatment, and the apparently 'mild

---

[6] "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.

or transient' nature of his symptoms since separation." J.A. 24.

Coleman primarily argues that the Board erred by placing more weight on the August 2005 evaluation, rather than the February 2006 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."[7] *Ohio Valley*, 556 F.3d at 192 (citation omitted).

III.

For the reasons detailed above, we affirm the district court's grant of summary judgment to the Air Force.

AFFIRMED

---

[7] We also reject Coleman's arguments that the Board failed to apply 38 C.F.R. §§ 4.3 and 4.7. Coleman failed to raise these arguments below, thereby waiving them, *see In re Under Seal*, 749 F.3d 276, 285–86 (4th Cir. 2014), and he cannot meet the high standard of fundamental-error review here.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
5:17-cv-00096-RJC-DSC

BLAIR COLEMAN, **Plaintiff,** **vs.** **HEATHER WILSON, Secretary of the Air Force,** **Defendant.**	))))))))	**ORDER** (Filed Mar. 30, 2022)

THIS MATTER comes before the Court on the United States' Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction and, in the alternative, Motion for Summary Judgment (the "Motion") (Doc. No. 38), Plaintiff's Motion for Oral Argument on the Issue of Jurisdiction (Doc. No. 42), the Magistrate Judge's Memorandum and Recommendation ("M&R") (Doc. No. 45), and both Parties' objections to the M&R (Doc. Nos. 16, 17). For the reasons stated herein the M&R is **ADOPTED**.

I. BACKGROUND

Neither party has objected to the Magistrate Judge's statement of the factual and procedural background of this case. Therefore, in addition to the background below, the Court adopts the facts as set forth in the M&R.

A. Factual Background

1. Plaintiff's Military Service and Discharge

Plaintiff served as an active-duty staff sergeant in the Air Force, where he intended to spend his career. (Doc. No. 1 ¶ 5). In 2004, while deployed in Iraq, he witnessed an airman severely injured by a rocket attack. (*Id.* ¶¶ 20-21). Afterwards, Plaintiff began experiencing anxiety disorder. (*Id.* ¶¶ 21-23).

On March 15, 2005, Plaintiff's duty was restricted due to his anxiety disorder. (*Id.* ¶ 28). He was referred to a Medical Evaluation Board ("MEB") for possible discharge. (*Id.*). On August 12, 2005, after a medical examination (the "MEB Examination"), the MEB referred his claim to an Informal Physical Evaluation Board ("IPEB") to determine whether his diagnosis of anxiety disorder rendered him unfit for military service. (*Id.* ¶¶ 36-37). In September 2005, the IPEB concluded that Coleman was unfit for military service and recommended discharge with severance pay and a disability rating of 10%. (*Id.* ¶ 38). Plaintiff did not dispute the recommendations of the IPEB and waived his right to a formal hearing. (*Id.* ¶ 39). Thereafter, on October 24, 2005, Plaintiff was medically separated from the Air Force with a 10% disability rating due to his anxiety disorder. (*Id.* ¶ 41). Plaintiff was not entitled to retirement benefits, including health care benefits, because his disability rating at separation was less than 30%. (*Id.*).

Afterward, Plaintiff submitted an application for disability benefits for, among other things, his anxiety

disorder from the Veterans Affairs ("VA"). (*Id.* ¶¶ 43). On February 22, 2006, the VA conducted a Compensation & Pension Examination ("the VA Examination") to determine his eligibility of benefits. (*Id.* ¶ 43). The VA assigned him a disability rating of 30%, for his anxiety disorder and he began receiving disability compensation benefits from the VA.[1] (*Id.* ¶¶ 44-45).

2. Creation of the Physical Disability Board of Review

In 2008, Congress created the Physical Disability Board of Review ("PDBR") to complete retroactive reviews of disability determinations for members of the armed forces who were separated due to a medical condition with a disability rating of 20% or less between September 11, 2001 and December 31, 2009, and who were not eligible for retirement. (*See* 10 U.S.C. § 1554a). Upon the eligible veteran's request, the PDBR reviews the findings and decisions of the military's disability assessment, considers any evidence presented by the veteran, and determines whether a recharacterization or modification of the disability rating should be made. 10 U.S.C. § 1554a (c)-(d).

The Department of Defense Instruction establishing policies, responsibilities, and procedures for the PDBR, requires the PDBR to "(a) Compare any VA disability rating for the specifically military-unfitting

[1] The VA also assigned Plaintiff an additional 10% disability rating due to other, not relevant, physical injuries, for a total of 40% disability rating.

condition(s) with the PEB combined disability rating; and (b) Consider any variance in its deliberations and any impact on the final PEB combined disability rating, particularly if the VA rating was awarded within 12 months of the former Service member's separation." (Department of Defense Instruction 6040.44 (June 27, 2008)). Additionally, the PDBR conducts reviews of the disability rating in accordance with the Veterans Affairs Schedule for Rating Disabilities ("VASRD") in effect at the time of separation. (*Id.*).

Under VASRD for mental health disorders, "[w]hen a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall 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." 38 C.F.R. § 4.129. The VASRD requires at least a 30% disability rating when the veteran has "[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)." 38 C.F.R. § 4.130. The VASRD requires a 10% disability rating when the veteran has "[o]ccupational and social impairment due to

mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication." *Id.*

3. PDBR Review of Plaintiff's Disability Rating

On April 16, 2011, Coleman filed an application for review by the PDBR, stating "I should have been medically retired. I was a career airman planning on making the Air Force my career. I feel 10% is unfair considering I'm still suffering from symptoms." (Doc. No. 1-1 at 1; Doc. No. 10 at 2). On May 17, 2012, the PDBR issued its decision. (Doc. No. 1-1).

First, the PDBR determined pursuant to VASRD § 4.129 that Coleman should have been placed on the Temporary Disability Retired List ("TDRL") for six months at a 50% disability rating beginning October 24, 2005, rather than being permanently discharged on that date. (Doc. No. 1-1 at 2). It determined he then should be permanently discharged on April 24, 2006, after six months on the TDRL. (*Id.*).

Next, the PDBR determined the 10% permanent disability rating was proper. (*Id.* at 4). The PDBR's analysis "centered on a 10% versus a 30% rating." (*Id.* at 3). It reasoned that a 30% rating "could be surmised from some of the documented symptoms at the time of the post separation [VA Examination] . . . [h]owever, . . . the [MEB Examination], commander's statement, and post separation [VA Examination] documented

[Plaintiff's] generally intact interpersonal and occupational functioning with treatment, and the apparently 'mild or transient' nature of his symptoms since separation." (*Id.* at 4).

B. Procedural Background

On June 8, 2017, Plaintiff filed this action, seeking an injunction pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, to correct his discharge records to reflect a medical retirement by reason of permanent disability with a physical disability rating of at least 30%. (Doc. No. 1). The Court dismissed the action for lack of subject matter jurisdiction because it found the "true nature of Plaintiff's Complaint takes a monetary form" and concluded the action should have been filed in the Court of Federal Claims. (Doc. No. 19). Coleman appealed to the Fourth Circuit, where he filed for the first time a Declaration waiving "any right to military retirement pay." (Doc. No. 39-1 at 2). Based on the Plaintiff's Declaration, the Fourth Circuit remanded to this Court to "reconsider its jurisdictional ruling in light of the Coleman Affidavit filed on appeal." (Doc. No. 25 at 1).

On remand, the Defendant filed its Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction and, in the alternative, Motion for Summary Judgment, which Plaintiff opposes. (Doc. Nos. 38, 39, 41, 42, 44). The Magistrate Judge recommended that the Court deny Defendant's motion to dismiss for lack of subject matter jurisdiction in light of Plaintiff's

waiver, and grant Defendant's motion for summary judgment because the PDBR decision was not arbitrary or capricious. (Doc. No. 45). Both parties objected. (Doc. No. 46 & 47).

II. STANDARD OF REVIEW

A district court may assign dispositive pretrial matters, including motions to dismiss, to a magistrate judge for "proposed findings of fact and recommendations." 28 U.S.C. § 636(b)(1)(A) & (B). The Federal Magistrate Act provides that a district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). However, "when objections to strictly legal issues are raised and no factual issues are challenged, de novo review of the record may be dispensed with." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). De novo review is also not required "when a party makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Id.*

III. DISCUSSION

A. Subject Matter Jurisdiction

The Magistrate Judge concluded this Court has subject matter jurisdiction over Plaintiff's request for injunctive relief under the Administrative Procedures Act ("APA"). (Doc. No. 45). Defendant argues the Court lacks subject matter jurisdiction and that the Court of

Federal Claims has exclusive jurisdiction under the Tucker Act. (Doc. No. 46).

The United States has sovereign immunity and cannot be sued without express consent. *Randall v. U.S.*, 95 F.3d 339, 345 (4th Cir. 1996). Here, the Court must examine the interplay between two federal statutes that waive sovereign immunity – the Tucker Act and the APA. *See Randall*, 95 F.3d at 345 ("[P]laintiffs in cases such as this one, challenging a decision of a board for the correction of military records, have used one of two avenues to establish federal jurisdiction: the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491; and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701–706."). "The interplay between the Tucker Act and the APA is somewhat complicated and raises some significant issues of federal court jurisdiction." *Randall*, 95 F.3d at 346.

The Tucker Act allows private parties to sue the federal government in the Court of Federal Claims for claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[2] 28 U.S.C.

[2] The Tucker Act is encompassed in two statutes: 28 U.S.C. § 1491 (commonly referred to as the "Big Tucker Act") and 28 U.S.C. § 1346(a)(2) (commonly referred to as the "Little Tucker Act"). The Big Tucker Act grants exclusive jurisdiction to the United States Court of Federal Claims for claims more than $10,000. The Little Tucker Act allows for concurrent jurisdiction with the district courts for civil actions or claims against the United States not exceeding $10,000. 28 U.S.C. § 1346(a)(2);

§ 1491(a)(1). The Tucker Act provides exclusive jurisdiction in the Court of Federal Claims for actions for more than $10,000. *Randall*, 95 F.3d at 346. The Tucker Act does not, on its face, grant the Court of Federal Claims equitable power, but it does authorize the award of injunctive relief "in limited circumstances, when such relief is necessary to provide an entire remedy and when the injunction is 'an incident of and collateral to' an award of monetary relief." *Randall*, 95 F.3d at 346-47 (citing 28 U.S.C. § 1491(a)(2)). As such, the Court of Federal Claims may provide claimants with an "entire remedy," including "restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491(a)(2); *see also Mitchell v. United States*, 930 F.2d 893, 896 (Fed. Cir. 1991).

The APA on the other hand allows private parties to sue the federal government in district court over final agency actions. *Randall*, 95 F.3d at 346. The waiver of sovereign immunity in the APA is limited to suits seeking relief other than monetary damages. *Id.* Review under the APA is also precluded where a plaintiff has an adequate remedy under the Tucker Act. *Randall*, 95 F.3d at 346. Thus, to bring a claim under the APA a plaintiff must prove that (1) he seeks relief other than money damages, and (2) there is no other

---

Randall, 95 F.3d at 346-47; Wright & Miller, *Fed. Practice & Proc.* § 3657. "[A] primary purpose of the Tucker Act is to ensure that a central judicial body adjudicates most claims against the United States Treasury." *Randall*, 95 F.3d at 346 (internal quotation marks omitted).

adequate remedy. 5 U.S.C. §§ 702, 704; *Hoffler v. Hagel*, 122 F. Supp. 3d 438, 442 (E.D.N.C. 2015), *aff'd in part, dismissed in part sub nom. Hoffler v. Mattis*, 677 F. App'x 119 (4th Cir. 2017) (citations omitted).

First, to determine whether a plaintiff seeks monetary relief, courts look to the "essence" of the complaint. *Randall*, 95 F.3d at 347. The Court previously ruled that the nature of Plaintiff's Complaint is monetary relief and belongs in front of the Court of Federal Claims, noting the Complaint specifically references that the 10% disability rating deprived Plaintiff of retirement pay. (Doc. No. 19). Now the Court must decide, at the direction of the Fourth Circuit, if the essence of Plaintiff's Complaint changed from monetary to equitable relief based on the Plaintiff's express waiver of "any right to military retirement pay." (Doc. No. 39-1 at 2).

In analogous jurisdictional issues, courts acknowledge district courts may exercise jurisdiction under the Little Tucker Act when plaintiffs waive their right to monetary relief over $10,000. *See e.g. Stone v. U.S.*, 683 F.2d 449, 454 (D.C. Cir. 1982) ("[P]laintiff's express waiver was sufficient to bring his case within the District Court's jurisdiction."); *Goble v. Marsh*, 684 F.2d 12, 13 (D.C. Cir. 1982) ("Plaintiffs whose damages exceed $10,000 may waive all claims greater than $10,000 in order to establish the jurisdiction of the District Court."); *U.S. v. Park Place Associates, Ltd.*, 563 F.3d 907, 927 (9th Cir. 2009) ("Parties may waive their right to receive more than $10,000 in order to satisfy the Little Tucker Act and obtain jurisdiction in

the district court."); *Woodard v. Marsh*, 658 F.2d 989, 992 (5th Cir. 2981) ("In his amended complaint, Woodard waived all claims for damages in excess of $9,999.99. Therefore, the district court had jurisdiction of his monetary claims."); *Roedler v. Dep't of Energy*, 255 F.3d 1347, 1351 (Fed. Cir. 2001) ("A district court may permit multi-plaintiff Little Tucker Act cases to proceed when each plaintiff waives recovery in excess of $10,000, even when potential liability exceeds $10,000."); Wright & Miller, *Federal Practice and Proc.* § 3657 ("[T]he plaintiff may waive all damages over $10,000 in order to bring the claim within the district court's subject matter jurisdiction."). Similarly, district courts exercise jurisdiction over claims against the United States under the APA where plaintiffs dismiss causes of actions that would otherwise prevent the district courts from exercising jurisdiction. *See Bennett v. Murphy*, 166 F. Supp. 3d 128, 131 (D. Mass 2016) (exercising jurisdiction under APA where "Bennett previously waived his claim for monetary damages in the form of retirement back pay and allowances; accordingly, he seeks only injunctive and declaratory relief."); *Clark v. Murphy*, No. 5:14-cv-565-FL, 2016 WL 3102016, at *3 (E.D.N.C. June 2, 2016) ("Plaintiff seeks leave to amend his complaint to waive all monetary and injunctive relief previously sought in his complaint, and to advance his arguments in support of vacating and remanding the Board's decision under the APA. . . . Plaintiff's waiver of all claims for monetary and injunctive relief reconciles his remaining claim with the jurisdiction of this court, pursuant to the APA. Accordingly, the court grants plaintiff's motion for

leave to amend. . . ." (citations omitted)). The Court finds these cases persuasive and agrees with the Magistrate Judge that after waiving any right to military retirement pay, the essence of the relief Plaintiff seeks is equitable relief to alter or amend his military records for purposes other than backpay or retirement pay. Plaintiff provides a number of non-monetary benefits for which he will become eligible if he is ultimately successful, such as healthcare benefits.

Defendant argues the essence of Plaintiff's Complaint is monetary because he seeks relief based on 10 U.S.C. § 1201, a money-mandating statute. Plaintiff brings his Complaint under 10 U.S.C. § 1554a, not 10 U.S.C. § 1201, as Defendant asserts. But Defendant argues 10 U.S.C. § 1554a triggers 10 U.S.C. § 1201, such that the Complaint seeks relief for monetary benefits. While 10 U.S.C. § 1554a may implicate a money-mandating statute, § 1554a itself is not a money-mandating statute. The Federal Circuit in *Quesada v. United States*, concluded that 10 U.S.C. § 1554a is not a money-mandating statute. 136 Fed. Cl. 635 (Fed. Cir. 2018). Additionally, a Complaint does not seek monetary relief solely because it may result in monetary gain from the government or that it may implicate a money-mandating statute. *Powe v. Secretary of Navy*, 35 F.3d 556 (4th Cir. 1994) ("[A] suit seeking a military discharge upgrade is not for money damages, even though an upgrade would entitle the recipient to payment for leave accrued at the time of discharge.").

Next, the Court of Federal Claims may only award equitable relief "in limited circumstances, when such relief is necessary to provide an entire remedy and when the injunction is 'an incident of and collateral to' an award of monetary relief." *Randall*, 95 F.3d at 346-47 (citing 28 U.S.C. § 1491(a)(2)). Since Plaintiff seeks equitable relief and the Court of Federal Claims has limited authority to provide equitable relief, the Court agrees with the Magistrate Judge that the Court of Federal Claims does not provide an adequate remedy. *See Smith v. United States*, ___ Fed. Cl. ___, 2022 WL 778626, at * n.5 (Fed. Cir. 2022) ("This is not to say, however, that a covered individual whose claim in this court was time-barred as of the date of his PDBR decision would have no right to judicial review in any court. Other plaintiffs have brought claims in federal district court challenging PDBR decisions under the Administrative Procedure Act."). Accordingly, this Court has jurisdiction under the APA.

B. Summary Judgment

The APA provides for judicial review of final agency actions. 5 U.S.C. §§ 702, 704. Under the APA "[t]he 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." 5 U.S.C. § 706(2)(A). Although the court must conduct a careful review of the agency's decision, "the ultimate standard of review is a narrow one." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, (1989) (citation

omitted). Moreover, the standard is highly deferential "which presumes the validity of the agency's action." *Natural Res. & Def. Council, Inc. v. Envtl. Protection Agency*, 16 F.3d 1395, 1400 (4th Cir. 1993). Courts should not reweigh the evidence, make credibility determinations, or substitute their judgment for that of the agency. *Downey v. U.S. Dep't of the Army*, 685 Fed. App'x 184, 189 (4th Cir. 2017). Rather, courts should determine whether the ultimate conclusion is supported by substantial evidence in the record. *Id.* at 190.

"[A]n agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* "An action is arbitrary or capricious if 'the agency relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Nat'l Audubon Soc. v. U.S. Army Corps of Engineers*, 991 F.3d 577, 583 (4th Cir. 2021) (quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 287-88 (4th Cir. 1999)). "[S]o long as the agency provides an explanation of its decision that includes a rational connection between the facts found and the choice made, its decision should be sustained." *Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1115 (4th Cir. 2014) (quotations and citations omitted).

This standard of review is narrow and "military administrators are presumed to act lawfully and in good faith like other public officers, and the military is entitled to substantial deference in the governance of its affairs." *Petri v. U.S.*, 104 Fed. Cl. 537, 550 (Fed. Cl. 2012).

The Magistrate Judge concluded the PDBR's decision was not arbitrary and capricious. Plaintiff objects and argues the PDBR's decision was arbitrary and capricious.

1. Whether Plaintiff Was Required to Receive a Follow-Up Examination Pursuant to 38 C.F.R. § 4.129 After Being Placed On TDRL

Plaintiff argues the decision is arbitrary and capricious because (1) the PDBR did not comply with 38 C.F.R. § 4.129 since Plaintiff did not undergo a follow-up examination after being placed on TDRL and before his final date of separation; and (2) the Magistrate Judge erred by relying on *Petri v. U.S.*, 104 Fed. Cl. 537 (Fed. Cl. 2012).

Department of Defense Instruction 6040.44 requires the PDBR to conduct reviews of the disability rating in accordance with the VASRD. The VASRD provides, "[w]hen a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall 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." 38 C.F.R. § 4.129. Here, pursuant to § 4.129, the PDBR constructively placed Plaintiff on TDRL for six months. Plaintiff did not undergo a follow-up examination before the PDBR's recommended final separation date in April 2006.

The purpose of the PDBR is to retroactively review certain disability determinations made between September 11, 2001 and December 31, 2009. Requiring a retroactive physical examination would effectively render the application of § 4.129 to PDBR reviews meaningless because each application of § 4.129 would require either (a) a retroactive physical examination that is impossible to complete, or (b) every person placed on TDRL to remain on TDRL for years until their disability becomes legally permanent or they undergo a physical examination ordered by the PDBR years later. Like the Magistrate Judge, the Court finds *Petri*, instructive here. 104 Fed. Cl. 537 (Fed. Cir. 2012).

In *Petri*, the court reviewed whether the PDBR's review of a former member of the Air Force was arbitrary and capricious when it recommended that the plaintiff's records be retroactively corrected to reflect a 50% disability rating for six months on TDRL, and thereafter awarded a permanent disability rating of 10%, without the plaintiff undergoing a retroactive physical examination in the time between the TDRL and permanent discharge date. *Id.* at 549. The court analyzed the role of the PDBR, the Department of Defense Instruction and related memoranda, and

ultimately concluded the PDBR board acted reasonably in assigning a permanent disability rating of 10% to the plaintiff without a new physical or mental examination after placing the plaintiff of TDRL. *Id.* at 558. The court reasoned that an examination years later would not reflect the plaintiff's state of health six months after being placed on TDRL and noted that the dependency on medical records was critical to the state of health at the time of the plaintiff's separation. *Id.* Plaintiff argues *Petri* is distinguishable because in *Petri* the plaintiff's VA disability rating was more than six months after the plaintiff was released from TDRL and the PDBR expressed concerns that the plaintiff exaggerated his symptoms to the VA. These distinctions are immaterial to the question of whether, for purposes of the PDBR retroactive review, Plaintiff was required to undergo a physical examination before being taken off TDRL.

Plaintiff also relies on *Cook v. United States*, for his position that the PDBR was required to order a physical examination before taking Plaintiff off TDRL. 123 Fed. Cl. 277 (Fed. Cl. 2015). Faced with the same issue, the *Cook* court concluded the PDBR could not remove the plaintiff from TDRL in the absence of a follow-up examination. *Id.* at 308. However, unlike *Petri*, the *Cook* court considered Army regulation and policy rather than Air Force regulation and policy. In addition, interestingly, the *Cook* court recognized that a follow-up examination is an "impossible task" but nevertheless concluded the plaintiff was required to remain on TDRL until legally his temporary disability

rating became permanent after five years since a follow-up examination was not possible. *Id.* The court reasoned that "[a]llowing the Army to make a determination with such evidence (and lack of evidence) is, once again, tantamount to rewarding the Army for its own error—its failure to schedule the follow-up examination for plaintiff pursuant to statute and regulation." *Id.* The *Petri* court's reasoning is more persuasive. As discussed, the *Cook* court's conclusion renders the application of § 4.129 meaningless in the context of retroactive reviews by the PDBR. Moreover, allowing such a determination will not "reward" the relevant military branch "for its own error" when the PDBR recommends placing individuals retroactively on TDRL years later based on legislation not in existence at the time of the individual's original separation.

In sum, the PDBR's failure to require Plaintiff to undergo a follow-up examination after being placed on TDRL and before his final date of separation was not arbitrary and capricious.

2. Whether PDBR Properly Considered the Evidence and Reached a Conclusion Supported by Substantial Evidence

Plaintiff also argues (1) the PDBR failed to consider Plaintiff's correct date of permanent disposition; (2) the PDBR failed to consider the severity of Plaintiff's condition at his permanent date of disposition; (3) the PDBR failed to consider how Plaintiff's condition could have worsened in the two months after his

VA Examination but before he was permanently separated; (4) the PDBR erred in reasoning that the purposes of the MEB and VA examinations would result in different disability ratings; and (5) the PDBR's decision was not supported by substantial evidence. The thrust of these arguments is that the PDBR's decision, in places, referred to Plaintiff's date of separation in October 2005, rather than April 2006, and the PDBR failed to consider the medical examinations and Plaintiff's condition in relation to his recommended amended final date of separation of April 24, 2006.

As an initial matter, the PDBR itself recommended correcting Plaintiff's final separation date from October 2005 to April 2006, after determining he should be placed on TDRL for six months. The PDBR's decision makes clear that the PDBR considered the evidence in relation to both TDRL and final separation date in April 2006. The PDBR's decision is not arbitrary and capricious solely because the decision referred to two medical examinations based on their relation to Plaintiff's original separation date rather than its recommended modified separation date. When explaining its conclusion, the PDBR stated "[w]ith regard to the permanent rating at the end of the constructive period of TDRL [the evidence] . . . did not approach the 50% rating." (Doc. No. 1-1 at 3). Similarly, the PDBR's decision discussed in detail the VA Examination, which was the closest examination in time to his final separation date, and indicated throughout that the PDBR considered the VA Examination in reaching its conclusion.

Plaintiff argues the PDBR failed to consider the potential worsening of his condition in the two months between the VA Examination and his final separation date in April 2006. However, the PDBR observed that records indicated "recurring/relapsing nature of [Plaintiff's] condition during which significant social and occupational impairment was likely; none were seen during the time leading up to [October 2005] or following [October 2005] up to the time of the post-separation [VA Examination]." (Doc. No. 1-1 at 4). It noted it had to make a recommendation based on the severity of the condition at the time of permanent disposition and not on future possible worsening. (*Id.*). The PDBR reviewed the evidence and reached its conclusion based on the evidence available to it, including the VA Examination. While the PDBR did not have the benefit of an examination on or immediately before or after April 24, 2006, its discussion indicates it considered the potential for Plaintiff's condition to worsen following the VA Examination, and concluded, based on the evidence, the 10% disability rating was more appropriate than 30%, which is supported by substantial evidence. Finally, the PDBR was not required to interpret the evidence in the same way or reach the same conclusion as the VA. The PDBR is charged with its own review and application of VASRD separate from the VA. Accordingly, the PDBR's decision was not arbitrary and capricious and is supported by substantial evidence.

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that:

1. The Magistrate Judge's M&R, (Doc. No. 45), is **ADOPTED**;

2. Defendant's Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction and, in the alternative, Motion for Summary Judgment, (Doc. No. 38), is **GRANTED IN PART** and **DENIED IN PART**. Specifically, its Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED** and its Motion for Summary Judgment is **GRANTED**.

4. Plaintiff's Motion for Oral Argument on the Issue of Jurisdiction, (Doc. No. 42), is **DENIED as moot**.

The Clerk is directed to close this case.

Signed: March 30, 2022

/s/ Robert J. Conrad, Jr.

Robert J. Conrad, Jr. [SEAL]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
STATESVILLE DIVISION
CIVIL ACTION NO. 5:17-CV-00096-RJC-DSC

BLAIR COLEMAN, **Plaintiff,** **v.** **HEATHER WILSON, Secretary of the Air Force,** **Defendant.**	**MEMORANDUM AND RECOMMENDATION** (Filed Apr. 16, 2021)

THIS MATTER is before the Court on the "United States' Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction and, in the Alternative, Motion for Summary Judgment," Doc. 38, filed on February 22, 2021, and the parties' associated briefs and exhibits.

The matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and this Motion is now ripe for the Court's consideration.

Having fully considered the arguments, the record, and the applicable authority, the undersigned respectfully recommends that Defendant's Motion to Dismiss be denied and Defendant's Motion for Summary Judgment be granted as discussed below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Blair Coleman seeks injunctive relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., to correct his discharge records to reflect medical retirement from the United States Air Force by reason of permanent disability. Doc. 1 at 14. Coleman served as an active-duty staff sergeant and witnessed service members being severely injured and killed during a mortar attack in Iraq. Id. at 15. As a result of the trauma he experienced from the attack, he was entered into the Disability Evaluation System process. Id. at 6. His claim was forwarded to an Informal Physical Evaluation Board (IPEB) to determine whether his diagnosis of anxiety disorder rendered him unfit for military service. Id. On September 9, 2005, the IPEB concluded that Coleman was unfit for military service and assigned him a disability rating of ten percent. Id. at 8.

On October 24, 2005, he was medically separated from the Air Force. Id. at 8. Based upon his ten percent disability rating, Coleman was not entitled to continuing retirement benefits including health care, because his disability rating at separation was less than thirty percent. Id. On March 15, 2006, Veterans Affairs ("VA") assigned him a disability rating of thirty percent effective October 25, 2005. Id. at 9. He began receiving disability compensation benefits from the VA. Id.

In 2008, Congress passed the National Defense Authorization Act. See 10 U.S.C. § 1554. The Act mandated retroactive consideration of disability

determinations for members of the armed forces who were separated due to a medical condition with a disability rating of twenty percent or less between September 11, 2001 and December 31, 2009. Id. The Act created the Physical Disability Board of Review ("PDBR") to determine whether the Veterans Affairs Schedule for Rating Disabilities ("VASRD") guideline codified at 38 C.F.R. § 4.129 (mental disorders due to traumatic stress) applied to cases like Coleman's. Doc. 1-1 at 2.

On April 16, 2011, Coleman requested a hearing before the PDBR, stating "I should have been medically retired. I was a career airman planning on making the Air Force my career. I feel 10% is unfair considering I'm still suffering from symptoms." Doc. 1 at 11; Doc. 1-1 at 1; Doc. 10 at 2. On May 17, 2012, the PDBR issued its decision, determining pursuant to VASRD § 4.129 that Coleman should have been placed on the Temporary Disability Retired List ("TDRL") for six months at a fifty percent disability rating beginning October 24, 2005 rather than being permanently discharged on that date. Doc. 1-1 at 4. The Board concluded that he would have been permanently discharged on April 24, 2006 after six months on the TDRL. Id. The PDBR affirmed the ten percent disability rating. Id. Coleman did not undergo a follow-up examination before his removal from the TDRL. Doc. 1 at 11-12.

On April 8, 2014, the VA revised his diagnosis to Post-Traumatic Stress Disorder and increased his

disability rating to fifty percent effective February 8, 2013. Id. at 8.

On June 8, 2017, he filed this action to challenge the PDBR's decision under the APA. Doc. 1. The Court granted the United States' Motion to Dismiss for lack of subject matter jurisdiction, finding that the "true nature of Plaintiff's Complaint takes a monetary form." Doc. 19 at 5. On May 30, 2018, Coleman appealed that Order to the Fourth Circuit. Docs. 22, 24. After Coleman filed a Declaration "waiving any right to military retirement pay," Doc. 39-1 at 2, the Fourth Circuit remanded the case to "reconsider its jurisdictional ruling in light of the Coleman Affidavit filed on appeal." Doc. 25 at 1; Doc. 25-1.

On February 22, 2021, the Government filed a Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction and, in the Alternative, Motion for Summary Judgment. Doc. 38.

II. DISCUSSION

A. Standard of Review – Rule 12(b)(1)

Federal district courts have limited jurisdiction. United States ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 347 (4th Cir. 2009). "They possess only that power authorized by Constitution and statute." Randall v. United States, 95 F.3d 339, 344 (4th Cir. 1996). "Thus, when a district court lacks subject matter jurisdiction over an action, the action must be dismissed." Vuyyuru, 555 F.3d at 347.

Federal subject matter jurisdiction is a threshold issue for the Court, Jones v. Am. Postal Workers Union, 192 F.3d 417, 422 (4th Cir. 1999), and a challenge to subject matter jurisdiction is properly considered on a motion under Fed. R. Civ. P. 12(b)(1). Clinton v. Brown, No. 3:15-cv-0048-FDW-DSC, 2015 WL 4941799 (W.D.N.C. Aug. 19, 2015).

The burden of establishing federal subject matter jurisdiction rests on the party asserting it. See Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). The moving party should prevail on a motion to dismiss for lack of federal jurisdiction if "material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Richmond, Fredericksburg & Potomac R.R. Co. v. U.S., 945 F.2d 765, 768 (4th Cir. 1991).

In determining whether a factual basis for subject matter jurisdiction exists for purposes of deciding a Rule 12(b)(1) motion to dismiss, the court is to regard allegations in the pleadings as "mere evidence on the issue," and may consider evidence outside the pleadings without converting the motion to one for summary judgment. Id. at 768; Fed. R. Civ. P. 12(d). "A trial court may consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment." Adams, 697 F.2d at 1219 (citations omitted).

A service member may be entitled to retirement benefits or medical severance pay if he becomes disabled while on active duty. 10 U.S.C. §§ 1201-1221. The

Secretary of each service is authorized to place members in disability retirement status upon a finding that the member was unable to perform military duties by reason of disability while on active duty. 10 U.S.C. § 1201. A member is placed on the TDRL for a period not to exceed five years if the disability is not considered permanent. 10 U.S.C. § 1210. If the disability is considered permanent and rated as thirty percent disabling or higher, the member is placed in permanent retired status. 10 U.S.C. § 1201. If rated less than thirty percent, the member is only entitled to medical severance pay. 10 U.S.C. § 1203

B. The Court has subject matter jurisdiction over Coleman's Complaint.

Coleman challenges the disability rating of ten percent that he received upon his discharge from the Air Force in 2005. See Doc. 10 at 2. The Government asserts that Coleman is bringing a monetary claim and thus, the Tucker Act, 28 U.S.C. § 1491, provides an adequate remedy. But Coleman invokes the APA, 5 U.S.C. § 706, as the basis for subject matter jurisdiction.

The Fourth Circuit explained the relationship between the Tucker Act and the APA in Randall v. United States:

> The interplay between the Tucker Act and the APA is somewhat complicated and raises some significant issues of federal court jurisdiction. Determining the proper statutory framework for the district court's jurisdiction in this case is critical

> because it affects the appellate jurisdiction of this court. **The United States Court of Appeals for the Federal Circuit, not the regional courts of appeals, has exclusive jurisdiction over appeals in cases based "in whole or in part" on the Tucker Act.** 28 U.S.C. § 1295(a)(2). The provision of 28 U.S.C. § 1295(a)(2) is mandatory and cannot be waived by the parties, because it relates to the subject matter jurisdiction of this court.

95 F.3d 339, 346 (4th Cir. 1996) (emphasis added) (internal citations omitted). The APA limits district court jurisdiction to claims for "relief other than money damages," and "for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. The Tucker Act, like the APA, waives the United States' sovereign immunity from suit. 28 U.S.C. § 1491. Under the Tucker Act, the U.S. Court of Federal Claims has exclusive jurisdiction for monetary claims against the United States exceeding $10,000. See 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). See also Randall, 95 F.3d at 346–47.

But the Tucker Act only precludes APA judicial review "when plaintiff has an adequate remedy by suit under the Tucker Act." Randall, 95 F.3d at 346. The Supreme Court has recognized a "strong presumption that Congress intends judicial review of agency action," so that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Bowen v. Michigan Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986).

Therefore, to have jurisdiction over an APA claim, the court must find that (1) Coleman seeks relief other than money damages and (2) that there is no other adequate remedy in a court, including the U.S. Court of Federal Claims. See Hoffler v. Hagel, 122 F. Supp. 3d 438, 442 (E.D.N.C. 2015), aff'd in part, dismissed in part sub nom. Hoffler v. Mattis, 677 F. App'x 119 (4th Cir. 2017) (citing 5 U.S.C. §§ 702, 704; Bowen v. Massachusetts, 487 U.S. 879, 891 (1988); James v. Caldera, 159 F.3d 573, 578–79 (Fed. Cir. 1998)).

a. Coleman seeks injunctive relief.

In determining whether Coleman states a claim under the Tucker Act, the court looks to the "essence of his complaint." Hoffler v. Hagel, 122 F. Supp. 3d 438, 443 (E.D.N.C. 2015) (quoting Randall, 95 F.3d at 347) (citing James, 159 F.3d at 579) ("Our inquiry, however, does not end with the words of the complaint, however instructive they may be, for we still must look to the true nature of the action in determining the existence or not of jurisdiction.") (internal quotation omitted)). As for the first requirement, the Government contends that Coleman seeks monetary relief.

Based upon Coleman's declaration and the Complaint, the Court finds that the essence of his Complaint is for injunctive relief to alter or amend his military records. See Richmond, Fredericksburg & Potomac R.R. Co., 945 F.2d at 768 (explaining that the court may consider evidence outside the pleadings without converting the motion to one for summary

judgment). In his Declaration, Plaintiff specifically waived "any right to military retirement pay." Doc. 39-1 at 2. The injunctive relief sought would make Coleman eligible to:

- participate in the "Tricare" military health insurance system;
- enter military bases and utilize amenities such as shopping at the post/base exchange;
- stay at numerous campgrounds and other military vacation destinations, such as Shades of Green at Walt Disney World Resort in Florida, Hale Koa Hotel on Waikiki Beach in Hawaii, and numerous on base hotels and lodging in Germany and Italy;
- enjoy travel privileges aboard military aircrafts;
- wear his military uniform in public; and
- have burial privileges in national cemeteries.

Doc. 39-1 at 1–2. See Smalls v. United States, 471 F.3d 186, 190 (D.C. Cir. 2006).

While injunctive relief may lead to additional benefits for Coleman and his family, the essence of his claim is for equitable relief. See Powe v. Sec'y of Navy, No. 94-1258, 1994 WL 445695, at *2 (4th Cir. 1994) ("[A] suit seeking a military discharge upgrade is not for money damages, even though an upgrade would entitle the recipient to payment for leave accrued at the time of discharge.") (citation omitted).

The Government also contends that Coleman's claim for injunctive relief is based on a money-mandating statute, 10 U.S.C. § 1201. However, he seeks correction of his records based upon 10 U.S.C. § 1554a, which the U.S. Court of Federal Claims has explicitly stated "is not a money-mandating statute." Quesada v. United States, 136 Fed. Cl. 635, 642 (2018). See also Fisher v. United States, 402 F.3d 1167, 1174–75 (Fed. Cir. 2005) (citing Sawyer v. United States, 930 F.2d 1577, 1580 (Fed. Cir. 1991)). Therefore, Coleman does not exclusively seek monetary relief that falls within the jurisdiction of the U.S. Court of Federal Claims.

The Court finds that Coleman has satisfied the first requirement for APA jurisdiction. See Smalls, 471 F.3d at 190 (stating that "the phrase 'retirement benefits' connotes a host of benefits to which no monetary value can be attached,"); Nieves v. McHugh, 111 F. Supp. 3d 667, 674–675 (E.D.N.C. 2015) (stating that a request for placement on retirement status is request for equitable relief pursuant to the APA).

b. There is no other adequate remedy in a court.

The Government contends that Coleman has an adequate remedy under the Tucker Act and thus jurisdiction lies in the U.S. Court of Federal Claims.

But the Tucker Act only "authorize[s] courts to award injunctive relief in limited circumstances, when such relief is necessary to provide an entire remedy and when the injunction is 'an incident of and

collateral to' an award of monetary relief." Randall, 95 F.3d at 46–47 (citing 28 U.S.C. § 1491(a)(2)). Given that Coleman waived his right to military retirement pay (Doc. 39-1 at 2), the injunctive relief, if granted, would not be an "incident of and collateral to" an award of monetary relief. See 28 U.S.C. § 1491(a)(2) ("[T]he court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.").

The Court acknowledges that a thirty percent disability rating may entitle Coleman to monthly retirement benefits. But there is no guarantee that he will be entitled to additional monthly payments from the Government, especially since he waived his right to retirement pay. See Fulbright v. McHugh, 67 F. Supp. 3d 81, 85 (D.D.C. 2014) ("Qualifying for disability retirement, however, is no small task" because "military regulations establish a complex web of procedures for obtaining disability benefits after leaving active service."). It is well-settled that veterans may not receive both disability compensation and military retirement pay outside of limited exceptions, 38 U.S.C. § 5304(a), and any veteran entitled to both must elect which of the two he receives. See 38 C.F.R. § 3.750(c)(i). In light of the rules prohibiting the concurrent receipt of VA disability and military retirement pay, the Court finds that Coleman is not exclusively seeking monetary relief. See Randall, 95 F.3d at 347 (affirming the district

court's finding that Little Tucker Act did not provide jurisdiction because the plaintiff's "claims were primarily for equitable relief," such that the retroactive promotion sought by the plaintiff was not available in the U.S. Court of Federal Claims because it was "not incident of, or collateral to, a monetary award."). Therefore, he does not have an adequate remedy in the U.S. Court of Federal Claims.

c. Coleman's claim is not barred by the six-year statute of limitations in 28 U.S.C. § 2501.

Section 2501 provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The Federal Circuit has held that a cause of action for military disability benefits accrues when a service member seeks and is denied disability benefits from a board competent to grant such benefits – either a physical disability board if the member is on active duty or from a board of correction if the member has been discharged. See Chambers v. United States, 417 F.3d 1218, 1224, 1227 (Fed. Cir. 2005); Huff v. United States Dep't of the Army, 508 F. Supp. 2d 459, 464 (D. Md. 2007) (applying the Federal Circuit's "first competent board rule"). When a service member fails to request a hearing board prior to discharge, this failure has the same effect as a refusal by the service to provide review, and the service member's cause of action accrues at the time of discharge. Real v. United

States, 906 F.2d 1557, 1560 (Fed. Cir. 1990). Thus, once a member's military disability retirement claim accrues, he must bring the claim within six years from the date of accrual. 28 U.S.C. § 2501.

Here, an Informal Physical Evaluation Board considered Coleman's claim for disability benefits in September 2005, prior to his discharge from the Air Force. See Doc. 8 at 2–3. The board considered the question of Coleman's fitness for duty while he was still serving and determined a ten percent disability rating was appropriate. See Doc. 8 at 3. See also Miller, 361 F.2d at 250. Coleman waived his right to a formal physical-evaluation-board hearing and instead agreed with the board's findings and recommended disposition. Therefore, under the "date of discharge" rule in Miller and Real, the statute of limitations accrual date for Coleman's Tucker Act claim was April 24, 2006—the day he was discharged.

The Court concludes that the statute of limitations ran on any claim brought under the Tucker Act in April 2012. But, as discussed supra, Coleman is not bringing a claim under the Tucker Act here. He is seeking injunctive relief and judicial review of a final agency action. Notably, the Tucker Act "does not itself provide the substantive cause of action; instead, a plaintiff must look elsewhere for the source of substantive law on which to base a Tucker Act suit against the United States." Martinez v. United States, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (internal citations omitted). While Coleman could have filed a Tucker Act claim for money damages based on retirement pay and still availed

himself of permissive board (such as the PDBR) review, the Court cannot weigh in on his choice of remedy. Martinez, 333 F.3d at 1304 (noting that the Federal Circuit has "long held that, in Tucker Act suits, a plaintiff is not required to exhaust a permissive administrative remedy before bringing suit."). The Court finds that Coleman's claim is not barred by the statute of limitations.

Accordingly, the undersigned respectfully recommends that Defendant's Motion to Dismiss be denied.

C. Standard of Review – Rule 56

Federal Rule of Civil Procedure 56(a) provides:

> A party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(a). "A dispute is genuine if a reasonable jury could return a verdict for the non-moving party." Vannoy v. Fed. Rsrv. Bank of Richmond, 827 F.3d 296, 300 (4th Cir. 2016) (quoting Libertarian Party of Va v. Judd, 718 F.3d 308, 313 (4th Cir. 2013)). "A fact is material if it might affect the outcome of the suit under the governing law." Id.

The movant has the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The court must view the evidence and any inferences therefrom in the light most favorable to the non-moving party. See Tolan v. Cotton, 572 U.S. 650, 657 (2014); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court applies "the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the non-moving party." Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 570 (4th Cir. 2015) (quoting Tolan, 572 U.S. at 660). "Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." Id. at 568-69 (quoting 10A Charles Alan Wright & Arthur R. Miller et al., Federal Practice & Procedure § 2728 (3d ed.1998)). "The court therefore cannot weigh the evidence or make credibility determinations." Id. at 569 (citing Mercantile Peninsula Bank v. French (In re French), 499 F.3d 345, 352 (4th Cir. 2007)). In the end, the question posed by a summary judgment motion is whether the evidence "is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 252.

D. The PDBR's decision was not arbitrary or capricious.

The decision of the PDBR is a final agency action subject to judicial review under the APA. See 5 U.S.C. § 701, et seq.; Chappell v. Wallace, 462 U.S. 296, 303 (1983). A final agency action may be set aside only if it is "arbitrary, capricious or not based on substantial evidence." 5 U.S.C. § 706(2). The reviewing court determines whether an agency action was "arbitrary and capricious" as a matter of law. See 5 U.S.C. § 706(2)(A); Chan v. U.S. Citizenship and Immigr. Servs. 141 F. Supp. 3d 461, 464 (W.D.N.C. 2015) (explaining that the agency resolves "factual issues to arrive at a decision that is supported by the administrative record" and the district court determines "whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review") (internal citations and quotation marks omitted).

To comply with the APA, the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Sierra Club v. Dep't of the Interior, 899 F.3d 260, 293 (4th Cir. 2018) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Agency action is arbitrary and capricious when the agency fails to consider "an important aspect of the problem," provides an explanation for its decision that contradicts the evidence before it or "is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise." Roe v. Dep't of Def., 947 F.3d 207, 220 (4th Cir. 2020) (quoting State Farm, 463 U.S. at 43).

Review is "highly deferential, with a presumption in favor of finding the agency action valid." Ohio Valley Env't Coalition v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009) (citation omitted). The court "may not supply a reasoned basis for the agency's action that the agency itself has not given." See Roe, 947 F.3d at 220 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974)). Where the agency has examined the relevant data and provided an explanation that includes "a rational connection between the facts found and the choice made," deference is due. Ohio Valley, 556 F.3d at 192. The court does not re-weigh the evidence and must uphold a decision that "was supported by substantial evidence." Portner v. McHugh, 395 Fed. App'x. 991, 992 (4th Cir. 2010) (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Platone v. U.S. Dept. of Labor, 548 F.3d 322, 326 (4th Cir. 2008) (citation omitted).

The court considers the record before the agency at the time the agency issued its decision and "affidavits not contained in the agency record . . . where 'there was such failure to explain administrative action as to frustrate effective judicial review.'" Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv., 707 F.3d 462, 467–68 (4th Cir. 2013) (quoting Camp v. Pitts, 411 U.S. 138, 142–43 (1973)). Because judicial review of the agency

decision is limited to review of the administrative record, "there can be no genuine issue of material fact in an APA action[.]" Callaway Golf Co. v. Kappos, 802 F. Supp. 2d 678, 685 (E.D. Va. 2011). Summary judgment is thus the mechanism for determining "as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." Chan, 141 F. Supp. 3d at 464 (W.D.N.C. 2015) (citation omitted).

Defendant contends that the decision of the PDBR to deny Coleman's request for a thirty percent disability rating and medical retirement was not arbitrary and capricious. Coleman asserts the PDBR was arbitrary and capricious in its decision because it failed to: (1) consider evidence demonstrating that his PTSD worsened between the time of his original discharge and the date he was removed from the TDRL and (2) order a physical examination pursuant to VASRD § 4.129 following his release from the TDRL to determine how his condition had changed from his original separation date to the time he was released from the TDRL.

In assessing the accuracy and fairness of disability ratings, the PDBR is to "[r]eview the PEB record of findings and the combined disability rating decisions regarding the specifically military unfitting medical conditions with respect to the covered individual." Doc. 39-2 at 9. The Secretary of the Air Force must determine what information is required for PDBR review, including but not limited to medical records. Id. at 7.

The PDBR is required to consider retroactive application of VASRD § 4.129. 38 C.F.R. § 4.129 provides that:

> when a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall 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.

Here, the PDBR properly applied § 4.129. Doc. 1-1 at 2. The Board noted that "neither the military psychiatrists [nor] the VA C&P examiner diagnosed PTSD" and that "the VA elected not to apply § 4.129 in its rating decision." Id. Nonetheless, the PDBR determined there was sufficient evidence to support that "a highly stressful event severe enough to bring about the Veteran's release from active military service did occur," such that application of § 4.129 was appropriate. Id. In assigning a ten percent disability rating at the end of the TDRL period, the Board considered the MEB psychiatric examination performed two months prior to separation and the VA Psychiatric compensation and pension evaluation performed four months after separation. Id. Both documents "occurred close to separation and [were] the only proximate documents available for review." Id.

Coleman contends that the PDBR erred by not ordering a physical examination following his release from the TDRL and "improperly reduced his disability

rating from the statutorily required 50% TDRL rating to 30% without conducting such an examination." Doc. 1 at 13. But the plain language of § 4.129 does not require a physical examination – only an "examination" before release from the TDRL. See 38 C.F.R. § 4.129; Petri v. United States, 104 Fed. Cl. 537, 555 (2012).

While not binding authority, the U.S. Court of Federal Claims decision in Petri is instructive here. 104 Fed. Cl. 537 (2012). In Petri, a former Air Force member sought review from the PDBR after he was separated with a disability rating of ten percent due to PTSD and subsequently rated as fifty percent disabled due to PTSD by the VA. Id. at 544. The PDBR recommended that Petri's records be corrected to reflect a six-month placement on the TDRL followed by separation with a disability rating of ten percent. Id. at 545–46. Because the PDBR did not actually place him on the TDRL but instead corrected his records to reflect TDRL placement, the court rejected plaintiff's argument that the PDBR should have ordered a physical examination in 2010 before correcting his records to remove him from the TDRL retroactively. Id. at 552, 557. The court held that the PDBR "acted reasonably" and not "arbitrarily or capriciously" in assigning a permanent disability rating of ten percent "without a hearing and without a new physical or mental examination in 2010." Id. at 558–62.

As in Petri, the PDBR was not required to order a physical examination before Coleman's release from the TDRL. The Board examined the evidence available at the time – the MEB psychiatric examination created

two months before Coleman's separation and the VA psychiatric compensation and pension evaluation created four months after his separation. Nothing more was required. The PDBR satisfied § 4.129. As the court in Petri acknowledged, a 2011 physical examination would not have reflected Coleman's state of health six months after his 2005 separation, the time period pertinent for the 2011 PDBR's determination of a permanent disability. 104 Fed. Cl. at 558. While the court in Cook v. United States, 123 Fed. Cl. 277 (2015) declined to follow Petri, Cook is neither binding nor persuasive authority. Accordingly, the Court finds that the PDBR did not act arbitrarily or capriciously in assigning a permanent disability rating of ten percent without ordering a physical examination before Coleman's release from the TDRL.

Moreover, Coleman contends the PDBR failed to consider the timing of the VA's rating decision or the "severity of [his] condition at the time of his permanent disposition from the military." Doc. 41 at 17. But there is substantial evidence that the PDBR considered that decision. Under VASRD § 4.130, a ten percent disability rating is appropriate where there is

> occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication.

38 C.F.R. § 4.130. A thirty percent disability rating is appropriate where there is

> occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

38 C.F.R. § 4.130.

Here, the VA psychiatric compensation and pension evaluation noted that Coleman enjoyed his job and was "doing fairly well," from which the PDBR could conclude that his work efficiency had not decreased on a day-to-day basis. Doc. 1-1 at 3. His social functioning also appeared to be largely unaffected by his symptoms. Id. He was able to go out to eat and "get out socially," though he was a "little nervous." Id. These subjective descriptions are consistent with "mild or transient symptoms" and occupational and social impairment only during periods of significant stress as the PDBR found. Doc. 44 at 19. While the Board noted that "social and occupational impairment consistent with a 30% evaluation [] could be surmised from some of the documented symptoms at the time of the post separation C&P examination," it recommended ten percent based upon his "generally intact interpersonal and occupational functioning with treatment." Doc. 1-1 at 3–4.

Although the VA considered the same evidence and concluded that Coleman merited a thirty percent disability rating, the PDBR is not required to defer to the VA's determination. Doc. 1-1 at 1–2 ("[T]he VA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the veteran's disability rating should the degree of impairment vary over time."). The Board noted that its recommendation was "based on the severity of the condition at the time of the permanent disposition and not based on possible future worsening." Doc. 1-1 at 4. Because the PDBR examined the relevant data and provided an explanation that demonstrates "a rational connection between the facts found and the decision made," deference is due. Ohio Valley, 556 F.3d at 192. This Court is not "empowered to substitute its judgment for that of the [PDBR]," which is precisely what Coleman asks the Court to do here. See id. See also Doc. 41 at 16 ("The PDBR should have adopted the VA's 30% disability rating instead of reducing Mr. Coleman's rating to 10 percent.").

Given that review is "highly deferential," Ohio Valley, 556 F.3d at 192, the Court defers to the expertise of the PDBR because its decision does not contradict the evidence before it and is not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Roe, 947 F.3d at 220. The Court concludes that taking the evidence in the light most favorable to Coleman, there are no genuine issues of material fact. Callaway Golf Co., 802

F. Supp. 2d at 685 (explaining that because judicial review of the agency decision is limited to review of the administrative record, "there can be no genuine issue of material fact in an APA action"). The PDBR's decision in assigning a ten percent disability rating is supported by substantial evidence. See Chan, 141 F. Supp. 3d at 464 (applying summary judgment to determine "as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review").

Accordingly, the undersigned respectfully recommends that Defendant's Motion for Summary Judgment be granted.

III. ORDER

IT IS ORDERED that all further proceedings in this action, including all discovery, are **STAYED** pending the District Judge's ruling on this Memorandum and Recommendation and Order.

IV. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that Defendant's Motion to Dismiss be **DENIED** and Defendant's Motion for Summary Judgment be **GRANTED**.

V. NOTICE OF APPEAL RIGHTS

The parties are hereby advised that pursuant to 28 U.S.C. §636(b)(1)(c), written objections to the

proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within fourteen days after service of same. Failure to file objections to this Memorandum with the District Court constitutes a waiver of the right to de novo review by the District Judge. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005); Wells v. Shriners Hosp., 109 F.3d 198, 201 (4th Cir. 1997); Snyder v. Ridenour, 889 F.2d 1363, 1365 (4th Cir. 1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140, 147 (1985); Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Wells, 109 F.3d at 201; Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to the parties' counsel and to the Honorable Robert J. Conrad, Jr.

SO ORDERED AND RECOMMENDED.

Signed: April 16, 2021

/s/ David S. Cayer

David S. Cayer [SEAL]
United States Magistrate Judge

FILED: September 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1591
(5:17-cv-00096-RJC-DSC)

BLAIR COLEMAN

Plaintiff - Appellant

v.

FRANK KENDALL, Secretary of the Air Force

Defendant - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk