No. 24-2050

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CARISSA THOMPSON,
Plaintiff-Appellant,

v.

LLOYD J. AUSTIN, III; FRANK KENDALL, III; and
PHYSICAL DISABILITY BOARD OF REVIEW
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, CIVIL ACTION NO. 8:23-CV-02568-DKC

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January 2, 2025

Local Rule 26.1 Disclosure Statement

No. 24-2050 *Carissa Thompson v. Lloyd Austin, III, et al.*

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Appellant Carissa Thompson makes the following disclosures:

1. Is party a publicly held corporation or other publicly held entity? **No.**

2. Does party have any parent corporation? **No.**

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? **No.**

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation? **No.**

5. Is party a trade association? **No.**

6. Does this care arise out of a bankruptcy proceeding? **No**.

7. Is this a criminal case in which there was an organizational victim? **No.**

Signature: */s/ Michael A. Losco* Date: January 2, 2025

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Carissa Thompson, a United States Air Force veteran, filed an application with the Physical Disability Board of Review (the "PDBR") on November 19, 2013, seeking review of her improperly calculated medical disability rating. JA407.[1] The PDBR notified Ms. Thompson of its erroneous decision on April 29, 2016. JA427. On April 19, 2022, Ms. Thompson brought an action pursuant to the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 702, *et seq.*, in the United States District Court for the District of Columbia against Defendants-Appellees United States Secretary of Defense Lloyd Austin, III, Secretary of the Air Force Frank Kendall III, and the PDBR.[2] On August 29, 2023, that court transferred the action to the United States District Court for the District of Maryland (the "District Court"). JA034. The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331. JA014.

On September 17, 2024, the District Court issued a Memorandum Opinion and Order denying Ms. Thompson's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment. JA510. On October 16, 2024, Ms.

[1] "JA" citations are to the Joint Appendix submitted herewith.

[2] For the avoidance of doubt, Ms. Thompson does not seek monetary damages; she seeks administrative relief in a finding that the District Court's decision was contrary to law. *See Lancaster v. Secretary of Navy*, 109 F.4th 283, 293 (4th Cir. 2024) (explaining that APA's federal-government sovereign-immunity waiver "is limited to suits seeking relief other than money damages.") (cleaned up).

Thompson timely filed a notice of appeal. JA512. This Court has jurisdiction under 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the District Court erred in granting summary judgment for Defendants despite the PDBR's improper reliance on examinations that failed to comply with the Veterans Affairs Schedule for Rating Disabilities ("VASRD"), including by (i) failing to record range of motion ("ROM"); (ii) failing to record the degree at which pain began during range-of-motion testing; and (iii) failing to adequately evaluate Ms. Thompson's functional loss due to pain, in violation of 10 U.S.C. § 1216a.

2. Whether the District Court erred in granting summary judgment for Defendants despite the PDBR's failure (i) to give the VA's 40% disability rating particular consideration in violation of Department of Defense Instruction 6040.44 (the "Instruction") since that rating was based on an examination conducted within one year of Ms. Thompson's separation from the Air Force; and (ii) to resolve reasonable doubt in Ms. Thompson's favor.

STATEMENT OF THE CASE

I. RELEVANT STATUTES AND REGULATIONS

Chapter 61 of Title 10 of the United States Code establishes the process through which the United States Armed Forces discharge disabled service members. It authorizes a Physical Evaluation Board ("PEB") to discharge service members who are found to be unfit for continued military service due to physical or mental disability. If the PEB determines that the servicemember is unfit for duty, the PEB assigns a disability rating (from 0% to 100%) based on the VASRD, 38 C.F.R. §§ 4.1, *et seq.*

A servicemember assigned a disability rating of 30% or higher is entitled to status as a "***military retiree***," which entitles her to extensive benefits, including healthcare for herself and her family, monthly military pension payments, and access to military bases' medical facilities and commissaries. 10 U.S.C. § 1201. By contrast, if a servicemember is awarded a combined disability rating lower than 30%, the servicemember is instead "***medically separated***" with a one-time lump-sum severance payment and without disability retirement or military retirement benefits. 10 U.S.C. § 1203(a)-(b); *see also id.* § 1212.

A. The Dignified Treatment of Wounded Warriors Act and the Creation of the PDBR

In 2008, Congress enacted the Dignified Treatment of Wounded Warriors Act ("DTWWA"), which created the PDBR within the Department of Defense ("DoD"). Congress specifically intended the PDBR to combat the prevalence of under-ratings that deprived veterans of their earned benefits and reduced the government's corresponding liabilities. *See* Nat'l Def. Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, tit. XVI, §§ 1601-76. As the Chairman of the Veterans' Disability Benefits Commission explained to the Committees on Armed Services and Veterans' Affairs in 2007, military departments frequently assigned lower disability ratings than the Department of Veterans' Affairs (the "VA") for the same service member, even though both the VA and the military departments purportedly relied on the same disability rating criteria (*i.e.*, the VASRD).[3] He further testified that, based on data collected by the Veterans' Disability Benefits Commission, it was "apparent that [the Department of Defense] has strong incentive to assign ratings less than 30% so that only separation pay is required and continuing

[3] *Hearing to Receive Testimony on the Department of Defense and Veterans Affairs Disability Rating Systems and the Transition of Servicemembers from the Department of Defense to the Department of Veterans Affairs*, S. Hrg. 110–212, at 104 (Apr. 12, 2007) ("While DOD asserts that it follows the VA Schedule for Rating Disabilities, the instructions issued by DOD and the Services, in effect, change the criteria contained [in] the Rating Schedule and how the Rating Schedule is applied.").

family health care is not provided."[4] During the legislative process, Senator Carl Levin, then Chairman of the Armed Services Committee, acknowledged this ongoing problem and stated that the bill would establish "an independent board to review and, where appropriate, correct unjustifiably low Department of Defense disability ratings awarded since 2001."[5]

Until its sunset in October 2024, the PDBR had jurisdiction to review the applications of veterans who were medically separated between September 11, 2002 and December 31, 2009, with a disability rating under 30%. 10 U.S.C. § 1554a(a)-(b). The PDBR then recommended to the relevant service secretary (*e.g.*, the Secretary of the Air Force) whether the challenged disability rating should be confirmed or modified. *Id.* The relevant service secretary could then accept or reject the PDBR's recommendation. DoD Instruction 6040.44. The service secretary's decision is a final agency action. *See id.* at 7.

On October 1, 2024, the PDBR ceased operating. In a memorandum dated July 9, 2024 (the "July 9 Memo"), Under Secretary of Defense Ashish S. Vazirani declared "that the PDBR has completed its mission" and ordered the sunset of the PDBR. OFFICE OF THE UNDER SECRETARY OF DEFENSE, *Sunset of Physical Disability*

[4] *Id.* at 104.

[5] 153 Cong. Rec. S. 9857, 9858 (July 25, 2007).

Board of Review, July 9, 2024, available at https://bit.ly/3VXGJlC; *see also* Air Force Review Boards Agency, *Department of Defense Physical Disability Board of Review (PDBR) Sunset*, https://bit.ly/4fEL0BE (last visited Jan. 2, 2025) (the "Air Force Bulletin"). Pursuant to the July 9 Memo, "[a]ny cases or requests for review pending before the PDBR" as of October 1, 2024, "shall transfer to the Secretary of the Military Department concerned for assignment to their respective Board of Correction of Military/Naval Records (BCMR/BCNRs)." July 9 Memo at 1. Thus, pending cases before the PDBR by Air Force service members like Ms. Thompson "shall transfer" to the Air Force Board for Correction of Military Records ("AFBCMR"). July 9 Memo at 1; the Air Force Bulletin.

B. The PDBR's Mandate

DoD Instruction 6040.44 (the "Instruction") governed the PDBR's review. The Instruction provides that the PDBR's purpose "shall be to reassess the accuracy and fairness of the combined disability ratings assigned Service members who were discharged with a combined disability rating of 20 percent or less and were not found to be eligible for retirement." The Instruction further required the PDBR to "use the VASRD in arriving at its recommendations, along with all applicable statutes, and any directives in effect at the time of the contested separation (to the extent they do not conflict with the VASRD in effect at the time of the contested separation)." Instruction, Encl. 3 § 4(d). The PDBR was required to strictly follow the VASRD—

including any applicable interpretation of the schedule by the United States Court of Appeals for Veterans Claims" ("CAVC")—and could add criteria only if the use "of such criteria will result in a determination of a ***greater percentage*** of disability than would be otherwise determined through the utilization of the schedule." 10 U.S.C. § 1216a(a)(2).

Under the VASRD, "disability" means the inability "to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance" due to damage or infection in the musculoskeletal system. 38 C.F.R. § 4.40. "It is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss, with respect to all these elements." *Id.* Such functional loss "may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion." *Id.*; *see also DeLuca v. Brown*, 8 Vet. App. 202 (Vet. App. 1995) (requiring military review board to consider whether pain could significantly limit functional ability during flare-ups or with repeated use over a period of time). Painful motion with joint or periarticular pathology is considered disabling. 38 C.F.R. § 4.59; *see also Burton v. Shinseki*, 25 Vet. App. 1 (Vet. App. 2011) (Section 4.59 applies to joint conditions other than arthritis). Further, disability evaluations must be based on the servicemember's "function under the ordinary conditions of daily life including employment." 38 C.F.R. § 4.10.

If a medical examination report lacks sufficient detail, it is inadequate for rating purposes, and the adjudicator must disregard the report. 38 C.F.R. § 4.2 ("If a diagnosis is not supported by the findings on the examination report ***or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate*** for evaluation purposes." (emphasis added)). Where the rating criteria include ROM, a medical examination report that does not record ROM or does not denote functional loss due to pain is inadequate and must be discarded. *DeLuca*, 8 Vet. App. at 205–06 (military review board violated 38 C.F.R. § 4.40 by relying on examination that "merely recorded the veteran's range of motion" without addressing functional loss due to pain with motion).

Under Diagnostic Code 5235, ***a 40% disability rating is warranted for forward flexion of the thoracolumbar spine that is 30 degrees or less***. 38 C.F.R. § 4.71a. By contrast, a 10% disability rating is warranted for "[f]orward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees . . . or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour." *Id.* The VASRD stipulates that "[w]here there is a question as to which of two evaluations shall be applied, the ***higher evaluation will be assigned*** if the disability picture more nearly approximates the criteria required for that rating." 38 C.F.R. § 4.7 (emphasis added). In making this determination, any reasonable doubt regarding the degree of disability must be resolved in the

veteran's favor. 38 C.F.R. § 4.3 ("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.").

II. STATEMENT OF FACTS

A. Ms. Thompson's Exemplary Military Service and Career-Ending Injury

Plaintiff-Appellant Carissa Thompson is a former Airman First Class in the United States Air Force. Following the September 11th, 2001 terrorist attacks, Ms. Thompson enlisted in the Air Force immediately after she graduated from high school in June 2002. She served honorably as a Signals Intelligence Analyst from November 25, 2002 to May 23, 2005. For her exemplary service, Ms. Thompson received the Global War on Terrorism Service Medal and an Air Force Organizational Award.

On July 31, 2003, Ms. Thompson suffered a serious back injury. While riding as a passenger in a two-person all-terrain vehicle, Ms. Thompson was thrown from the vehicle, which rolled over on her, resulting in a burst fracture of her L1 vertebra. JA143. Ms. Thompson was hospitalized for weeks, placed in a brace, and prescribed narcotics for severe back pain. After she was released from the hospital, Ms. Thompson returned to military duty. For nearly two years, Ms. Thompson tried to perform her duties despite often suffering from excruciating pain and other debilitating physical limitations. During that two-year period, Ms. Thompson

underwent numerous treatments, but because of her injuries, she was often prohibited from serving full-time military duty. On September 4, 2003, Ms. Thompson was placed on a temporary physical "profile" due to her back injuries, restricting her from running, jumping, climbing, crawling, repeated bending, repeated twisting, engaging in ergometry testing, and engaging in sports. JA138. That profile also restricted Ms. Thompson from lifting anything heavier than 15 pounds or standing for more than 15 minutes per hour. *Id.*

B. Initial Treatment and Examination of Ms. Thompson's Injuries

On **September 25, 2003**, a staff physical therapist (Michael Curtin) found that Ms. Thompson's lumbosacral spine range-of-motion ("ROM") for forward flexion was 15 degrees. JA212. As discussed below, the degree of forward flexion is a critical measurement, as a 40% disability rating is warranted for forward flexion of the spine of 30 degrees or less – that is, the finding Mr. Curtin made in September 2003. *See* 38 C.F.R. § 4.71a.

On **October 21, 2003**, Dr. David Christensen, an orthopedist, examined Ms. Thompson and recorded that her flexion tolerated 30 degrees before she experienced pain. *See* JA197. Ms. Thompson reported wearing her back brace "most of the time," with low back pain and fatigue occurring approximately 15 minutes after removing the brace. *Id.* Ms. Thompson added that "when she flexes forward she has [an] increase in low back pain." *Id.*

On **March 26, 2004**, Dr. Christensen again examined Ms. Thompson and reported that a chiropractic treatment she received shortly before the March 2004 examination "made things worse and increased her pain in her back." JA208. Dr. Christensen further reported that Ms. Thompson had "quite a bit of axial back pain," and that his examination of Ms. Thompson showed that she had "pain with forward flexion." *Id.* Dr. Christensen failed to record Ms. Thompson's ROM. *Id.*

On **June 11, 2004**, Dr. Christensen again examined Ms. Thompson and noted "palpable prominence at approximately the L1 spinous process in the midline." JA205. Ms. Thompson reported feeling pain and discomfort within 30 to 60 minutes after waking up, and persistent pain without her back brace. *Id.* Ms. Thompson added that the pain "persist[ed] throughout the day as long as she was upright," and that she felt better only "by lying back down in supine position." *Id.* Dr. Christensen also stated that Ms. Thompson had "full [ROM] of the spine, being able to flex forward and touch her toes to the floor and going to full extension with some minor tightness at the level of her injury." *Id.* Because of Ms. Thompson's "long-standing symptoms," Dr. Christensen recommended bone scans to measure metabolic activity and assess the need for surgical intervention. JA 206. Dr. Christensen failed to note at what angle Ms. Thompson's "minor tightness" began when recording ROM measurements.

C. The Medical Evaluation Board's Examination and Referral of Ms. Thompson to a Physical Evaluation Board

On **July 26, 2004**, Dr. Warren Kadrmas prepared a Narrative Summary ("NARSUM") as part of the Medical Evaluation Board ("MEB") process. JA055, JA357. It is unclear whether ROM was measured as part of the July 26, 2004 NARSUM. The "Physical Examination" portions of the June 11 and July 26 reports are virtually identical. *See* JA205, JA357. Even the PDBR stated that "the MEB NARSUM examination was ***performed*** . . . on 11 June 2004 and the NARSUM was ***written*** in July 2004 by the same orthopedic specialist, with no change in the status of the back condition noted, approximately a year after the [fracture] had occurred." JA055 (emphasis added). Thus, it appears that at least that portion of the July 26 NARSUM was simply a write-up of the June 11 exam. JA055.

On **December 13, 2004**, Ms. Thompson visited a pain clinic where staff anesthesiologist Dr. Christopher Frandrup noted that Ms. Thompson could tolerate only 20 degrees of forward flexion. JA231. Dr. Frandrup further reported that Ms. Thompson's pain was exacerbated by activity, including walking and standing, and that her pain had worsened over the past six months. *Id.* Ms. Thompson reported that her TENS unit[6] and physical therapy provided temporary relief, but that she

[6] TENS stands for Transcutaneous Electrical Nerve Stimulation, which uses low-voltage electrical currents to relieve pain. *See* CLEVELAND CLINIC, *Transcutaneous Electric Nerve Stimulation*, https://cle.clinic/3YGwV02 (last visited Dec. 31, 2024).

suffered from a tingling sensation in her low back, radiating outward. *Id.* Shortly after the December 13, 2024 examination, Ms. Thompson was placed on convalescent leave due to her extreme and persistent back pain. *Id.*

On **February 1, 2005**, at Dr. Kadrmas' recommendation, Ms. Thompson visited an orthopedic clinic and met with spine surgeon Dr. Steven Cyr. Dr Cyr assessed Ms. Thompson's condition as "an L1 compression fracture with continued chronic pain." JA232. He reported that Ms. Thompson "continues to have pain that is worse with activity," and that she was "on a Fentanyl patch for her pain control." *Id.* Dr. Cyr reported that Ms. Thompson planned to leave the Air Force due to her condition and would "consider surgical options at that time." *Id.* Dr. Cyr further stated that Ms. Thompson had a normal heel-to-toe walk and gait, and recorded observations regarding Ms. Thompson's "bilateral lower extremities," including the "iliopsoas, quadriceps, hamstrings, tibialis anterior, extensor hallucis longus, peroneals, and gastrocnemius soleus"— all muscles located at hip-level or lower. *Id.* None of the strength tests listed directly measured Ms. Thompson's back flexion. Dr. Cyr failed to report any measurement of forward flexion.

On **February 17, 2005**, the MEB issued a report referring Ms. Thompson's case to a PEB. On **April 6, 2005**, the PEB determined that Ms. Thompson was unfit for duty due to a compression fracture of her L1 vertebra, under Diagnostic Code 5235, 38 C.F.R. § 4.71a ("Code 5235"). JA347. Despite Ms. Thompson's persistent,

significant, and well-documented pain and physical limitations, the PEB assigned Ms. Thompson a disability rating of only 10%. As a result of this artificially low disability rating, Ms. Thompson was medically separated, rather than medically retired, from the Air Force, and was discharged on **May 23, 2005**. JA329. Ms. Thompson received a one-time, lump-sum payment of $6,190.80 for the disability that rendered her unfit to continue serving her country. JA060.

D. The VA's Evaluation and Proper Disability Rating of 40%

On **August 3, 2005**, less than four months after the PEB's disability report, Ms. Thompson received a Compensation and Pension ("C&P") examination conducted by the VA. JA112-15. The C&P report stated that Ms. Thompson occasionally used a wheelchair and was capable of taking only "a few steps for short distances, satisfying bathroom needs, etc., but she [had] considerable pain and [felt] numbness in both legs." JA113. At the time of the August 3 C&P examination, Ms. Thompson noted that "her pain [was] getting worse instead of better." *Id.* Dr. Jim Kokel, the physician who conducted Ms. Thompson's C&P examination, noted that Ms. Thompson had "chronic low back pain, constant every day, 24 hours a day," making it difficult for her to sleep and ranging from a constant ache to a stabbing pain. JA116. Ms. Thompson wore her back brace for the C&P examination, as she wore the back brace every day, and Dr. Kokel determined that her forward flexion was limited to 30 degrees due to pain: "Forward flexion goes from 0 to 30 degrees

with pain in the entire lumbar spine at 30 degrees, minus 60 degrees secondary to pain." JA117.

On **August 25, 2005**, the VA assigned Ms. Thompson a disability rating of 40% "for forward flexion of the thoracolumbar spine of 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine" under Code 5235. JA068. This finding was consistent with Ms. Thompson's forward flexion measurements as recorded in September 2003, October 2003, and December 2004. The VA also relied on the well-documented medical record that Ms. Thompson wore a back brace daily and used a TENS unit and wheelchair at times. *See* JA068. In rendering its decision, the VA considered "Service Medical Records from September 13, 2002 through February 17, 2005," the August 3 C&P examination, and an additional August 11, 2005 examination. *Id.* Ms. Thompson applied for unemployment benefits shortly after the August 11 examination. JA074.

On **November 20, 2005**, the VA confirmed that Ms. Thompson's injury was "so severe as to render [her] unemployable." Her unemployment benefits were awarded effective **May 24, 2005**. *Id.*

On **March 17, 2008**, Ms. Thompson received a second C&P examination at the VA, which reaffirmed the VA's earlier conclusions regarding the severity of her injuries. JA129-30. The VA examiner recorded Ms. Thompson's forward flexion as "less than 10 degrees, and more in the range of 5 degrees," with pain noted on all

motions. *Id.* The examiner further noted that Ms. Thompson could stand for only 20 minutes and that she was unemployed and having difficulty taking care of herself and her infant child due to back pain. *Id.* The VA retained the 40% disability rating for her injury. *Id.*

E. Ms. Thompson's PDBR Appeal and the PDBR's Incorrect Decision

As explained above, the PDBR had jurisdiction to review the applications of veterans who were medically separated between September 11, 2001 and December 31, 2009 with a disability rating below 30%. 10 U.S.C. § 1554a(a)-(b). Upon review, the PDBR was required to make recommendations to the relevant service secretary—here the Secretary of the Air Force ("SECAF")—concerning whether the challenged determination should be modified. *Id.* The service secretary's decision to accept or reject the PDBR's recommendation is a final agency decision. Ms. Thompson sought reconsideration of her incorrect 10% disability rating, but in an April 29, 2016 decision, the PDBR erroneously declined to correct Ms. Thompson's 10% disability rating. JA052-57. SECAF accepted the PDBR's decision in June 2016. JA051.

Although the PDBR's April 29, 2016 decision briefly summarized portions of Ms. Thompson's medical records, the PDBR focused on only three reports in deciding to confirm the PEB's erroneous 10% disability rating: the June 11, 2004 exam; the July 26, 2004 NARSUM; and the February 1, 2005 exam. JA055. As a

preliminary matter, the PDBR provided two contradictory summaries of the June 2004 and July 2004 reports. On the last page of its cursory four-page decision, the PDBR described the July 2004 NARSUM as a written summary of the June 11, 2004 examination. *Id.* Two pages earlier, the PDBR stated that "[t]he MEB NARSUM examination took place on 26 July 2004 . . . [and] cited the same symptoms and findings as the orthopedic evaluation on 11 June 2004. JA053.

Neither summary is correct. The **June 11, 2004** examination was an "Orthopedic Spine Clinic Outpatient Follow-up Note" prepared by Dr. Christensen. As summarized above, Dr. Christensen reported that Ms. Thompson experienced "persistent pain" since coming out of her back brace; felt "pain and discomfort within 30 to 60 minutes of awakening"; that the pain persisted "throughout the day as long as she is upright." JA205.

The **July 26, 2004** report, titled "Narrative Summary" and addressed to the MEB, was prepared by a *different* orthopedic surgeon, Dr. Kadrmas. JA357. The July 26, 2004 NARSUM reported some of the same findings as the June 11, 2004 examination, and added further evidence of Ms. Thompson's disabilities (*e.g.*, Ms. Thompson could walk only for 10 minutes due to back pain; that Ms. Thompson tried using an elliptical trainer but was unable to do so for more than five minutes). *Id.*

Neither the June 11 2004 NARSUM nor the July 26, 2004 examination recorded the angle at which Ms. Thompson's pain began with forward flexion. And the **February 1, 2005** examination Dr. Cyr conducted did not make *any* finding on forward flexion. *See* JA232.

The PDBR mentioned in passing that Ms. Thompson underwent an examination on **December 13, 2004**, in which her forward flexion was limited to 20 degrees, JA051, but inexplicably gave that December 2004 examination no further consideration. The PDBR also mentioned Ms. Thompson's **September 4, 2003** and **October 21, 2003** examinations, but failed to mention that those examinations reported her forward flexion as limited to 10 degrees and 30 degrees, respectively. *See* JA050-51. These three examinations—the September 2003, October 2003, and December 2004 examinations—all provided evidence of Ms. Thompson's forward flexion limitations and confirmed her entitlement to a 40% disability rating.

The PDBR also selectively discounted Ms. Thompson's **August 3, 2005** VA C&P examination—at which Dr. Kokel reported that Ms. Thompson's forward flexion went "from 0 to 30 degrees with pain in the entire lumbar spine at 30 degrees" (JA117)—purportedly because Ms. Thompson was wearing her back brace at the time. The PDBR provided no explanation for why the back brace would have caused Ms. Thompson to suffer pain "from 0 to 30 degrees with pain in the entire lumbar spine at 30 degrees." *Id.* Nor did it explain why Dr. Kokel was incorrect in

his belief that he accurately recorded Ms. Thompson's forward flexion while wearing her back brace, or why the VA was incorrect in assigning Ms. Thompson a 40% disability rating based on that August 2006 examination and her forward flexion measurement.

Finally, the PDBR failed to mention that during Ms. Thompson's **March 17, 2008** VA C&P examination, the VA examiner recorded Ms. Thompson's forward flexion to be "less than 10 degrees, and more in the range of 5 degrees"—on which basis the VA maintained its 40% disability rating. *See* JA054, JA083, JA129.

In flagrant disregard of this well-documented medical record, the PDBR concluded that "***based on ROM criteria***, . . . a higher [disability] rating than 10% was not warranted." JA055.

SUMMARY OF ARGUMENT

In granting summary judgment in favor of Defendants and against Ms. Thompson, the District Court committed two errors which this Court should reverse. ***First***, the District Court accepted the PDBR's improper reliance on examinations that failed to comply with the VASRD and the CAVC's binding interpretation of the VASRD, including by (i) failing to record Ms. Thompson's range of motion; (ii) failing to record the degree at which Ms. Thompson's pain began during the range-of-motion testing; and (iii) failing to adequately evaluate Ms. Thompson's functional loss due to pain, in violation of 10 U.S.C. § 1216a.

Second, the District Court accepted the PDBR's failure (i) to give the VA's 40% disability rating particular consideration in violation of the Instruction because that rating was based on an examination conducted within one year of Ms. Thompson's separation from the Air Force; and (ii) to resolve reasonable doubt in Ms. Thompson's favor.

The evidence in the Administrative Record confirms both decisions were in error, and that the District Court committed error by affirming those decisions.

ARGUMENT

I. Standard of Review

This Court "review[s] a motion for summary judgment de novo." *Anderson v. Diamondback Inv. Grp., LLC*, 117 F.4th 165, 173 (4th Cir. 2024). "Summary judgment is appropriate if, viewing the facts and all justifiable inferences therefrom in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (cleaned up).

Separately, in APA cases, this Court reviews the District Court's evaluation *de novo*, "independently assessing whether the agency action was unlawful." *Vanda Pharms., Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 98 F.4th 483, 490 (4th Cir. 2024) (cleaned up).

Under either framework, this Court's standard of review is *de novo*.

II. Proper Application of the Administrative Procedure Act

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *F.C.C. v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). In evaluating challenges to agency action under the APA, a court must "ensure[] that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* (collecting cases). This is because the APA "requires agencies to engage in 'reasoned decisionmaking.'" *D.H.S. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (quoting *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015)).

A reviewing court "must 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Mountain Valley Pipeline, LLC v. N. Carolina Dep't of Envt'l Quality*, 990 F.3d 818, 826 (4th Cir. 2021) (quoting 5 U.S.C. § 706(2)(A)). "An action is arbitrary and capricious if the agency relied on factors outside those Congress intended it to consider; failed to consider an important part of the problem; offered an explanation contradicted by 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.'" *Id.* (quoting *Defs. of Wildlife v. Dep't of the Interior*, 931 F.3d 339, 345 (4th Cir. 2019)).

Although the "arbitrary and capricious" standard requires some measure of respect for the agency's judgment, it "is not meant to reduce judicial review to a 'rubber-stamp' of agency action." *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192–93 (4th Cir. 2009) (cleaned up). The court must undertake a "searching and careful" inquiry of the record to "understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made." *Id.*

An agency's decision must be reversed if it "is not supported by substantial evidence, or the agency has made a clear error in judgment." *Spirit Airlines, Inc. v. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (cleaned up). "Substantial evidence" means "more than a scintilla but less than a preponderance of the evidence." *Cal. Pub. Utils. Comm'n v. F.E.R.C.*, 20 F.4th 795, 802 (D.C. Cir. 2021) (cleaned up).

And an agency's decision must also be set aside if the decision was "not in accordance with law." 5 U.S.C. § 706(2)(A); *Hatmaker v. United States*, 117 Fed. Cl. 560, 565 (Fed. Cl. 2014). As part of its review of Ms. Thompson's disability rating, the PDBR was required to strictly follow the Instruction and the VASRD. 10 U.S.C. § 1216a; DoD Instr. 6040.44, Encl. 3 § 4. When the PDBR's disability rating for medical retirement is "inconsistent with the applicable statute and regulations,"

the District Court's award of summary judgment to the agency should be vacated with a "remand for further proceedings." *Sissel v. Wormuth*, 77 F.4th 941, 942 (D.C. Cir. 2023).

The PDBR's obligations under the VASRD included: (i) with any form of joint pathology, to "recognize painful motion . . . as productive of disability," 38 C.F.R. § 4.59, and find inadequate any examination that merely records ROM without addressing functional loss due to pain, 38 C.F.R. §§ 4.2, 4.40; (ii) "to administer the law under a broad interpretation" and resolve any doubt concerning the degree of disability "in favor of the claimant," 38 C.F.R. § 4.3; and (iii) when there is a question about which of two disability evaluations will be applied, to apply the higher evaluation if the "disability picture more nearly approximates the criteria required for that rating." 38 C.F.R. § 4.7. Moreover, "[t]he [PDBR's] consideration of factors which are wholly outside the rating criteria provided by the regulations is error as a matter of law." *Massey v. Brown*, 7 Vet. App. 204, 208 (Vet. App. 1994). When one or more of these obligations is not met, the PDBR's decision must be vacated.

III. The District Wrongly Concluded That the VASRD Does Not Require an Examiner to Indicate Where Pain Begins in Degrees for the Exam to Be Adequate

The VASRD requires that any examination of a disability like Ms. Thompson's, for which range of motion is at issue, must denote the functional loss resulting from pain throughout the range of motion. *See* 38 C.F.R. § 4.40 (defining "disability" as including "functional loss . . . due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion"); *see also* 38 C.F.R. § 4.59 ("The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability.").

Where a medical examination report does not contain sufficient detail, "it is incumbent upon the rating board to return the report as inadequate for evaluation purposes." 38 C.F.R. § 4.2; *Bowling v. Principi*, 15 Vet. App. 1, 12 (2001). Because functional loss due to pain must be considered in evaluating ROM, a report that fails to record functional loss due to pain likewise must be discarded. *See DeLuca*, 8 Vet. App. at 206 (ordering a new examination where medical examination on which the board relied, which recorded limited left-shoulder range of motion, lacked detailed consideration of the impact of pain during flare-ups as required by 38 C.F.R. § 4.40).

The CAVC has explicitly held that to adequately portray functional loss as required by the VASRD, examiners must note where pain begins during range-of-motion testing. In *Mitchell v. Shinseki*, the CAVC emphasized that identifying

during the range of motion assessment the point where a veteran experiences pain is essential for accurately assessing the extent of the disability. 25 Vet. App. 32, 44 (Vet. App. 2011).

By contrast, the District Court wrongly concluded that "the VASRD does not require an examiner to record where pain begins upon movement." JA501 (quoting 38 C.F.R. § 4.40). This was legal error.

IV. The District Court Wrongly Upheld the PDBR's Reliance on Exams that Did Not Record ROM or Functional Loss Due to Pain

Based on its erroneous assertion that the VASRD does not require an examiner to indicate where pain begins in degrees, the District Court wrongly concluded that the PDBR properly relied on reports that did not record where pain began. Worse, it concluded that the PDBR properly relied on reports that failed to record ROM *altogether*. To the contrary, the VASRD requires that all such reports be discarded as inadequate for rating purposes.

Where, as here, the relevant rating criterion is ROM, a report that fails to record ROM does not contain sufficient detail to determine whether that criterion is satisfied. *Crockwell v. Austin*, No. 22-1649, 2024 U.S. Dist. LEXIS 55955, at *21 (D.D.C. Mar. 28, 2024). It must therefore be discarded for purposes of the rating decision. In *Correia v. McDonald*, the CAVC held that range-of-motion tests are necessary to assess pain during movement, and without these measurements, the exam is legally insufficient for rating purposes. 28 Vet. App. 158, 163 (Vet. App.

2016). And *DeLuca* mandates that examiners assess whether pain significantly limits functional ability. 8 Vet. App. at 206.

Here, the PDBR relied entirely on reports that contained no ROM measurements or did not record where functional loss due to pain began. Each of those examinations failed to record where pain began upon movement. The **June 11, 2004** exam and the **July 26, 2004** NARSUM concluded that Ms. Thompson had a full range of movement of the spine but indicated that she was in a great deal of pain at all times. JA205, 357.

The **June 2004** exam report merely mentioned Ms. Thompson's pain and discomfort but did not connect these symptoms to functional limitations, as required by *DeLuca*. Specifically, the report noted: "Ms. Thompson felt pain and discomfort within 30 to 60 minutes of awakening," which "persists throughout the day as long as she is upright." JA205. However, the PDBR failed to address the extent of the impairment or how it affected her ability to function in daily activities or maintain employment. The **July 2004** NARSUM made similar observations, adding that Ms. Thompson could walk for no more than ten minutes, "limited by back pain," and that she was only able to ride an elliptical trainer for five minutes. JA357. Both reports, however, failed to record where pain began upon movement. *See* JA205, 357. The **February 1, 2005** exam failed to record the ROM at all. JA053-54.

All three examinations were therefore inadequate for evaluating the extent of Ms. Thompson's disability, violating the VASRD and the CAVC's decisions, and thus the PDBR should have discarded them. Nevertheless, the District Court rubber-stamped the PDBR's reliance on those deficient reports, holding that the **June 2004** exam and the **July 2004** NARSUM "discuss Plaintiff's pain and functional loss," and that the PDBR "recognized and considered the limitations" of the **February 2005** exam. JA501. Because each of those reports was inadequate under the VASRD, the PDBR's reliance on them was arbitrary and capricious, and its decision was unsupported by substantial evidence. The District Court's endorsement of the PDBR's erroneous decision was likewise wrong as a matter of law.

V. The District Court Wrongly Upheld the PDBR's Decision to Disregard Probative Examinations, Including Those Nearest in Time to Ms. Thompson's Separation

The District Court also erred by failing to rectify the PDBR's arbitrary disregard of exams that supported a higher rating, including exams conducted closer in time to Ms. Thompson's separation from the Air Force.

In determining a service member's disability rating, the service branch "takes a snapshot of the service member's condition at the time of separation from the service." *Ward v. United States*, 133 Fed. Cl. 418, 431 (Fed. Cl. 2017). Therefore, as the District Court acknowledged, examinations conducted further in

time from a servicemember's separation "makes them less probative than the examinations done closer to [Ms. Thompson's] separation date. JA507.

The administrative record contains *five* ROM measurements that compel a 40% disability rating. Two of these exams were closer in time to Ms. Thompson's separation than the exams relied upon by the PDBR to assess forward flexion (the **February 2005** exam does not even mention the issue), and therefore presented the most accurate picture of Ms. Thompson's disability upon her separation. The PDBR addressed and distinguished just one of those results, leaving the other four completely unaccounted for in its conclusion, violating the APA standard by failing to "consider all of the relevant evidence in the record, 'whether or not it supports the challenged conclusion.'" *Valles-Prieto v. United States*, 159 Fed. Cl. 611, 618 (Fed. Cl. 2022) (quoting *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983)); *see also Williams v. Roth*, No. 21-cv-2135, 2022 WL 4134316, at *7 (D. Md. Sept. 12, 2022) ("Although the Board certainly summarized the evidence, it utterly failed to integrate any facts into its conclusory determination."); *U-Ahk-Vroman-Sanchez v. Dep't of Defense*, No. 19-cv-3141, 2021 WL 394811, at *6 (D.D.C. Feb. 4, 2021) ("[D]espite referencing contrary evidence suggesting abnormalities with Plaintiff's shins, the Board did not explain in any detail why the VA's evidence was not 'satisfactory evidence of painful motion' and thus was insufficient for a 10 percent disability rating.").

Although the PDBR relied upon two examinations that found Ms. Thompson's ROM to fall within normal limits, JA205, 357, the PDBR was required to reconcile such findings with the contrary findings in four other examinations:

September 25, 2003 (15 degrees ROM); **October 21, 2003** (30 degrees); **December 13, 2004** (20 degrees), **August 3, 2005** (30 degrees); and **March 17, 2008** (in the range of 5 degrees). *See U-Ahk-Vroman-Sanchez*, 2021 WL 394811, at *5 ("[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation.") (quoting *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018)). Yet the PDBR made no attempt to reconcile the contrary findings of three of those four examinations—merely referencing the other exams without factoring their contrary findings into its conclusions.

Regarding the **December 13, 2004** exam, the PDBR said only the following:

> the CI reported back pain, graded 3/10, in the lumbosacral region exacerbated by activity, walking, standing which had worsened over the past 6 months. Additionally, the CI complained of a tingling sensation and pain in her lower right back radiating to the back of her knees and sharp, shooting, non-radiating pain in the lumbar region. On examination there was tenderness to palpation of all spinal levels from T10 to L5, buttocks muscles and positive facet loading on the left. *Back flexion (normal 90 degrees) and extension (normal 30 degrees) were noted to be 20 degrees each*. The CI's oral pain medications had been stopped and she had been prescribed a long acting opioid pain patch. The dose of the pain patch was increased and an antidepressant medication for chronic pain was prescribed.

JA053-54 (emphasis added). By its own account of the **December 2004** exam, which acknowledged that Ms. Thompson's back flexion was limited to 20 degrees, the PBDR listed evidence contradicting the reliability of the June and July 2004

exams. 38 C.F.R. 4.71a (requiring the government to assign a 40% disability rating for "forward flexion of the thoracolumbar spine 30 degrees or less").

Although the PDBR mentioned the **December 2004** exam in passing, it did not grapple with the evidence supporting a higher rating. *See* JA054. In their brief before the District Court, Defendants stated, "[a]s for the **December 13, 2004** pain clinic visit, the PDBR interpreted the thorough and positive strength testing during the **February 2005** orthopedic clinic examination (roughly three months before Plaintiff's separation) as supportive of ROM within the functional limits." JA415. But that is false. For instance, the PDBR did not actually compare the probative value of the **December 2004** exam with the **February 2005** examination and conclude that the latter was more robust. The PDBR simply avoided any analysis at all of the December 2004 examination's documentation of back flexion limited to 20 degrees.

The PDBR's failure to grapple with the **December 2004** ROM measurement in its decision is especially problematic since that exam was closer in time to Ms. Thompson's May 2005 separation than the **June** and **July 2004** reports upon which the PDBR relied. This alone fatally compromises the PDBR's conclusions. But the PBDR also failed to consider other exams that were available at the time Ms. Thompson entered the Disability Evaluation System, including the **September 25, 2003** physical therapy consultation in which Ms. Thompson's spinal flexibility was documented to be limited to 15 degrees. JA212. Although the PBDR noted the **September 4, 2003**, **October 21, 2003** and **March 24, 2004** examinations, the PDBR omitted the forward flexion measurements from its account of the latter two

examinations in violation of the requirement that the service branch account for "the clinical evidence present at the 'snapshot' time upon entering the Disability Evaluation System," in addition to the evidence available at the time of a member's separation. *See id.*; *see also Gregory v. United States*, 151 Fed. Cl. 209, 227 (Fed. Cl. 2020).[7]

Regarding the **October 21, 2003** exam, the PDBR provided several details, noting improvement (but persistence) of back pain, fatigue while out of brace, that she denied lower extremity symptoms, that she had increased lower back pain ("and occasionally some paresthesias in bilateral feet"), and that Ms. Thompson and the surgeon agreed that surgery was unnecessary at the time. JA053. Despite listing all these details, the PDBR's opinion conspicuously omits the critical finding of that examination for purposes of evaluating Ms. Thompson's disability: "The patient is limited in flexion to approximately 30 degrees before she experiences pain at approximately L5 region." JA197. The PDBR and District Court's failure to address the ROM finding amounts to arbitrary and capricious conduct.

In sum, the PDBR did not even attempt to reconcile its recommendation with the substantial weight of probative evidence in the administrative record. It merely

[7] The Disability Evaluation System "is the Department of Defense's mechanism for determining whether a service member will return to duty, medically separate, or medically retire due to disability" and includes the MEB and the PEB. *See* WARRIOR CARE, RECOVERY COORDINATION PROGRAM, DEFENSE HEALTH AGENCY, *Disability Evaluation*, https://bit.ly/4a3flIP (last visited Jan. 2, 2025).

referenced the numerous exams that contradicted its recommendation. But it did not "reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking." *Crockwell* at *29-30 (quoting *Fred Meyer Stores, Inc. v. N.L.R.B.*, 865 F.3d 630, 638 (D.C. Cir. 2017)).

The District Court asserted that the exams in September 2003, October 2003, and March 2008 were "less probative" than exams that took place closer in time to Ms. Thompson's separation. JA507. But the court failed to account for the fact that those other exams on which the PDBR relied were inadequate for ratings purposes and should have been discarded.

The District Court further concluded that "[t]he December 13, 2004, examination was discussed in detail by the PDBR, and the ROM variance recorded during that examination was rectified by the later February 1, 2005, examination." *Id.* But the February 2005 exam failed to record ROM at all, so it could not have "rectified" the December 2004 exam's finding that Ms. Thompson's ROM was only 20 degrees, accompanied by "sharp shooting" pain. JA231.

In sum, the PDBR arbitrarily and capriciously failed to grapple with contradictory evidence, and the District Court upheld that error. The District Court's decision was therefore wrong as a matter of law.

VI. The District Court Erred by Upholding the PDBR's Failure to Give Particular Consideration to the VA C&P Exam

Finally, the District Court wrongly held that the PDBR properly disregarded the VA C&P exam's ROM measurement notwithstanding the PDBR's obligation to give particular consideration to that exam.

The PDBR must "conduct reviews of the disability rating(s) of the covered individual in accordance with the VASRD in effect at the time of separation." DoDI 6040.44, Enc. 3, § 4(f). Additionally, the PDBR must "[c]ompare any VA disability rating for the specifically military-unfitting condition(s) with the PEB combined disability rating" and "[c]onsider 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 for the former Service member's separation." DoDI 6040.44, Enc. 3, § 4(a)(5). The C&P exam was precisely such an examination and thus the PDBR was bound to give "special consideration" to the findings of that exam. *Crockwell*, 2024 U.S. Dist. LEXIS 55955, at *47 (quoting *Adams v. United States*, 117 Fed. Cl. 628, 637 (Fed. Cl. 2014)). In fact, the C&P examination was closer in time to Ms. Thompson's separation than any other examination considered by the PDBR. It was therefore especially probative of her disability at the time of her separation. *See id.*

A. The Use of a Back Brace Did Not Undermine the Exam's Validity

The PDBR concluded that the C&P examination's recorded ROM was not useful for a VASRD rating because Ms. Thompson wore "a rigid back brace . . .

designed to restrict ROM" during the examination. JA055; JA504-05. The PDBR's decision to disregard the C&P exam's findings on the basis that Ms. Thompson was wearing a back brace was unlawful for two reasons. First, the ROM measurement during the C&P exam was based on Ms. Thompson's pain threshold, not the effects of the back brace. Second, the exam included other findings that supported a 40% disability rating regardless of the back brace. The PDBR's disregard of the C&P exam therefore violated the VASRD and the Instruction and was contrary to law.

First, the ROM measurement during the C&P exam was based on Ms. Thompson's pain threshold, not the effects of the back brace. The assertion that Ms. Thompson's use of a back brace diminishes the credibility of the examination was arbitrary and capricious and unsupported by evidence. The PDBR wrongly asserted that the back brace was the *cause* of the pain that limited Ms. Thompson's range of motion, despite that the C&P report provided no basis for that assertion; nor does the assertion comport with basis common sense. Ms. Thompson experienced pain "in the entire lumbar spine at 30 degrees, minus 60 degrees with pain in the entire spine at 10 degrees." JA117. The report continued: "Forward flexion goes from 0 to 30 degrees with pain in the entire lumbar spine at 30 degrees, minus 60

degrees secondary to pain." *Id.* "Secondary to" means "due to."[8] In other words, Ms. Thompson's ROM was 30 degrees—60 degrees less than full ROM of 90 degrees—*due to* pain, not any constrictive effects of the brace. Likewise, the examiner noted limitations on ROM in other dimensions, also "secondary to pain." *Id.*

Nevertheless, the PDBR "leap[t] to the conclusion" that the brace *caused* Ms. Thompson's limited range of motion. *Cf. Crockwell*, 2024 U.S. Dist. LEXIS 55955, at *31. The PDBR's speculation ran counter to the plain language of the C&P exam report. *See id.* (it is impermissible "pure speculation" to infer that a report's silence on the device used to obtain ROM measurements means no device was used). "Such reasoning falls short of the PDBR's duty to engage in 'reasoned decisionmaking.'" *Id.* at *33 (citing *Bhd. of Locomotive Eng'rs & Trainmen v. FRA*, 972 F.3d 83, 115 (D.C. Cir. 2020)).

Other language in the C&P report also contradicted the PDBR's decision. After observing that Ms. Thompson's brace made it "difficult" to examine her back, the report continued with the disjunctive "***but*** she ***was*** very limited in all ranges of motion." JA117 (emphasis added). The examiner plainly did not consider the brace to be the cause of the limited ROM. Nor did the PDBR have any basis for assuming

[8] U.S. DEP'T OF VETERANS' AFFAIRS, *VA Blue Button: Exploring Your Mental Health Notes, Common Abbreviations and Acronyms*, https://bit.ly/3PhCxt9 (last visited Dec. 31, 2024).

that the VA examiner had measured Ms. Thompson's ROM unreliably because of the back brace. As in *Crockwell*, the "PDBR offered little by way of explanation or reasoning as to precisely why" Ms. Thompson's wearing a back brace invalidated the range of motions captured by the VA. *See Crockwell*, 2024 U.S. Dist. LEXIS 55955, at *35.

The PDBR also failed to explain why the VA, bound by the same examination rules as the Department of Defense, found "no inconsistency" or "inherent tension" regarding the back brace when awarding Ms. Thompson a disability rating of 40 percent based on her limited range of motion. *See id.* In short, the PDBR's assumption about the effects of the brace on the VA's ability to assess Ms. Thompson's ROM—for the purpose of assigning her disability rating—rests (at best) on uninformed speculation and is contrary to the VA examiner's findings.

Moreover, as in *Crockwell*, where the PDBR failed to explain its conclusion that a goniometer was not used at a VA exam, the PDBR here did not articulate a satisfactory explanation for its conclusion that the VA adjudicator could not obtain accurate range of motion measurements with Ms. Thompson's back brace on. *Id.* at *34 (D.D.C. Mar. 28, 2024) (citing *Butte Cnty. v. Hogan*, 613 F.3d 190, 194 (D.C. Cir. 2010)). In *Crockwell*, the VA physician found no inconsistency between the plaintiff's normal gait and limited range of motion. Here, the VA examiner

reported no tension in acquiring adequate range of motion measurements while Ms. Thompson was wearing her back brace. The PDBR's failure to explain its conclusion, which contradicted a medical doctor's judgment, "does not withstand scrutiny." *Id.* at *35-36.

Second, even absent the ROM measurement, the C&P exam report provided ample evidence to support the VA's 40% disability rating. The examiner's description of Ms. Thompson's condition showed that her quality of life and employment prospects were severely restricted by her disability. The examiner noted she was in constant, excruciating pain that severely limited her ability to function: "she has chronic low back pain, constant every day, 24 hours a day. It is difficult for her to sleep and she is currently on Morphine patch every three days, but wears it every day." JA116. The examiner stated that her condition "definitely interferes with her daily activities in that ***she can hardly do anything***," adding that she had no occupation at the time of the examination. *Id*. (emphasis added). The PDBR made no effort to reconcile this description, baselessly asserting that her pain was not functionally impairing—in direct contradiction of the evidence. *Id.*

Moreover, it was appropriate for Ms. Thompson to wear the brace during the C&P exam. Evaluative ratings under the VASRD must be based on the veteran's "function under the ordinary conditions of daily life including employment." 38 C.F.R. § 4.10. The disability "must be considered from the point of view of the

veteran working or seeking work. 38 C.F.R. § 4.1. As the C&P examination report documented, Ms. Thompson wore the brace "every day." JA117.

The PDBR's decision similarly violated the APA because it discounted the proximate in-time VA examination (which actually calculated range of motion in degrees). The PDBR improperly relied instead on a separate exam where the "examiner documented thorough muscle strength evaluation, including of the iliopsoas muscle, a hip flexor that has its origins from the upper lumber spine, with normal strength of all muscles noted and no particular difficulty with pain or muscle spasm during strength testing." JA055.

However, the PBDR offered no explanation or reasoning as to why Ms. Thompson's range of motion measurements at her VA exam were inconsistent with normal muscle strength testing performed at another time. At her VA exam—which directly resulted in her 40% rating—the examiner recorded "active range of motion did not produce any weakness" and that she had "good strength." JA117. Therefore, like in *Crockwell*, the PDBR's failure here to explain its conclusion, which ran counter to [the VA] medical doctor's judgment, "does not withstand scrutiny." *Crockwell*, 2024 U.S. Dist. LEXIS 55955, at *36 (citing *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. MSHA*, 925 F.3d 1279, 1285 (D.C. Cir. 2019)).

The District Court failed to engage with these shortcomings of the PDBR's recommendation. The District Court did not acknowledge that the PDBR's analysis was irreconcilable with the C&P exam report, and the District Court found no error in the PDBR's failure to grapple with the C&P exam's finding that Ms. Thompson's ROM was limited *by pain*. Instead, the District Court stated: "In providing an explanation for the ROM variance recorded in the C&P examination, compared to prior examinations, the PDBR satisfied its standard." JA505. According to the District Court's reasoning, the PDBR could have satisfied its obligation by providing *any* explanation whatsoever, no matter how at odds with the factual record or the VASRD's requirements. *Cf. Crockwell*, 2024 U.S. Dist. LEXIS 55955, at *28 (explaining that "the PDBR is 'required to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'") (quoting *Nasdaq Stock Mkt. LLC v. S.E.C.*, 38 F.4th 1126, 1135 (D.C. Cir. 2022) (cleaned up)). This approach would undermine Congress's intent in establishing the PDBR to combat the prevalence of unjustifiably low disability ratings by mandating conformance to the VASRD.

As such, the PDBR, and therefore the District Court, "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," and "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 Eng'rs*, 991 F.3d 577, 583 (4th Cir. 2021) (quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 287-88 (4th Cir. 1999)) (explaining when an agency decision is arbitrary and capricious).

The PDBR's decision was also contrary to law because it disregarded the C&P ROM measurement "for reasons that are, at worse, speculative and, at best, conclusory and incomplete. The PDBR accordingly fell short of its obligation under the Instruction not only to 'acknowledge the VA's ratings, but to evaluate and weigh them,' in a fair and conscientious manner. Failure to do so was contrary to law." *Crockwell*, 2024 U.S. Dist. LEXIS 55955, at *49 (quoting *U-Ahk-Vroman-Sanchez*, 2021 WL 394811, at *7). The District Court failed to remedy this error and thus committed a reversible error of law.

B. The District Court Wrongly Asserted That There Was No Reasonable Doubt

As the District Court acknowledged, "Section 4.3 of the VASRD states '[w]hen 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. Section 4.7 requires, in cases of doubt, that the PDBR applies 'the higher evaluation . . . if the disability picture more nearly approximates the criteria required for that rating.'" 38 C.F.R. § 4.7; JA508.

However, the District Court erroneously concluded, without any justification, that Ms. Thompson failed to "show[] that reasonable doubt triggering VASRD sections 4.3 and 4.7 existed or that the PDBR's decision not to apply VASRD 4.3 and 4.7 was otherwise was arbitrary and capricious or contrary to law." JA508. The District Court's conclusion is incorrect and cherry-picks statutory language.

Section 4.7 states that "when there is a question about which of two disability evaluations will be applied," a review board must "apply the higher evaluation if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned." 38 C.F.R. § 4.7. Ms. Thompson identified five separate ROM measurements in the record that showed her ROM was less than 30 degrees, and the VA awarded a 40% disability rating. In addition, Plaintiff provided additional evidence that her disability picture more nearly approximated the criteria for a 40% rating, including that "she has chronic low back pain, constant every day, 24 hours a day," JA116, and that "she can hardly do anything." JA117. The examinations supporting a lower rating did not record ROM or functional loss due to pain. The evidence strongly supported the 40% disability rating and plainly established a reasonable doubt concerning the PEB's 10% rating. The PDBR was obliged to resolve that doubt in Ms. Thompson's

favor. Instead, the PDBR ignored or mischaracterized the multiple, consistent ROM ratings that contradicted its conclusion.

Further, under C.F.R. § 4.2, the PDBR was required to reconcile "the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present." Far from painting the "consistent picture" required by law, the PDBR disregarded years of adverse findings from an array of clinicians and credited just two outlier ROM readings that did not comport with VASRD requirements.

In sum, reasonable doubt existed under an accurate reading of the record. The PDBR's failure to resolve reasonable doubts in Ms. Thompson's favor was arbitrary and capricious, and the District Court's decision upholding that error was erroneous.

CONCLUSION

The Court should reverse the District Court's order denying Ms. Thompson's motion for summary judgment and granting Defendants' motion for summary judgment and direct the District Court to remand Ms. Thompson's case to the Air Force Board for Correction of Military Records for proper re-evaluation of her disability rating.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument in this case. Oral argument is necessary because the issues here are complex and oral argument will aid significantly in the decisional process.

Dated: January 2, 2025

Respectfully Submitted,

/s/ Michael A. Losco

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)B) because, excluding parts of this document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 9,821 words. This complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared in a proportionally spaced typeface using fourteen-point font and Times New Roman font style.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 2, 2025, Appellant Carissa Thompson caused the foregoing BRIEF OF APPELLANT CARISSA THOMPSON to be served on the following counsel of record for Defendants-Appellees by filing the brief on the Court's PACER electronic case-filing system and by sending the same by electronic mail and UPS, overnight delivery, addressed as follows:

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