No. 24-2306

United States Court of Appeals for the Federal Circuit

WILLIAM OLAS BEE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
No. 1:21-cv-01970-PSH, Judge Philip S. Hadji

BRIEF OF APPELLANT

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December 6, 2024

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CERTIFICATE OF INTEREST

Case Number: 24-2306

Short Case Caption: *Bee v. United States*

Filing Party/Entity: William Olas Bee, Plaintiff-Appellant

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: December 6, 2024 Signature: */s/ Darryl H. Steensma*
Name: Darryl H. Steensma

1. Represented Entities. Provide the full names of all entities represented by undersigned counsel in this case. Fed. Cir. R. 47.4(a)(1).

William Olas Bee, an individual.

2. Real Party in Interest. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. Fed. Cir. R. 47.4(a)(2).

None.

3. Parent Corporations and Stockholders. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. Fed. Cir. R. 47.4(a)(3).

N/A.

4. **Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

Latham & Watkins LLP: Ryan T. Giannetti,* Denis Griffin,* David Muliken.*

* No longer with firm.

National Veterans Legal Services Program (of counsel to Mr. Bee): Matthew Handley.

5. **Related Cases.** Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

None.

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). Please do not duplicate information. This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. **Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

N/A.

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STATEMENT OF RELATED CASES

No other appeal in or from the same civil action or proceeding in the lower court was previously before this or any other appellate court.

JURISDICTIONAL STATEMENT

This case involves a challenge to a decision from the Board for Correction of Naval Records (BCNR or Board). The Board is "a civilian body within the military service, with broad-ranging authority . . . 'to correct an error or remove an injustice' in a military record." *Clinton v. Goldsmith*, 526 U.S. 529, 538 (1999) (quoting 10 U.S.C. § 1552(a)(1)). Plaintiff-Appellant William Bee petitioned the BCNR to correct his military records to reflect that he should have been discharged with medical retirement as unfit to perform his duties due to his service-connected post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). The BCNR denied the petition, and Mr. Bee brought suit in the Court of Federal Claims.

The Tucker Act confers jurisdiction on the Court of Federal Claims over claims based on "money-mandating" statutes or regulations. *Martinez v. United States*, 333 F.3d 1295, 1302-03 (Fed. Cir. 2003). The money-mandating statutes here are 10 U.S.C. §§ 1552, 1201. *See* 10 U.S.C. § 1552(c)(1) (The "Secretary concerned may pay . . . a claim for . . . pecuniary benefits, . . . if, as a result of correcting a record . . . the amount is found to be due the claimant on account of his . . . service."); *id.* § 1201 (mandating disability retirement pay and benefits for

qualified servicemembers); *see also, e.g.*, *McCord v. United States*, 943 F.3d 1354, 1359 (Fed. Cir. 2019) ("Although § 1552 itself is not a 'money-mandating' statute, it becomes 'money-mandating' if a claimant was improperly denied benefits but became entitled to them under other provisions of law." (citation omitted)).

On August 23, 2024, the Court of Federal Claims denied Mr. Bee's motion for judgment on the administrative record and granted the government's cross-motion for judgment on the administrative record, Appx2, and it entered final judgment on the same day, Appx28. Mr. Bee timely appealed on September 9, 2024. *See* Appx35. This Court has "jurisdiction over an appeal from a final decision of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3)." *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005).

STATEMENT OF THE ISSUES

1. Whether the BCNR erred by failing to give "liberal consideration" to Mr. Bee's petition seeking discharge relief related to his service-connected PTSD and TBI.

2. Whether the BCNR erred by failing to properly apply the fitness standard, which requires relating the nature and degree of Mr. Bee's TBI and PTSD-related disabilities to the requirements and duties expected of a servicemember in his office, grade, rank, and rating.

3. Whether the BCNR's decision denying Mr. Bee's petition is otherwise arbitrary and capricious and lacks substantial evidence.

INTRODUCTION

William Bee enlisted in the Marine Corps and served honorably as an Infantry Marine at the height of the War in Afghanistan. He deployed four times to the region, where he engaged in intense combat, lost friends on the battlefield, and suffered two major head injuries. The first head injury was from a rock that was propelled into his head from a sniper's bullet; the second was from a massive explosion that collapsed a building on top of him. Mr. Bee was awarded the Purple Heart for his sacrifice, Appx4020, and the Board below acknowledged that his "combat record was among the most extensive and noteworthy" it had ever seen, Appx4248. But the heroism and sacrifice that defined Mr. Bee's military career exacted a profound personal cost—ever since his injuries, he has suffered debilitating PTSD and TBI. None of this is disputed. All that is disputed is whether Mr. Bee's injuries left him unable to reasonably perform the duties expected of an Infantry Unit Leader in the Marine Corps, which was his rate at the time of discharge. The record unequivocally demonstrates that Mr. Bee was unfit to continue performing such duties and that he therefore should have been medically retired.

Mr. Bee suffered extensive injuries and trauma from the explosion and building collapse during his final deployment in Afghanistan. The explosion killed

two Marines under his command and injured the rest of his squad members. The explosion knocked Mr. Bee off his feet, ruptured his eardrums, and left him unconscious for an extended period—the next thing he remembered was waking up inside a CT scanner. After these injuries, Mr. Bee was diagnosed with PTSD and TBI and placed on limited duty. It became increasingly evident that he was unable to perform his duties as an Infantry Marine—a role centered on combat. Due to his PTSD and TBI, he could no longer meet the standard requirements of an Infantry Marine, such as "locate, close with, and destroy the enemy by fire and maneuver." Appx1283. But instead of referring Mr. Bee to the Disability Evaluation System (DES) for a determination of his ability to perform his duties, he was shuffled to non-operational positions, first supervising a urinalysis program and then as an instructor for Navy chaplains and medics.

Even in these non-combat positions, Mr. Bee continued to struggle with his debilitating symptoms. Because of these challenges, when the Navy presented him with the option of early retirement, he accepted and voluntarily separated from the Marine Corps.

Before his discharge, Mr. Bee was evaluated by a doctor from Veterans Affairs (VA), who confirmed his diagnoses of PTSD and TBI. The doctor found that Mr. Bee's symptoms were debilitating, causing him to be disoriented, suffer from headaches, have trouble sleeping, and have difficulty controlling his body and

emotions. Due to his neurological symptoms, the VA gave Mr. Bee a 90% combined disability rating for his PTSD and TBI. Before discharge Mr. Bee was also evaluated in a separation physical, where the doctor ordered a comprehensive neurological examination. But the doctor did not wait for that neurological examination—as required by regulation—and instead finalized Mr. Bee's separation physical and deemed him "fit" for service at the time of discharge.

Some years later, still struggling with his PTSD and TBI, Mr. Bee applied to the BCNR to correct his discharge records to reflect that he should have been referred to the DES, found unfit to perform his duties, and medically retired. The BCNR denied his petition in a deeply flawed decision.

First, the Board failed to apply the correct legal standard to Mr. Bee's petition—liberal consideration—which fundamentally changes how the Board is required to evaluate the evidence. Liberal consideration provides a "more lenient . . . evidentiary standard" for PTSD- and TBI-related correction claims, such as Mr. Bee's petition. *Doyon v. United States*, 58 F.4th 1235, 1238 (Fed. Cir. 2023). The Board did apply, or even purport to apply, that standard—and its analysis runs directly contrary to the principles of liberal consideration.

Second, the Board failed to properly apply the fitness standard. The sole standard to determine whether a servicemember must be medically retired asks whether the member is unfit to perform the duties of his or her office, grade, rank,

or rating because of a service-connected injury. That inquiry requires the Board to take into account the following considerations: (1) common military tasks, (2) physical readiness and fitness tests, (3) deployability, and (4) loss of special qualifications. Here, the Board ignored the deployability factor and failed to account for the common military tasks required of Mr. Bee as an Infantry Unit Leader in the Marine Corps. Although the BCNR acknowledged Mr. Bee's combat-induced PTSD and TBI, it concluded that his performance reviews while instructing Navy chaplains and medics showed that he was fit to perform the duties of an Infantry Unit Leader. The Board reached that conclusion based on the mistaken assumption that those instructor duties are equivalent to those of an Infantry Unit Leader. But the Board never set forth the duties of an Infantry Unit Leader, nor did it explain how Mr. Bee's performance in a non-operational instructor role could establish his fitness to perform as an Infantry Unit Leader.

Third, the BCNR made numerous other errors that rendered its decision arbitrary and capricious and lacking substantial evidence, such as its reliance on inapposite performance reviews, its dismissal of medical evidence contrary to its decision (including Mr. Bee's VA disability rating), and its failure to account for the irregularity in Mr. Bee's separation physical.

Equally flawed is the decision from the Court of Federal Claims upholding the Board's decision. There, the court determined that the Board *did* apply liberal

consideration, even though the Board did not purport to do so and its analysis was fundamentally inconsistent with the principles of liberal consideration. The court also agreed with the Board's dispositive reliance on Mr. Bee's performance reviews while serving as an instructor for Navy chaplains and medics. In short, the court's decision, like that of the BCNR, was fundamentally flawed and cannot stand.

Mr. Bee's heroism on the battlefield cannot be divorced from the toll it continues to exact through his PTSD and TBI. His commendable military record, marked by intense combat and personal loss, speaks volumes to his dedication and valor. But his injuries left him unable to continue serving in the Marine Corps. Instead of being referred to the DES and receiving medical retirement, Mr. Bee was relegated to various non-combat positions, an implicit acknowledgment of his inability to perform the duties of his rating. The BCNR and the Court of Federal Claims compounded those mistakes in their flawed decisions below. This Could should correct those errors and ensure that Mr. Bee receives the disability retirement that he deserves.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Mr. Bee Enlists As An Infantry Marine

In 1999, Mr. Bee enlisted in the Marine Corps at the age of seventeen. Appx4052; Appx4940. He was inspired to join the Marines because of his family's

distinguished military service—and that resolve only strengthened after the terrorist attacks on September 11. Appx4035. After his training, he became an Infantry Marine and was assigned the Primary Military Occupation Specialty (PMOS) of Rifleman. Appx4052. A Marine's PMOS—also called a "rate"—identifies the Marine's primary skills within the Marine Corps' broader career-designation system, the Military Occupational Specialty (MOS). Appx4052. Later in his career, Mr. Bee advanced to the rate of Infantry Unit Leader, which was his rate at the time of his separation from the Marine Corps. Appx4052; Appx4086.

As an Infantry Marine, Mr. Bee was required to engage in combat, whether on the front lines during deployments or by leading combat exercises between deployments. The Marine Corps defines an Infantry Marine as "[n]aval oriented expeditionary warriors . . . providing maximum versatility in chaotic and uncertain conditions of crisis and conflict"; "capable of the full spectrum of combat, day or night, against opposing forces with a full spectrum of capabilities"; "using maneuver warfare to locate, close with, and destroy the enemy"; "able to secure and defend self and vital terrain by repelling the enemy's assault by fire, maneuver, and close combat." Appx1283. For an Infantry Marine, combat is the sine qua non of the role.

B. Mr. Bee Deploys To Afghanistan Four Times, Sustaining Serious Injuries

Mr. Bee's experience in service matched his job description as an Infantry Marine: he was regularly deployed to the front lines where he engaged in extensive

combat. His performance reports from that period attest to this. *See* Appx4856-4860; Appx4861-4866; Appx4867-4871; Appx4872-4876; Appx4877-4881. He first deployed to Afghanistan in September 2001, right after the September 11 terrorist attacks, and was deployed there a second time the following year. Appx4440; Appx4926; Appx4967.

In 2008, Mr. Bee deployed to Afghanistan for a third time. Appx4448. During that deployment, he distinguished himself by his heroism and was awarded a Navy and Marine Corps Achievement Medal (NAM) with the Combat Distinguishing Device, Bronze V. Appx4548; Appx4550. His records from that time recount a series of heroic actions he took in combat, including braving small arms fire to identify the enemy's position and protect his fellow Marines. Appx4548.

During one such encounter with the enemy, Mr. Bee suffered a major head injury. On May 18, 2008, he was washing his laundry by hand when he heard gunfire from an enemy sniper. Appx4059; Appx4069. Without time to put on his body armor or helmet, Mr. Bee grabbed his rifle to return fire. As he aimed over a stone wall, a sniper shot barely missed him, hitting the wall and propelling a rock into his head, causing him to lose consciousness for five minutes. *See* Appx4069; Appx4185. A photographer embedded with his unit captured the moment of Mr. Bee's injury—a striking image that makes clear the significance of the impact.

Appx4022. After his deployment, he was evaluated by a physician and diagnosed with a "[p]otential TBI with persistent symptoms." Appx4081-4082.

Mr. Bee deployed to Afghanistan for his fourth and final time from December 2009 until June 2010. Appx4448. Again, Mr. Bee distinguished himself by his heroic actions. Appx4552 (recommending another NAM because of Mr. Bee's "aggressive decision making, tactical ability and calmness under fire prevented the enemy from inflicting friendly casualties and led to one low level Taliban Commander killed in action and three enemy wounded"). He also suffered additional significant injuries and trauma.

During that time, a close friend of Mr. Bee was shot in the head and died in his arms. Appx4035. Another injured Marine, who Mr. Bee helped move to safety, died during a helicopter evacuation. Appx4035. And Mr. Bee engaged in an extended firefight with the Taliban, during which he almost ran out of ammunition and a fellow Marine was struck by enemy fire. Appx4035.

On June 8, 2010, two days before his deployment was supposed to end, Mr. Bee was serving in Marjah, Helmand Province in Afghanistan. Appx4035. That region was a critical center for the Taliban's production of improvised explosive devices (IEDs). Appx4035. While on duty, Mr. Bee's squad "came under heavy fire while in a compound in which the enemy had planted [several] well-hidden IED's." Appx4063; Appx4037. The enemy remotely detonated these explosives.

Appx4063; Appx4037. The force of the blast collapsed the building, knocked Mr. Bee off his feet, blew out both his eardrums, and left him unconscious for an extended period. Two of the Marines under Mr. Bee's command were killed instantly and every other Marine in his squad was injured. Appx4037; Appx4118. Mr. Bee does not remember anything after the blast until "waking up" inside a CT scanner, and soon after learning of the deaths of his fellow Marines. Appx4118; Appx4063.

Mr. Bee was medically evacuated from Afghanistan to Germany. Appx4062; Appx4118. During this time, he experienced short-term memory loss, decreased concentration, and an ataxic gait. On June 16, 2010, still overseas, Mr. Bee had a positive screening for TBI. Appx4118-4119. He was referred to both physical and occupational therapy and a follow-up appointment with a neurologist once back in the United States. Appx4118-4119.

C. Mr. Bee Returns To The United States And Attempts To Continue Serving With His Injuries

Mr. Bee returned to the United States and was sent to Camp Lejeune, North Carolina, where he was promptly placed on limited duty because of his TBI symptoms. Appx4009; Appx4083; Appx4181; Appx4906; Appx4990. The Camp Lejeune TBI Clinic referred Mr. Bee for an extensive neuropsychological evaluation, which was conducted by Dr. Karen Johnson in July and September of

2010. Appx4062; Appx4070; Appx4180. The evaluation included both clinical interviews and testing. Appx4062; Appx4070; Appx4180.

Dr. Johnson diagnosed Mr. Bee with an Axis I cognitive disorder and chronic, moderate PTSD and found significant impairment to his learning functions. Appx4180. She also conducted a Global Assessment of Functioning (GAF), which assesses how one's mental health affects functioning in daily life on a scale of 0 to 100. Dr. Johnson gave Mr. Bee a GAF score of 40-45, which indicates either "[s]erious symptoms (e.g. suicidal ideation . . .) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." Appx1214. Under her Axis IV diagnosis, which addresses relevant "psychosocial and environmental" problems, Dr. Johnson noted Mr. Bee's "[h]istory of combat trauma" and that his status "post significant blast exposure" involved "[c]oncern regarding his future." Appx4180.

After the injuries and trauma of his fourth deployment, Mr. Bee was rotated through several non-operational roles. While still on limited duty, he was assigned to oversee the battalion's urinalysis testing program. Appx4520. In that role, he monitored servicemembers in substance abuse treatment programs. Appx4520. It was during this time that Mr. Bee's promotion to Infantry Unit Leader was finalized. *See* Appx4520 (reflecting new PMOS).

In November 2010, shortly before the end of his limited duty, Mr. Bee was reassigned to be an instructor for Navy chaplains and medics at Field Medical Training Battalion—East (FMTB-E). Appx4552. His assignment was to train noncombatants in the "knowledge, skills, and abilities necessary to serve with and support the Marine Corps." Appx4522, Appx4524, Appx4529, Appx4534. As the BCNR acknowledged, this non-operational assignment, was intended to provide "a well-deserve[d] opportunity to 'take a knee' after [Mr. Bee's] multiple combat deployments." Appx4256.

D. Mr. Bee Continues To Struggle And The Navy Encourages Him To Separate—So He Separates From The Marine Corps

The fallout from Mr. Bee's injuries and trauma continued as he served as an instructor for Navy chaplains and medics. His TBI caused recurrent bouts of nausea, vomiting, and abdominal pain that required colleagues to step in for him and take over his classes. Appx4028. His behavior became "increasingly erratic over time," and his superiors warned him about his "overly harsh discipline of trainees under [his] supervision." Appx4028-4029. One superior even told Mr. Bee's wife that she "should keep all weapons and knives locked away in the home" and should "sleep with [their] son, separately from SSgt. Bee, in a locked bedroom in order to prevent any possible violence." Appx4025. Given these struggles, when the Marine Corps in 2013 sought to reduce its numbers by offering a bonus to those entering a Voluntary Separation Program (VSP), Mr. Bee agreed to voluntarily separate from

the Marine Corps. Appx4399. For separating through the VSP, Mr. Bee received a bonus of $80,217.14 after taxes, Appx4256, though that amount was recouped in full by reducing his VA benefits following separation, Appx41193.

Before his separation, Mr. Bee began the process with the Department of Veterans Affairs to assess his service-connected disabilities. Mr. Bee was examined by Dr. Roy Vogel at Camp Lejeune for both TBI and PTSD. Appx4058-4067 (PTSD evaluation); Appx4068-4076 (TBI evaluation). These examinations occurred in January 2013—three months before Mr. Bee's discharge in April 2013. Appx4058-4067; Appx4068-4076. The results of Dr. Vogel's examinations show that Mr. Bee's TBI and PTSD-related disabilities had not improved since the time of Dr. Johnson's evaluations in 2010. If anything, Mr. Bee's condition had deteriorated. Dr. Vogel confirmed that Mr. Bee had PTSD and TBI, and he further diagnosed Mr. Bee with Post-Concussion Syndrome/Cognitive Impairment, Primary Insomnia, Generalized Anxiety Disorder, Panic Disorder with Agoraphobia, and Major Depressive Disorder. Dr. Vogel assigned Mr. Bee a GAF score of 40 (as discussed above, on a 0-100 scale), indicating "[s]ome impairment in reality testing or communication; major impairment in several areas, such as work or school, family relations, judgement, thinking, or mood." Appx4040; *see* Appx4058-4059; Appx4068; Appx4108.

Dr. Vogel noted that Mr. Bee suffered debilitating symptoms from his PTSD and TBI. His PTSD caused "recurrent episodes of intense, panic-level anxiety . . . on an almost continuous basis." Appx4058-5059. It also left Mr. Bee able to get only four hours of "non-restorative" sleep per night because of "intrusive, disturbing thoughts, images, dreams." Appx4058. Mr. Bee was also suffering from daily moderate headaches, one to two migraines per month, dizziness, noise sensitivity, chronic fatigue, difficulty concentrating, blurred or double vision, and sensitivity to light, among other symptoms of PTSD. Appx4066.

Dr. Vogel also noted that Mr. Bee's TBI caused "substantial and persistent" memory deficits, "difficulty maintaining attention or concentration on a task," problems understanding "spoken and written language" relative to his pre-injury norm, "[m]oderately impaired judgment," as well as "los[ing] track of brief moments of time." Appx4070-4072. Because of his TBI, he was also "[o]ccasionally disoriented to two of the four aspects (person, time, place, situation) of orientation or often disoriented to one aspect of orientation." Appx4071. Dr. Vogel's evaluation found that Mr. Bee "[u]sually gets lost in unfamiliar surroundings, has difficulty reading maps, following directions and judging distances [and] [h]as difficulty using assistive devices such as GPS." Appx4072. And it noted many of the same symptoms of fatigue, dizziness, sensitivity, impaired vision, and headaches that the PTSD examination noted. Appx4069.

Before Mr. Bee could be discharged under the VSP, he needed to complete a separation physical to confirm that he was fit for continued service. Mr. Bee had that physical shortly after his examination by Dr. Vogel. Appx4101-4105. The doctor conducting the physical noted that Mr. Bee had a number of concerning symptoms, all of which overlap with the symptoms observed by Dr. Vogel: dizziness, vertigo, lightheadedness, memory lapses, anxiety, headaches, and depression. Appx4101-4105. The doctor also noted that Mr. Bee had difficulty walking, which is typical of TBI. Appx4104. Given these concerns, he ordered a neurology consult for Mr. Bee to be properly evaluated. Controlling guidance required separation physicals to include a review of all specialty consultations and an assessment regarding a member's worldwide qualification for retention before finalizing the separation physical. Appx1481-1482 (separation physicals "will include . . . a review of the individual medical history and medical record . . . [and] any indicated specialty consultations;" "an assessment is made regarding a member's worldwide qualification for retention (according to Service guidelines)"). Without having the neurology report or assessing worldwide qualification, and despite noting serious neurological symptoms, the doctor deemed Mr. Bee fit to separate. Mr. Bee was honorably discharged through the VSP on April 1, 2013. Appx4089.

II. STATUTORY AND REGULATORY FRAMEWORK

A. The Disability Evaluation System

The military uses the DES to discharge servicemembers who are no longer fit to continue serving due to disability. The controlling guidance for implementing the DES across the Department of Defense (DOD) at the time of Mr. Bee's discharge was Department of Defense Instruction 1332.38 (DoDI 1332.38), which requires deeming a servicemember unfit when the evidence "establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating." DoDI 1332.38, E3.P3.2.1 (Nov. 14, 1996), https://web.archive.org/web/20130304060340/www.dtic.mil/whs/directives/corres/pdf/133238p.pdf. Mirroring DoDI 1332.38, the Navy's implementing instruction, Secretary of the Navy Instruction 1850.4E (SECNAVINST 1850.4E), similarly provides that the "sole standard to be used in making determinations of physical disability as a basis for retirement or separation is unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated while entitled to basic pay." SECNAVINST 1850.4E, encl. 3, pt. 3, § 3301 (Apr. 30, 2002), https://www.secnav.navy.mil/mra/CORB/Documents/SECNAVINST-1850-4E.pdf. The Navy instruction further directs that common military tasks, physical readiness/fitness tests, deployability, and loss of special qualifications "shall" all be

considered in determining whether a member can reasonably perform his or her duties. *Id.* § 3304.

Commanding officers and medical officers are required to identify servicemembers whose disabilities may hinder their ability to perform their duties and refer them to the DES. *See* SECNAVINST 1850.4E, encl. 1, § 1005. The instructions do not provide for servicemembers to self-refer to the DES. The first phase of the DES process involves a Medical Evaluation Board (MEB), which determines whether the servicemember's disabilities prevent him or her from meeting military retention standards. While the MEB does not render an unfitness determination or assign disability ratings, it provides a medical opinion that initiates the subsequent phases of the DES process. If the MEB finds that the servicemember cannot meet retention standards, the case is referred to an informal Physical Evaluation Board (PEB).

Upon referral, the PEB evaluates the servicemember's fitness for duty. The PEB can determine that a servicemember is fit, unfit but ineligible for benefits, or unfit and eligible for either medical separation with severance pay or medical retirement with disability benefits.

If a servicemember is deemed unfit and eligible for benefits, the PEB assigns a disability rating based on the VA rating system. This rating determines the level of benefits and services the servicemember will receive upon discharge. A rating

below 30 percent results in medical separation with a lump-sum severance payment, while a rating of 30 percent or higher leads to medical retirement with ongoing benefits, including lifetime healthcare coverage.

B. Boards For The Correction Of Military/Naval Records

Following World War II, Congress established administrative boards to correct military records in response to "a large number of private bills in congress for formerly discharged servicemen seeking to have the nature and character of their discharge corrected or upgraded." *Kalista v. Sec'y of the Navy*, 560 F. Supp. 608, 611 (D. Colo. 1983) (collecting cases). Under Section 1552, each military branch established a board for the correction of military records whose function is, on application by a serviceman, to review the military record and intervene where necessary to correct error or remove injustice." *Parisi v. Davidson*, 405 U.S. 34, 38 n.4 (1972) (citing 10 U.S.C. § 1552(a)). The correction board for the Navy and the Marine Corps is the BCNR.

Congress designed the correction boards to serve as a flexible and pragmatic means for aggrieved servicemembers to seek redress. *Caddington v. United States*, 147 Ct. Cl. 629, 632 (1959) (Section 1552 "is remedial in nature," and "imposes on the Secretary the twofold duty to properly evaluate the nature of any error or injustice and, in addition, to take such corrective action as will appropriately and fully erase such error or compensate such injustice."). Because of that remedial purpose, courts

have long held that Section 1552 should "be liberally construed, rather than narrowly or technically." *Oleson v. United States*, 172 Ct. Cl. 9, 18 (1965).

Section 1552 authorizes the BCNR to provide a wide range of relief through the correction of records. Correction boards "may entertain any kind of application for correction, ranging from changing the terms of a discharge, to correction of error in citation of awards received, to amending the records" related to performance evaluations and promotion decisions. *Porter v. United States*, 163 F.3d 1304, 1311 (Fed. Cir. 1998) (citations omitted). Former servicemembers may seek to change the "terms of [their] discharge" for various reasons, *id.*, including to constructively amend a service date, *see, e.g.*, *Prochazka v. United States*, 90 Fed. Cl. 481, 486-87, 497 (2009), to change their characterization of service, *see, e.g.*, *Lefrancois v. Mabus*, 910 F. Supp. 2d 12, 16-17 (D.D.C. 2012), to change their administrative separation to a disability retirement, *see, e.g.*, *Walden v. United States*, 22 Cl. Ct. 532, 536-38 (1991), to increase the rating of their disability retirement, *see, e.g.*, *Van Cleave v. United States*, 70 Fed. Cl. 674, 686 (2006), and more. Section 1552 further provides that the Board may award back pay "if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his . . . service." 10 U.S.C. § 1552(c)(1).

If a servicemember were discharged without going through the DES system, and specifically without referral to a PEB, the BCNR evaluates the servicemember's

petition using the standards and considerations that would have been used by the PEB. *See Kelly v. United States*, 157 Fed. Cl. 114, 119 (2021), *vacated on other grounds*, 69 F.4th 887 (Fed. Cir. 2023).

In 2017, Congress amended Section 1552 to provide additional protections for former servicemembers who raise claims related to PTSD and TBI. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 §§ 520, 522, 131 Stat. 1283, 1379, 1380 (2017). The amendment applies to all "former member[s] of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury" that is "related to combat or military sexual trauma." 10 U.S.C. § 1552(h)(1). The BCNR must review such claims "with liberal consideration to the claimant that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal." *Id.* § 1552(h)(2)(B). Thus, when a servicemember petitions the BCNR to correct his records to reflect that he should have been discharged for "unfitness based on PTSD-related disability," such a petition "plainly falls within 10 U.S.C. § 1552(h)'s requirement that the BCNR shall apply liberal consideration." *Doyon*, 58 F.4th at 1248.

C. Binding DOD Guidance

In 2014, Secretary of Defense Chuck Hagel issued guidance to the correction boards regarding claims related to PTSD. ADD1-4 (Memorandum from Chuck Hagel for Secretaries of the Military Departments (Sept. 3, 2014)) (Hagel Memo). The Hagel Memo explained that there have been significant advances in the understanding of mental health since the Vietnam War, at which point the diagnosis of PTSD did not exist. ADD1. As a result, PTSD diagnoses for many veterans "were not made until decades after service was completed," and their records lack sufficient "substantive information" concerning PTSD. *Id*. To address that problem, the Hagel Memo requires correction boards to give "[l]iberal consideration" to "petitions for changes in characterization of service" when the former servicemember's records "document one or more symptoms" of PTSD. ADD3.

In 2017, DOD expanded on the Hagel Memo's guidance in a new memorandum by Undersecretary of Defense Anthony Kurta. ADD5-9 (Memorandum from Anthony M. Kurta for Secretaries of the Military Departments (Aug. 25, 2017)) (Kurta Memo). The Kurta Memo explained that its guidance applied to correction boards considering requests by veterans for "modification of their discharge due in whole or in part to mental health conditions," including PTSD and TBI. ADD6 (¶ 1). It clarified that liberal consideration principles are "not limited to Under Other Than Honorable Condition discharge characterizations but

rather apply to *any petition seeking discharge relief* including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations." ADD8 (¶ 24) (emphasis added). It also defined "discharge" to include "the characterization, narrative reason, separation code, and re-enlistment code." *Id.* (¶ 20).

The Kurta Memo also clarified how to apply "liberal consideration." ADD8-9 (¶¶ 20-26). Although liberal consideration does not mandate relief in every case, it requires correction boards to consider certain evidence and apply certain presumptions. *Id*. The Kurta Memo explained that "[c]onditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge." ADD7 (¶ 16). In addition, the "veteran's testimony alone" may establish that the PTSD or TBI warrants "excuse[ing] or mitigate[ing] the discharge." *Id.* (¶ 7). Finally, the Kurta Memo requires that, if a veteran's "[c]onditions or experiences . . . may reasonably have existed at the time of discharge," the Board must "liberally conside[r them] as excusing or mitigating the discharge." *Id.* (¶ 16). This "liberal consideration standard prescribed by the Kurta Memo" was "codified" in 10 U.S.C. 1552(h). *Doyon*, 58 F.4th at 1246.

III. PROCEDURAL HISTORY

After his discharge, Mr. Bee continued to struggle with his debilitating TBI and PTSD. In 2018, Mr. Bee sought to correct his discharge records to reflect that

he should have been medically retired due to his TBI and PTSD, which rendered him unfit. Appx4031. That correction would, among other things, afford Mr. Bee and his family the benefits of TRICARE healthcare.

A. BCNR Proceedings

In 2019, the BCNR denied Mr. Bee's petition in a three page decision. Appx4003-4005. This lawsuit followed. Appx1001-1024. After briefing and oral argument, the parties agreed to a voluntary remand to afford the BCNR another opportunity to reconsider its decision and resolve the matter in a "just, speedy, and inexpensive manner." Appx1415-1421 at Appx1418.

On remand, the Board again denied Mr. Bee's petition. Appx4245-4263. The Board acknowledged that Mr. Bee suffered from combat-induced PTSD and TBI, which was "apparent from [his] medical record." Appx4248. Nonetheless, the Board denied relief, concluding that there was insufficient evidence that Mr. Bee was unfit to perform his duties at the time of his discharge.

The Board relied extensively on Mr. Bee's performance reviews (also referred to as fitness reports or FITREPs) from his time as an instructor for Navy chaplains and medics. Appx4246, Appx4255, Appx4260. The Board also highlighted Mr. Bee's participation in the VSP, suggesting it contradicted his assertion that he should have been discharged as unfit. Appx4255-4256. The Board acknowledged Mr. Bee's argument that, in order to determine whether his disabilities rendered him unfit

to perform the duties of his office, grade, rank, and rating, the Board needed to first set forth what those duties were. Appx4248. In Mr. Bee's case, those are the duties of a Staff Sergeant, pay grade E-6, Infantry Unit Leader in the Marine Corps. Appx4260. But the Board flatly refused to do so. Appx4248. Instead, it simply asserted that the burden of proof was on Mr. Bee to demonstrate that his medical conditions rendered him unable to perform his duties. Appx4248.

The Board also emphasized that none of the medical providers who treated Mr. Bee referred him to the DES system to process him for medical retirement, claiming that this showed Mr. Bee was fit. Appx4253. The Board then discounted the diagnoses and medical analyses from Dr. Johnson, Dr. Blumenfield, and Dr. Vogel, instead giving substantial weight to the separation physical (which failed to follow up on the neurological consult or include the mandatory assessment for worldwide qualification). Appx4261-4262. Finally, the Board disregarded the results of Mr. Bee's examination for VA benefits—failing to even mention that he was given a 90% disability rating for his PTSD and TBI—asserting "the inherent unreliability and irrelevance of a VA C&P examination toward fitness determinations in general." Appx4260.

B. The Court Of Federal Claims

Mr. Bee challenged the Board's decision in the Court of Federal Claims. Appx1433-1479. In his motion for judgment on the administrative record, Mr. Bee

argued that the Board failed to apply liberal consideration, improperly applied the fitness standard, and issued a decision that was otherwise arbitrary and capricious and not supported by substantial evidence. Appx1495-1544. The government argued that the Board was not required to apply liberal consideration, that it had properly applied the fitness standard, and that its decision was otherwise sound. Appx1547-1602.

The court denied Mr. Bee's motion and granted the government's cross-motion. Appx26. On liberal consideration, the court acknowledged the parties' dispute over whether the Board was required to apply that standard to Mr. Bee's petition. Appx12-13. But the court held that it need not resolve that issue because, in any event, the Board *did* apply liberal consideration in its ruling against Mr. Bee. Appx12-13. Although the Board "did not use the phrase 'liberal consideration,'" the court determined that the Board applied that standard, because "liberal consideration is an invitation to robustly engage with the evidence," and the court "f[ound] that the Board accepted that invitation." Appx13.

As for the fitness standard, the court held that the Board need not set forth the duties of Mr. Bee's office, grade, rank, and rating in order to determine whether he was fit to perform such duties. Appx17. Instead, the court stated, it was sufficient that the Board found Mr. Bee fit to perform his duties instructing Navy chaplains and medics, and those duties overlap with certain training duties of an Infantry

Marine. Appx17. According to the court, the Board did not need to "exhaustively catalogue[]" the duties of Infantry Unit Leader. Appx17.

The court also rejected Mr. Bee's argument that his inability to be deployed in combat or perform the common military tasks of an Infantry Unit Leader demonstrated his unfitness. Although deployability is one of four mandatory factors for consideration when assessing fitness, and "the Board did not explicitly address the issue of deployability," the court determined this was "not a point of error." Appx14. Because the relevant regulation states that "non-deployability *alone* will *not normally* constitute a basis for a finding of Unfit," SECNAVINST 1850.4E, encl. 2, § 2051 (emphasis added), the court thought that the Board "had no reason to consider the issue of deployability as it alone could not have affected the outcome." Appx14-15. From there, the court reasoned that "because deployability cannot serve as the sole basis for a finding of unfit, neither can a member's inability to perform 'common military tasks' that are only prevalent in a deployment setting"—namely, "combat." Appx18. The court stated that combat is not a "common military task" for servicemembers stationed domestically due to the rarity of military engagements on U.S. soil, concluding that the Board did not err by failing to address common military tasks related to combat specifically. Appx18. Thus, according to the court, the Board did not err by failing to consider Mr. Bee's inability to be deployed or

perform the common military tasks of Infantry Unit Leader related to combat. Appx18.

Finally, the court concurred with the BCNR's conclusion that the "the most probative evidence" of Mr. Bee's fitness were his performance reports from his time as an instructor for Navy chaplains and medics. Appx26; *see* Appx9-10, Appx20-22. Even though Mr. Bee had argued that such reports could not show his fitness to perform the duties of an Infantry Unit Leader—duties focused on combat—the court interpreted this argument as "asking the court to ignore the Board's conclusion" and "reweigh the evidence." Appx9-10.

SUMMARY OF THE ARGUMENT

First, the BCNR erred by refusing to give "liberal consideration" to Mr. Bee's petition, and the Court of Federal Claims erred by upholding the Board's decision in that respect. The Board's enabling statute requires it give liberal consideration to petitions like Mr. Bee's that seek discharge relief related to combat-induced PTSD or TBI. 10 U.S.C. § 1552(h). As this Court has explained, when a servicemember petitions the BCNR to correct his records to reflect that he should have been discharged for "unfitness based on PTSD-related disability," such a petition "plainly falls within 10 U.S.C. § 1552(h)'s requirement that the BCNR shall apply liberal consideration." *Doyon*, 58 F.4th at 1248. That standard is independently mandated

by binding DOD guidance, specifically the Hagel and Kurta Memos. Despite these authorities, the BCNR failed to apply liberal consideration to Mr. Bee's petition.

While the BCNR did not purport to apply liberal consideration, and the government did not defend its decision on that basis, the Court of Federal Claims nonetheless held that the Board *had* in fact applied liberal consideration. That ruling does not withstand scrutiny. Reviewing a petition under the liberal consideration standard requires implementing specific principles detailed in the Kurta Memo. The Board applied none of those principles here, and even relied on reasoning that is directly contrary to liberal consideration. Had the Board properly applied the correct standard, it would have granted Mr. Bee the relief he sought.

Second, the Board misapplied the fitness standard by failing to relate Mr. Bee's disabilities to the duties of his office, grade, rank, and rating. It never conducted this analysis because it refused to identify or consider the specific duties of a servicemember in the office, grade, rank, and rating of Mr. Bee—an Infantry Unit Leader at the E-6 grade. The Marine Corps makes clear that the primary duty of such Marines is to prepare for and engage in combat. Yet because the Board never identified the duties Mr. Bee was expected to perform, it never assessed whether Mr. Bee's disabilities prevented him from performing them.

Instead of conducting the mandatory fitness inquiry, the Board put dispositive weight on performance reports from Mr. Bee's time instructing Navy chaplains and

medics. But those reports do not reflect the scope of the duties expected of an Infantry Unit Leader in the Marine Corps. As this Court has held, the Board may not simply rely on past performance reports without establishing that those reports reflect the duties reasonably expected of the servicemember's office, grade, rank, and rating. *Kelly v. United States*, 69 F.4th 887 (Fed. Cir. 2023). The Board also failed to consider mandatory criteria for the fitness determination, such as deployability and the potential medical risks posed by Mr. Bee's PTSD and TBI in combat situations. The Board's failure to address these factors underscores its main error: refusing to consider Mr. Bee's ability to perform the combat duties inherent to his rate of Infantry Unit Leader at the grade of E-6. Had the Board properly conducted the fitness inquiry, it would have granted Mr. Bee relief, because it is undisputed that his PTSD and TBI render him unable to engage in combat—let alone in a leadership role.

Third, the Board's decision is arbitrary and capricious and not supported by substantial evidence. The Board improperly dismissed Mr. Bee's VA disability ratings, which assigned him a 90% combined disability rating for TBI and PTSD. Courts have consistently rejected the Board's argument that VA ratings are irrelevant to fitness determinations. Additionally, the Board relied on the lack of a referral to an MEB as evidence that no referral was needed, despite the relevant Navy instruction requiring such a referral for Mr. Bee's TBI and PTSD. Courts have

rejected this "catch 22" reasoning. Furthermore, the Board improperly relied on Mr. Bee's separation physical to overcome substantial contrary medical evidence, even though the separation physical violated regulations and guidance by failing to follow-up on Mr. Bee's neurology consult and performing a worldwide assessment. Finally, the Board relied on Mr. Bee's participation in the VSP program to undermine his claim, despite the fact that voluntary separation has no bearing on the standard for medical retirement.

In sum, the Board's failure to apply the correct legal standards and its reliance on arbitrary and unsupported reasoning render its decision unsound. The Board's decision, along with the Court of Federal Claims' decision upholding it, should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] a decision of the Court of Federal Claims granting or denying a motion for judgment on the administrative record without deference." *Barnick v. United States*, 591 F.3d 1372, 1377 (Fed. Cir. 2010) (citing *Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005)). The Court therefore applies "the same standard of review as the trial court," and will overturn the BCNR's decision if it is "arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Id.*

II. THE BOARD ERRED BY FAILING TO APPLY LIBERAL CONSIDERATION TO MR. BEE'S PETITION

A. The Board Was Required To Apply Liberal Consideration To Mr. Bee's Petition

The Board's enabling statute, binding DOD guidance, and this Court's decision in *Doyon* all confirm that the Board was required to apply liberal consideration to Mr. Bee's petition.

First, 10 U.S.C. § 1552(h) requires the BCNR to give liberal consideration. The statute provides that the BCNR must give "liberal consideration" to all "former member[s] of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury" that is "related to combat or military sexual trauma." 10 U.S.C. § 1552(h)(1). For such petitions, the Board must "review the claim with liberal consideration to the claimant that [PTSD] or [TBI] . . . potentially contributed to the circumstances resulting in the discharge." *Id.* § 1552(h)(2)(B). Mr. Bee's application falls squarely within the plain meaning of those provisions, and that plain meaning should control.

Second, Section 1552(h) codified binding DOD guidance—the Hagel and Kurta Memos—which also require the BCNR to give liberal consideration to Mr. Bee's petition. Those Memos provide guidance that is binding on the Board. *See Fisher v. United States*, 402 F.3d 1167, 1177 (Fed. Cir. 2005) ("[T]he military is

bound to follow its own procedural regulations should it choose to promulgate them."). The Hagel and Kurta Memos embody the commonsense notion that servicemembers discharged with combat-induced PTSD or TBI should be held to a more lenient evidentiary standard when seeking to establish a correction to their discharge records based on PTSD or TBI. The Kurta Memo expanded on the guidance from the Hagel Memo and made clear that liberal consideration is not limited to changes in "discharge characterizations" but applies to "*any petition seeking discharge relief*" related to PTSD or TBI. ADD8 (¶ 24) (emphasis added).

At the outset, the Kurta Memo states that it applies to correction boards "considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including [PTSD] and [TBI]." ADD6 (¶ 1). It then broadly defines the word "discharge": "Unless otherwise indicated, the term 'discharge' includes the characterization, narrative reason, separation code, and re-enlistment code." *Id.* (¶ 20). The Kurta Memo thus applies to "requests by veterans for modification of" their "characterization" of service; modification of their "narrative reason" for discharge; modification of their "separation code;" and modification of their "re-enlistment code." ADD6-8 (¶¶ 1, 20). That is exactly what Mr. Bee seeks: His petition asks the BCNR to modify the narrative reason for his discharge ("Force Shaping-VSP") and separation code ("MCN1"), Appx4049, to

show instead that he was unfit for service at the time of his separation due to PTSD and TBI, which in his case would result in medical retirement, 10 U.S.C. § 1201.[1]

Third, this Court already held in *Doyon* that both DOD guidance and 10 U.S.C. § 1552(h) require the BCNR to apply liberal consideration to servicemembers seeking to correct a discharge record to reflect unfitness based on PTSD-related disability: "Whether Mr. Doyon's discharge was misattributed to unsuitability based on a personality disorder instead of unfitness based on PTSD-related disability plainly falls within 10 U.S.C. § 1552(h)'s requirement that the BCNR shall apply liberal consideration when reviewing whether PTSD 'potentially contributed to the circumstances resulting in the discharge.'" *Doyon v. United States*, 58 F.4th 1235, 1248 (Fed. Cir. 2023) (citation omitted); *id.* at 1243 ("Mr. Doyon requested the BCNR change the narrative reason on his DD-214 form *to*

[1] While Mr. Bee's case was pending before the Court of Federal Claims, DOD released a memorandum issued by DOD Acting Undersecretary Ashish S. Vazirani, titled "Clarifying Guidance to Boards for Correction of Military/Naval Records Considering Cases Involving Both Liberal Consideration Discharge Relief Requests and Fitness Determinations" (Vazirani Memo). The government has acknowledged that the Vazirani Memo "was issued after the BCNR's decision in this case" and is "not the basis for[] [the Government's] position" regarding liberal consideration. Appx1689. As such, it is irrelevant to determining whether the BCNR erred here. The Vazirani Memo is also wrong on the merits and directly conflicts with *Doyon* by stating: "10 U.S.C. § 1552(h) cannot be read to require the application of liberal consideration to assess whether a qualifying PTSD or TBI condition potentially contributed to the circumstances resulting in a medical discharge which never occurred." Appx1716. *Doyon* already rejected that precise argument.

reflect that he was discharged due to physical disability (i.e., PTSD) rather than personality disorder," and "such challenge is entitled to liberal consideration under the Kurta Memo." (emphasis added)).

In *Doyon*, the government had argued that liberal consideration was limited to cases where a servicemember seeks a record correction to excuse or mitigate a discharge based on *misconduct*, not discharges seeking *medical retirement*. This Court expressly rejected that position, explaining that liberal consideration applies to "*any petition seeking discharge relief*," which includes requests for "disability retirement." 58 F.4th at 1243; *see also id.* at 1244-46. This Court stated that "nothing in the text of § 1552(h) limits liberal consideration for PTSD-related claims to characterization upgrades or *any other subset* of misconduct-related discharge relief regularly provided by the BCNR." *Id.* at 1246 (emphasis added). Thus, in the language of the Kurta Memo, a petition seeking discharge relief in the form of medical retirement is one way that liberal consideration may "excuse or mitigate" a discharge.

Other courts have faithfully followed *Doyon*'s clear mandate that liberal consideration applies to applications for disability retirement. In *LaBonte v. United States*, a veteran challenged a decision by a corrections board after it denied his request for "retirement benefits for his disabilities." No. 18-1784C, 2023 WL 3197825, at *1 (Fed. Cl. May 2, 2023). Just like here, the board had denied relief

because, although the veteran had PTSD "prior to service separation," the board believed the applicant "met medical retention standards" and so was not entitled to "disability separation/retirement." *Id.* at *5 (citation omitted). In other words, "[t]he issue raised by the plaintiff's claim [wa]s whether the plaintiff was medically fit for continued service at the time of his discharge." *Id.* at *6. On that question, the Court explained, *Doyon* plainly held that "'liberal consideration' . . . would need to be applied to the retroactive determination of whether the plaintiff was entitled to retirement due to disability." *Id.* at *9.[2]

In sum, the statute, binding guidance, and controlling precedent all required the Board to apply liberal consideration to Mr. Bee's petition.

B. The Board Did Not Apply Liberal Consideration To Mr. Bee's Petition

Despite the clear mandate to apply liberal consideration to Mr. Bee's petition, the Board failed to do so. The Board did not purport to review Mr. Bee's petition

[2] Even before *Doyon*, the Chief Judge of the Court of Federal Claims independently reached the same conclusion—holding that liberal consideration applied to a veteran's claim "that he was unfit for continued service as of the date of his discharge." *Hassay v. United States*, 150 Fed. Cl. 467, 479 (2020). As to that unfitness issue, the Court vacated in part because "the BCNR decision does not reflect adherence to the principles set forth in" the Hagel, Kurta, and Wilkie memos. *Id.* at 483; *see id.* at 484-85 (requiring the BCNR, "[i]n conducting its review" of whether the plaintiff "was unable to reasonably perform the duties of his office," to "apply the DoD guidance cited above"); *see also Valles-Prieto v. United States*, 159 Fed. Cl. 611, 619 (2022) (vacating a decision denying disability retirement in part for failing to apply liberal consideration).

under that standard nor did it apply the principles of liberal consideration. In fact, the government did not defend the Board's decision by claiming it had applied liberal consideration—instead, the government erroneously argued that the Board was not required to apply that standard to Mr. Bee's petition. *See, e.g.*, Appx1596 (arguing liberal consideration did not apply because "there [was] nothing negative about Mr. Bee's behavior that prompted his discharge"). In spite of these facts, the Court of Federal Claims ruled that the Board *had* in fact applied liberal consideration but merely omitted to say it was doing so. Appx12-13. According to the court, even though the Board "did not use the phrase 'liberal consideration,'" the Board nonetheless applied that standard because it accepted the "invitation to robustly engage with the evidence." Appx13. That ruling does not withstand scrutiny.

First, the Board did not *purport* to apply liberal consideration. That is a strong indication it did not do so, because the Board's practice is to expressly state that it is applying liberal consideration when it does. *See, e.g.*, BCNR Decision at 4, No. 77-21 (Aug. 11, 2021), https://boards.law.af.mil/NAVY/BCNR/CY2021/NR20210000077_Redacted.pdf ("Accordingly, the Board applied liberal consideration to Petitioner's PTSD condition and the effect that it may have had

upon Petitioner's misconduct.").[3] The Board is well aware of liberal consideration and openly acknowledges the standard when it applies it. It did not do so here.

That is likely why the government did not contend that the Board applied liberal consideration. In its opening brief before the Court of Federal Claims, the government argued that the Board was not required to apply liberal consideration—not that it had applied the standard correctly. It merely asserted that the Board's decision was not "ill-liberal[]." Appx1594.[4] All of this strongly suggests that the Board did not in fact apply the correct legal standard.

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[3] *See also, e.g.*, BCNR Decision at 4, No. 8641-20 (Oct. 31, 2021), https://boards.law.af.mil/NAVY/BCNR/CY2021/NR20210007440_Redacted.pdf ("Because Petitioner based his claim for relief upon his undiagnosed PTSD condition, the Majority reviewed his application in accordance with the guidance of references (b)–(d). Accordingly, the Majority applied liberal consideration to Petitioner's claimed mental health condition and the effect that it may have had upon his misconduct."); BCNR Decision at 3, No. 57-21 (Aug. 5, 2021), https://boards.law.af.mil/NAVY/BCNR/CY2021/NR20210000057_Redacted.pdf ("The Board found that applying liberal consideration and in consideration of the self-referral . . . to for treatment, Petitioner is entitled to an upgrade to an honorable characterization of service . . . ."); BCNR Decision at 3, No. 7440-21 (Mar. 3, 2022), https://boards.law.af.mil/NAVY/BCNR/CY2021/NR20210007440_Redacted.pdf ("Upon review and liberal consideration of all the evidence of record, the Board concluded that Petitioner's request warrants relief. Additionally, the Board reviewed his application under the guidance provided in the Hagel, Kurta, and Wilkie Memos.").

[4] In its reply brief, the government suggested that the Board may have applied some lighter version of liberal consideration, though it admitted that the Board had not applied the standard to the question of whether Mr. Bee's condition should mitigate (i.e., lessen the severity of) his discharge. Appx1661 (arguing that the BCNR "applied liberal consideration as far as it was reasonably able" by accepting

Second, the Board's decision does not address or reflect the substance of liberal consideration. It nowhere accounts for the "more lenient . . . evidentiary standard" that liberal consideration requires. *Doyon*, 58 F.4th at 1238. Nor does it apply any of the specific principles of liberal consideration mandated by the Kurta Memo. To the contrary, critical parts of the Board's analysis directly *contradict* those principles.

For example, the Board failed to follow paragraph 7 of the Kurta Memo, which instructs that a "veteran's testimony alone" may establish "the existence a condition," "*and* that the condition . . . excuses or *mitigates the discharge*." ADD9 (¶ 7) (emphasis added). Rather than giving weight to Mr. Bee's testimony, the Board discounted it precisely *because* it was his testimony. The Board repeatedly dismissed Mr. Bee's declaration that explained how his TBI and PTSD symptoms disrupted his work as an instructor, including how his supervisors had warned him about his "erratic behavior." Appx4028; Appx4255, Appx4258. It likewise dismissed the declaration of Mr. Bee's wife, which explained how Mr. Bee's supervisors had warned her to hide the weapons in the house and sleep separate from Mr. Bee with her door locked. Appx4025.

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the existence of Mr. Bee's PTSD and TBI and asserting the "obvious inapplicability of the liberal consideration guidance to determinations of unfitness").

To the Board, none of this evidence carried any weight because it was all trumped by Mr. Bee's performance reports, which it described as the "objective evidence." Appx4255, Appx4258. But that overreliance on cold records and dismissal of the veteran's testimony is exactly what liberal consideration is intended to prevent. The standard requires the Board to give weight to evidence that comes "from sources other than a veteran's service record," including "physicians," and "statements from family members." ADD6 (¶ 4). The Board's undue reliance on Mr. Bee's performance reports is particularly inappropriate here, because those reports are prohibited from including any comments on medical fitness or the effects of medical issues. *See infra* at 49-50.

The Board also failed to apply the instructions of paragraph 9 of the Kurta memo, which provides that "a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge." ADD7 (¶ 9). Nonetheless, the BCNR disregarded Dr. Vogel's diagnosis because it was "solely based on [Mr. Bee's] own self report." Appx4255. The BCNR even insinuated that Mr. Bee fabricated his medical history to Dr. Vogel for financial reasons. *See* Appx4262. Finally, the Board did not follow paragraph 16 of the Kurta Memo, which provides that, if a veteran's "[c]onditions or experiences . . . may reasonably have existed at the time of discharge," the Board must "liberally conside[r them] as excusing or mitigating the discharge." ADD7

(¶ 16). But the BCNR failed to address whether Mr. Bee's conditions should mitigate his discharge under the liberal consideration standard. *See* Appx4261. Other such examples abound.[5]

Third, the court fundamentally misunderstood the substance of liberal consideration, leading it to conclude that the Board had applied the standard. Per the court: "liberal consideration is an invitation to robustly engage with the evidence specifically affecting the veteran, not run away from it." Appx13. Because the court found that the Board "accepted that invitation," the court concluded that it had applied liberal consideration. Appx13. But "robustly engag[ing] with the evidence" is not liberal consideration. The Board should always robustly engage with the evidence before it. The liberal consideration standard, on the other hand, requires the Board to apply a series of specific principles provided in the Kurta Memo, which

[5] Further, the Board failed to follow paragraphs 10 and 17 from the Kurta Memo, which broadly require the Board to liberally consider evidence that may reasonably support a veteran's condition and that the condition mitigates the discharge. Instead of following those principles, the Board dismissed highly probative evidence such as Mr. Bee's VA disability rating as "unrelated to fitness determinations." Appx4246; *see infra* at 54 (discussing improper disregard of VA disability ratings). It also repeatedly presumed that Mr. Bee's performance reports were dispositive evidence of fitness because they showed him "capably performing [his] dut[y]" immediately prior to his discharge. Appx4258; *see also* Appx4253, Appx4255. But the Kurta Memo repeatedly warns that a lack of evidence in certain parts of the record should not overcome supported medical diagnoses. ADD6, ADD8 (¶¶ 4, 9, 26(b)); *see infra* at 46-53 (discussing improper reliance on performance reports).

are designed to account for the evidentiary difficulties often faced by servicemembers with PTSD and TBI. The Board did not apply those principles, as Mr. Bee pointed out to the court, Appx1603-1338 at Appx1610, but the court ignored that and instead misconstrued the standard. That should not stand.

* * *

The Board's failure to apply liberal consideration was a critical error that infected its entire decision. Had it properly applied the correct standard, it would have ruled in Mr. Bee's favor and corrected his discharge records. That is not only because the BCNR analysis was unsound and lacks substantial evidence, *see infra* at 53-57, but also because its rationale for denying the petition turned on reasoning that is directly contradictory to principles of liberal consideration.

The BCNR erred by failing to give Mr. Bee's petition the liberal consideration mandated by statute, binding guidance, and *Doyon*. Rather than apply liberal consideration, and the commonsense principles it embodies, the Board took the opposite approach and discounted Mr. Bee's evidence for all the reasons rejected by Congress when it codified the Kurta Memo in Section 1552(h). The Board's decision, and the Court of Federal Claim's decision upholding it, should be reversed.

III. THE BOARD MISAPPLIED THE FITNESS STANDARD

A. The Board Did Not Relate Mr. Bee's Disabilities To The Duties Of An Infantry Unit Leader

Separate and apart from failing to apply the liberal consideration standard, the Board made an additional, independent legal error that undermines its decision: it failed to properly apply the fitness standard. The controlling instruction provides that "[t]he *sole standard* to be used in making determinations of physical disability as a basis for retirement or separation is unfitness to perform the duties of office, grade, rank or rating." SECNAVINST 1850.4E, encl. 3, pt. 3, § 3301 (emphasis added); *see also* 10 U.S.C. § 1201(a); DoDI 1332.38, E3.P3.2.2.1 (same). The instruction further provides that "[e]ach case [involving a fitness determination] is considered by relating the nature and degree of physical disability of the member to the requirements and duties that member may reasonably be expected to perform in his or her office, grade, rank or rating." SECNAVINST 1850.4E, encl. 3, pt. 3, § 3301. Thus, to apply the fitness standard, the Board must "*relate[]*" [1] "the nature and degree of physical disability" *to* [2] "the requirements and duties . . . [of] his or her office, grade, rank, or rating." *Id.* But the Board never conducted that analysis, because it never set forth or considered the duties of Mr. Bee's "office, grade, rank, and rating."

Most relevant here are Mr. Bee's grade and rank. "Grade" refers to the "step or degree in a graduated scale of office or military rank that is established and

designated as a grade by law or regulation (E-7, O-5, W-2)." SECNAVINST 1850.4E, encl. 2, § 2057(b). "Rating" refers to "Primary Military Occupational Specialties (PMOS) prescribed for Marines (0311, Rifleman; 3531, Motor Vehicle Operator; etc.)," but "[d]oes not include secondary specialties (NEC or SMOS)." *Id.* § 2057(d). Mr. Bee's rating—his PMOS—at separation was 0369, Infantry Unit Leader and his grade was E-6.[6]

To evaluate Mr. Bee's fitness to perform the duties of his "office, grade, rank, or rating," the Board was required to consider whether Mr. Bee could perform the duties of an Infantry Unit Leader at the E-6 grade. To do so, the Board was required to consider the extent to which Mr. Bee's disabilities impacted four factors: (1) common military tasks, i.e., whether the member is unable to reasonably perform routine assignments expected of his or her office, grade, rank or rating; (2) physical readiness/fitness tests, i.e., whether the member's condition prohibits him or her from taking all or part of physical readiness/fitness tests; (3) deployability, i.e., whether the member's condition prevents him or her from being positioned outside

[6] "Rank" refers to the "order of precedence among members of the Armed Forces," that is, their level of seniority relative to other servicemembers. SECNAVINST 1850.4E, encl. 2, § 2057(c). "Office" refers to "[a] position of duty, trust, authority to which an individual is appointed," *id.* § 2057(a), and primarily refers to a member's billet. A billet is a servicemember's current assignment, while a rating describes the skill set a servicemember has achieved to function in their primary role. For Mr. Bee, his office was a training billet at the Navy Field Medical Training Battalion and his rank was Staff Sergeant.

the continental United States for an unspecified amount of time; and (4) special qualifications, i.e., whether the member's condition causes the loss of any specialized qualifications. SECNAVINST 1850.4E, encl. 3, pt. 3, § 3304. The Board did not conduct that analysis, as it failed to assess Mr. Bee's common military tasks as an Infantry Unit Leader and his ability to deploy in that role. Instead, it focused on Mr. Bee's performance in his temporary position with the Navy as an instructor to Navy chaplains and medics, an assignment for which there is no corresponding Marine Corps PMOS. The Board's failure to consider Mr. Bee's duties as an Infantry Unit Leader at the grade of E-6 is dispositive, because it could not "relate" Mr. Bee's disabilities to the requirements and duties of an Infantry Unit Leader when it never identified the requirements and duties of an Infantry Unit Leader.

The Marine Corps Infantry Training and Readiness Manual makes abundantly clear that combat is a core duty of an Infantry Unit Leader. The manual lists the operational positions available for Infantry Unit Leaders and their accompanying "Core Capabilities." Appx1293-1306 at Appx1293-1303. All of the core capabilities refer to combat. Nine of the positions state the core capabilities include both "[l]ocat[ing], clos[ing] with, and destroy[ing] the enemy by fire and maneuver" and "[r]epel[ling] the enemy assault by fire and close combat." Appx1293-1301. Positions that do not use these specific phrases still include core duties that involve

combat, such as coordinating operational support, Appx1302, or "assist[ing] . . . in the tactical employment of the organic weapons systems for the unit," Appx1303. The Marine Corps does not differentiate the duties of an Infantry Unit Leader based on duty station. That is because the role of an Infantry Unit Leader is combat. And those duties—whether preparing for deployment or executing in combat—are designed to keep the unit primed for combat effectiveness. In short, the job is combat.

Every position for an Infantry Unit Leader at Mr. Bee's grade listed in the Marine Corps Infantry Training and Readiness Manual requires that the member "maintain the capabilities of core and core plus skills for an 0300 Basic Infantry Marine," which include the abilities to navigate with a map and compass, conduct mounted land navigation, and navigate with a GPS. Appx1287-1289; Appx1291-1301.

The Board never considered whether the nature and degree of Mr. Bee's disabilities prevented him from performing any of these required duties. Its failure to do so renders its decision legally unsound.

B. The Board Improperly Bypassed The Fitness Inquiry By Giving Dispositive Weight To Inapposite Performance Reports

Rather than relating the nature and degree of Mr. Bee's disabilities to the requirements and duties that he may reasonably be expected to perform as an Infantry Unit Leader, the Board instead relied primarily on Mr. Bee's performance

reports from when he was assigned as an instructor for Navy chaplains and medics. Appx4260. The Board simply asserted that these performance reports were sufficient evidence that Mr. Bee was fit to perform the duties of his office, grade, rank, and rating—without establishing that those instructor duties are commensurate with the duties an Infantry Unit Leader is expected to perform. That reasoning is fundamentally flawed.

Before determining whether Mr. Bee could perform the duties of an Infantry Unit Leader, the Board needed to identify what those duties *are*. The Board cannot circumvent that inquiry by merely pointing to Mr. Bee's latest performance reports without regard to whether those reports reflect the scope of the duties expected of a servicemember in his office, grade, rank, and rating. Numerous courts have held as much.

For example, in *Kelly v. United States*, a former Navy diver sought to correct his discharge records to reflect that he should have been found unfit and separated with disability retirement. 69 F.4th 887, 888 (Fed. Cir. 2023). The petitioner had served as a "Second-Class Navy Diver at the E4 grade," but after a head injury, he was reassigned to a role "maintaining diving equipment." *Id.* at 895-96. The Board denied his petition by relying on his "last two performance evaluations," the second of which covered only his maintenance work. *Id.* at 895. The Court of Federal Claims vacated the Board's decision, and this Court affirmed in relevant part. *Id.* at

900. As the Court explained, "the two performance evaluations failed to sufficiently address whether Mr. Kelly was able to perform the common duties of a Second-Class Navy Diver at the E4 grade." *Id.* at 895. The "common duties of a Navy diver include descending into the ocean at any depth and working in, among other conditions, hostile environments that include cold muddy water where tasks can be completed only by feel." *Id.* at 895-96. Thus, regardless whether the petitioner was fit to maintain diving equipment, that "does not necessarily equate to a finding that he was fit to perform work that a member in his office, grade, rank, or rating would reasonably be expected to perform." *Id.* at 896. This Court also agreed with the Court of Federal Claims that the Board "failed to consider all relevant criteria enumerated in SECNAVINST 1850.4E § 3304." *Id.*

In *Nyan v. United States*, the Court of Federal Claims reached a similar conclusion. 153 Fed. Cl. 234, *vacated solely as to remedy*, 154 Fed. Cl. 463 (2021). There, a former servicemember likewise sought to correct his military records to reflect that he should have been found unfit and separated with disability retirement. *Id.* at 235. The Navy had denied his request "based largely if not entirely on comments contained in his most recent performance evaluation." *Id.* at 242. At the time of separation, the servicemember was a "petty officer third class in the grade of E4 with a rating of a Hospital Corpsman," *id.* at 236, but his performance review addressed a narrower range of responsibilities while he was on limited duty, *id.* at

242-43. The Navy argued that the duties the servicemember were performing were "within the scope of his rating," but the court rejected that argument for two reasons:

> First, the question is not whether Mr. Nyan was disabled from performing any and all work that a Hospital Corpsman might be assigned to perform, but rather whether he was disabled from performing work that a Hospital Corpsman at the E4 grade could "reasonably be expected to perform." SECNAVINST 1850.4E encl. 3, § 3301. Second, even if some Hospital Corpsman serve as "administrative personnel," there is nothing in the record to show that to be true for those Hospital Corpsmen who have attained the E4 grade. To the contrary, the evidence of record shows that, as a Hospital Corpsman at the E4 grade, Mr. Nyan was *expected* to perform a wide range of duties that went beyond sitting at a desk doing paperwork.

Id. at 243. The court thus rejected the Navy's reliance on the inapposite performance report and required it to properly apply the fitness standard.

Here, the Board made the same error rejected in *Kelly* and *Nyan*. It did not rely on evidence showing Mr. Bee was able to perform the duties of his office, grade, rank, and rating, but instead relied on performance reports that did not cover the scope of his expected duties. Even if instructing Navy chaplains and medics fell within the scope of the duties of an Infantry Unit Leader, that "does not necessarily equate to a finding that he was fit to perform work that a member in his office, grade, rank, or rating would reasonably be expected to perform." *Kelly*, 69 F.4th at 896.

The Board's extensive reliance on Mr. Bee's performance reports as an instructor of Navy chaplains and medics was also unsound because, as the Board has elsewhere recognized, commanders are expressly barred from commenting on

medical fitness or the effects of medical issues in performance reports. *See* Board Decision on Remand at 6, *Nyan v. United States*, No. 20-cv-00343 (Fed. Cl. Nov. 8, 2021), ECF No. 34 (noting that petitioner's "fitness (performance) reports . . . are specifically prohibited from commenting on medical conditions"). The Board's use of these performance reports as "objective evidence" of Mr. Bee's lack of impairments goes beyond the scope of what the reports actually document. Appx4255. Courts have rejected this type of reliance. *See Hassay*, 150 Fed. Cl. at 480 ("while performance evaluations are relevant to whether a servicemember is fit for duty, it is error to place exclusive reliance upon them when there is other contrary evidence in the record.").

The Board also relied on Mr. Bee's performance reports to the exclusion of the mandatory criteria for fitness determinations in DoDI 1332.38. In "making a determination of a member's ability" to perform "the duties of his or her office, grade, rank, or rating," the service may consider: (1) whether the servicemember's "medical condition represents a decided medical risk to the health of the member or to the welfare [or safety] of other members were the member to continue on active duty"; and whether (2) the servicemember's "medical condition imposes unreasonable requirements on the military to maintain or protect the member." DoDI 1332.38, E3.P3.2.2.1–2 (emphasis added); *accord* SECNAVINST 1850.4E, encl. 3, § 3302(b) (1), (2) (stating identical standard). Mr. Bee's PTSD caused

debilitating panic attacks in the relative peace of the non-operational setting as an instructor of Navy chaplains and medics; as an Infantry Unit Leader in combat, facing the most extreme of "triggering factors," *id.*, Mr. Bee would have been at high risk of responding inappropriately—possibly becoming "debilitated" or freezing up—which would have unquestionably posed "a decided medical risk" to the health of Mr. Bee and to the welfare of other the other Marines under his command. DoDI 1332.38, E3.P3.2.2.1.

The Board also failed to consider whether Mr. Bee was deployable in its fitness assessment. *See* SECNAVINST 1850.4E, encl. 2, § 2051 ("[N]on-deployability *shall* be one of many factors considered by the PEB in determining Fitness for continued naval service." (emphasis added)). Although non-deployability alone should not "normally" be the sole criteria for a finding of unfitness, the Board *must* consider whether non-deployability "interferes with [a service member's] ability to perform the duties of office, grade, rank or rating."[7] *Id.*

[7] The Court of Federal Claims misinterpreted SECNAVINST 1850.4E, Enclosure 2, § 2051 by suggesting that non-deployability could never provide the basis for a finding of unfitness. Appx18 ("[T]he ability to deploy[] *cannot* serve as the sole basis for a finding of unfit" (emphasis added)); Appx15 ("[The Board] had no reason to consider the issue of deployability as it alone *could not* have affected the outcome . . . ." (emphasis added)). The instruction does not say that. Instead, it says members who are "non-deployable for a condition that is permanent in nature and significantly interferes with his or her ability to perform the duties of office, grade, rank or rating should be referred to the PED for disability evaluation," and

Infantry Unit Leaders are required to be able to assist commanders in "deployment and tactical employment" of combat assets. Appx1291. This accords with the Marine Infantry's primary mission of close combat against the enemy. Therefore, an inability to deploy to a combat zone prevents an Infantry Unit Leader's from performing his duties. But the Board did not address the impact of non-deployability at all. Appx14 ("[T]he Board did not explicitly address the issue of deployability . . . ."). The failure to consider deployability was a legal error that underscores the Board's main error: refusing to consider the duties of an Infantry Unit Leader—duties that inexorably include combat.

The Board, tacitly acknowledging the Mr. Bee could not deploy, asserted that Mr. Bee could perform his duties while in a "garrison environment." Appx4259 (finding that "the duties [Mr. Bee] performed in [the instructional] billet were substantially the same as you would have been performing in a garrison

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that while non-deployability "*shall* be one of many factors considered by the PED in determining Fitness . . . non-deployability *alone* will not *normally* constitute a basis for a finding of Unfit." SECNAVINST 1850.4E, Encl. 2, § 2051 (emphases added). That is, the instruction "does not foreclose the possibility that these considerations, when evaluated collectively with the other identified considerations (including common military tasks), could have the combined effect of supporting a determination of unfitness." *Kelly v. United States*, 157 Fed. Cl. 114, 128 (2021). The court compounded that error by then concluding that, because non-deployability could not make a member unfit, and because of "the rarity of military engagements on American soil," it was impossible that a member could be found unfit on the basis that he could not engage in combat. Appx18. That assertion, based entirely on the court's instincts about the nation's military needs, is novel and unsupported anywhere in the record.

environment"). The BCNR cited no authority for the definition of "garrison environment." But it provided a list of duties from Mr. Bee's performance reports as an Instructor of Navy Chaplains and medics in a footnote to its garrison environment theory. Unsurprisingly, none of those duties involve the combat duties of an Infantry Unit Leader. Appx4259 & n.31.

* * *

Once the duties of Mr. Bee's office, grade, rank, and rating come into focus, it is readily apparent that his disabilities rendered him unable to perform those duties. The Marine Corps designates combat as the "primary mission" of Infantry Marines. Appx1084; *see* Appx1283. As Mr. Bee's medical record makes clear, he was in no position to engage in combat, much less lead Marines in combat as an Infantry Unit Leader. Neither the BCNR, the government, nor the Court of Federal Claims has ever suggested that Mr. Bee was fit to engage in combat. Mr. Bee was indisputably unfit for combat duties, and thus unfit for the duties of his office, grade, rank, and rating.

IV. THE BOARD'S DECISION IS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In addition to its failure to apply the correct legal standards, the Board's decision is deeply flawed in other respects as well, rendering it arbitrary and capricious and lacking substantial evidence. Most notably, the Board ignored critical parts of the record and relied on a series of improper inferences. *See Motor*

Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983) (holding that agency action may be overturned when it "entirely fail[s] to consider an important aspect of the problem" (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)); *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983) ("Under the substantial evidence rule, *all* of the competent evidence must be considered, whether original or supplemental, and whether or not it supports the challenged conclusion.").

First, the Board improperly dismissed Mr. Bee's VA disability ratings. It did not even mention that the VA had assigned Mr. Bee a 90% combined disability rating for his TBI and PTSD—much less explain why those disabilities were not indicative of unfitness. The Board disregarded that evidence based on the supposed "inherent unreliability and irrelevance" of VA ratings as they relate to "fitness determinations." Appx4260. But courts have consistently rejected that reasoning, vacating Board decisions when they "decline[] to consider plaintiff's disability ratings as determined by the VA." *Valles-Prieto*, 159 Fed. Cl. at 618 ("[T]he [Board] failed to consider relevant evidence when it declined to consider plaintiff's disability ratings as determined by the VA."); *Ferrell v. United States*, 23 Cl. Ct. 562, 571 (1991) ("Plaintiff's VA ratings . . . are . . . entitled to great weight in these regards when based on a medical examination . . . .").

Second, the Board relied on the fact that Mr. Bee was not referred to an MEB for DES processing—the very error Mr. Bee sought to correct—as dispositive evidence that Mr. Bee did not need to be referred in the first place. The relevant Navy instruction required that Mr. Bee be referred to an MEB due to both his TBI and his PTSD. *See* SECNAVINST 1850.4E, encl. 8, §§ 8001, 8012(a)(1), (f), 8013(a)(5). Instead of recognizing this as the error it was, the Board applied the "presumption of regularity" to the lack of a referral, concluding that no referral was needed because the "military medical providers who treated and assessed [Mr. Bee's] medical conditions during the period in question" did not "believe[] that they warranted referral to an MEB." Appx4255. Courts have rejected that "catch 22" because "it is the agency's own procedural errors which put plaintiff into a position of having to overcome this presumption." *Ferrell*, 23 Cl. Ct. at 569. The Board made this error repeatedly and explicitly.[8]

[8] *See, e.g.*, Appx4248 ("The burden was on you to prove that you were reasonably unable to perform the duties of your office, grade, rank, or rating due to you medical conditions at the time of your discharge *despite the fact that none of the numerous medical providers who treated or evaluated you over the final three years of your enlistment ever believed that they warranted referral to the MEB* . . . ." (emphasis added)); Appx4253 ("It is unlikely that any physician would, and *apparently none among the numerous different specialty clinics and primary care providers that you visited at different locations after incurring your final TBI in June 2010 did*, believe that your medical conditions significantly interfered with the performance of duties appropriate to your office, grade, rank or rating." (emphasis added)).

Third, the Board improperly relied on Mr. Bee's separation physical as persuasive evidence over all other medical reports. But the separation physical was itself fundamentally flawed. Binding guidance required that separation physicals "will include . . . a review of the individual medical history and medical record . . . [and] *any indicated specialty consultations*." Appx1481-1482 (emphasis added). In addition, "an assessment is made regarding a member's worldwide qualifications for retention (according to Service guidelines)." *Id.* During Mr. Bee's separation physical, the Navy physician noted Mr. Bee's TBI-related problems and ordered a neurology consult. But the Navy did not wait for the consult or assess Mr. Bee for worldwide qualification before finalizing his physical. Appx4206. The physician stated that Mr. Bee was fit, but simultaneously noted numerous debilitating conditions: "[d]izziness, vertigo . . . [m]emory lapses or loss . . . [g]ait abnormality." Appx4203.

The separation physical asserts that Mr. Bee had a "excellent general overall feeling," but it is unclear what question prompted that response and thus what Mr. Bee meant. Nor is it clear how someone with the impairments noted in the report could be, overall, in excellent health. But what *is* clear is that he had objective symptoms of PTSD and TBI, and a consultation was ordered but not completed before finalizing his physical. Instead of considering this omission and realizing that Dr. Vogel's report may well have reflected what such a follow up would reveal, the

Board relied on the absence of a follow-up examination to conclude the conditions must not have been as severe as Mr. Bee claimed during the examination by Dr. Vogel. Appx4262. This was arbitrary and capricious. *See Harrison v. Kendall*, 670 F. Supp. 3d 280, 303 (E.D. Va. 2023) (failure to consider PTSD in absence of indicated psychological examination impermissibly compounded original error).

Finally, the Board also improperly relied on Mr. Bee's application for voluntary separation to "undermin[e his] claim that [he was] erroneously discharged." Appx4248. The Board noted that Mr. Bee received a bonus for voluntarily separating, Appx4256 & n.24, but omitted that the entire amount was recouped through a reduction in his VA benefits, Appx41193. In any event, whether a member applied for voluntary separation has no logical bearing on the "sole standard" to be used in assessing whether a member can medically retire: "unfitness to perform the duties of office, grade, rank or rating." SECNAVINST 1850.4E, encl. 3, pt. 3, § 3301. Accordingly, it cannot constitute substantial evidence to support the Board's decision.

V. THE COURT SHOULD ENSURE TIMELY RELIEF

For years Mr. Bee served honorably and heroically in the thick of the War in Afghanistan. Even after his initial major head injury, he returned to the fight until he was so injured he could no longer serve. In 2018, Mr. Bee submitted his petition to the BCNR to correct his discharge records to reflect that he should have been

discharged with disability retirement due to his unfitting conditions. Since then, Mr. Bee has been caught in an extended cycle of litigation with the BCNR, which has repeatedly failed to adhere to controlling authority in addressing his petition.

In these circumstances, this Court should not remand to give the Board "yet a third bite at the apple." *Keltner v. United States*, 165 Fed. Cl. 484, 517-18 (2023) (refusing to remand to the Board for a third time and instead entering judgment for the veteran seeking to correct his discharge records). Instead, this case should be remanded with instructions to enter judgment for Mr. Bee and grant him appropriate relief. *See, e.g.*, *Doe v. United States*, 132 F.3d 1430, 1437 (Fed. Cir. 1997).

The record is fully developed and supports Mr. Bee's claim for disability retirement. After nearly six years of litigation, Mr. Bee deserves prompt, effective relief—not yet another round of argumentation before a Board repeatedly persisting in the same errors. The BCNR was "created to remedy wrongs[,] not to confound them." *Duhon v. United States*, 461 F.2d 1278, 1282 (Ct. Cl. 1972). The opposite happened in Mr. Bee's case. Now, years later, any meaningful remedy must ensure timely relief.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Federal Claims, which denied Mr. Bee's motion for judgment on the administrative record and granted the government's cross-motion.

December 6, 2024

Respectfully submitted,

/s/ Darryl H. Steensma

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CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Federal Circuit Rule 32(b)(3) and Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(e) and Federal Circuit Rule 32(b)(1) because it contains 13,998 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because this brief was prepared using Microsoft Word 365 in 14-point Times New Roman font.

/s/ Darryl H. Steensma
Darryl H. Steensma

ADDENDUM

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ADDENDUM

I. Materials Required Pursuant to Fed. Cir. R. 30(a)(1), (b)(2)(A)-(B), (c)(1) (Appx1 to Appx28)

II. Addendum Pursuant to Federal Rule of Appellate Procedure 28(f)

In the United States Court of Federal Claims

WILLIAM OLAS BEE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 21-1970

(Filed: August 23, 2024)

ORDER

On March 16, 2022, Plaintiff filed a Motion for Judgment on the Administrative Record (ECF 20), and on May 11, 2022, the Government filed its Response and Cross Motion for Judgment on the Administrative Record and Motion to Dismiss (ECF 23). On joint motion, the Court subsequently remanded this case to the Board for Correction of Naval Records (BCNR) for further proceedings. ECF 36. The BCNR issued a new decision on May 5, 2023, and the parties subsequently filed a new round of dispositive briefing before this Court (ECF 47; ECF 54). Accordingly, Plaintiff's Motion for Judgment on the Administrative Record (ECF 20) and the Government's Cross Motion for Judgment on the Administrative Record and Motion to Dismiss (ECF 23) are **DENIED** as moot.

IT IS SO ORDERED.

s/ Philip S. Hadji
PHILIP S. HADJI
Judge

In the United States Court of Federal Claims

WILLIAM OLAS BEE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 21-1970
Filed: August 23, 2024

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OPINION AND ORDER

HADJI, *Judge*.

Following selfless service to the Nation, which included four deployments to Afghanistan, Plaintiff voluntarily separated from the Marine Corps in April 2013 as part of the "Voluntary Separation Program" for which he was paid a bonus of $106,956.18 to separate. AR 9, 195. He now brings this action asking the Court to "correct" his records to reflect that he was medically retired, rather than voluntarily separated, and thus entitled to additional compensation under 10 U.S.C. § 1201. Before the Court are Plaintiff's Motion for Judgment on the Administrative Record (ECF 47), the Government's Cross-Motion for Judgment on the Administrative Record (ECF 54), and the Government's Motion to Dismiss pursuant to Rule 12(b)(1) (ECF 54). For the following reasons, the Government's Cross-Motion for Judgment on the Administrative Record is **GRANTED**, and Plaintiff's Motion for Judgment on the Administrative Record and the Government's Motion to Dismiss are **DENIED**.

BACKGROUND

Plaintiff served in the Marine Corps from 1999 to 2013. AR 50-51, 224. His primary military occupation specialty (PMOS) was initially that of infantry riflemen (0311). AR 60, 1039. Over the course of his service, he deployed to Afghanistan four times. AR 194, 311. During his third deployment, Plaintiff suffered a significant head injury in combat, exhibiting "[p]otential [Traumatic Brain Injury (TBI)] with persistent symptoms." AR 79. During his fourth deployment, he suffered extreme stress and trauma from witnessing the deaths of fellow Marines and was knocked unconscious from the detonation of multiple improvised explosive devices. AR 9, 15, 35-36. Due to the severity of his wounds, Plaintiff was medically evacuated from Afghanistan to Germany. AR 1, 9, 36. Following his return from his final deployment in June 2010, Plaintiff was diagnosed with TBI and Post-Traumatic Stress Disorder (PTSD). AR 173-78. He was placed on limited duty status until no later than December 2010,[1] although he continued to serve as an infantry squad leader and mortar section leader during that time. AR 1302-06, 1307-1311.

In October 2010, Plaintiff was promoted to staff sergeant (E-6) and his PMOS changed from rifleman (0311) to infantry unit leader (0369). AR 60, 383. He served for a short time as his battalion's substance abuse coordinator until mid-November 2010, when he transferred to the Marine Corps Field Medical Training Battalion-East. AR 383, 1314. There, he served as a Military Instructor for thousands of Navy medical and religious personnel slated to serve with Marine Corps units worldwide. AR 1314, 1316, 1321-1326. During his assignment at the Field Medical Training Battalion, he received fitness reports documenting his "outstanding" professional and military performance and ranking him in the upper half of the Marines in his reporting group. AR 2, 385-401.

More specifically, his 2011 fitness report listed various billet accomplishments and documented that Plaintiff: (1) developed field exercises to better train Navy personnel that more accurately represented tactics techniques and procedures used in operational theatres; (2) trained 1347 students in offensive/defensive attacks, ambushes, and land navigation field exercises and hikes; (3) completed the Formal School Instructor Course; (4) personally lead, mentored, and trained 314 sailors for duty in the Marine Operating Forces; (5) led platoons on 20 conditioning hikes totaling 100 miles; and (6) maintained flawless accountability of personnel, weapons, and equipment for his platoons. AR 1316; *see also* AR 511. Plaintiff's company commander not only recognized him as a "top performer" whose combat and infantry experience served as "the backbone for the highly successful training program provided to the Hospital Corpsmen as we prepare them for combat duty with the Marine Corps" but "enthusiastically recommend[ed him] for promotion and increased responsibility." AR 1320. Plaintiff's reviewing officer ranked him above 11 of his peers, stating that his "leadership skills, instructional ability, and attention to detail are

[1] The Government argues that Plaintiff's limited duty status terminated in October 2010. ECF 54 at 55. Plaintiff argues that it terminated in December 2010. ECF 47 at 42.

truly impressive" and noting that he "continues to excel in all aspects of job performance." AR 1320, 511.

Similarly, Plaintiff's 2012 fitness report noted that, among other things, Plaintiff: (1) personally led, mentored, and trained over 268 students in combat leadership, offensive and defensive operations, land navigation, weapons handling, close order drill, and physical training; (2) trained and mentored over 1,200 students in his role as the combat marksmanship coach; and (3) assisted in the development and refinement of a field exercise that reflected "more realistic and current tactics, techniques, and procedures used in the Fleet Marine Force." AR 1321. His leadership commended him as "an outstanding Marine" who performed in a "highly exemplary manner" and "[s]tands ready today to be a [Gunnery Sergeant]." AR 1325.

In October 2012, Plaintiff requested to separate early from the Marine Corps through the Voluntary Separation Program, four days after the program was announced. AR 9, 480. In January 2013, as part of the separation process, Plaintiff underwent a Department of Veterans Affairs (VA) Compensation and Pension exam (C&P exam) by Dr. Roy Vogel, who confirmed Plaintiff's diagnoses for TBI and PTSD and further diagnosed him with Post-Concussion Syndrome/Cognitive Impairment, Primary Insomnia, Generalized Anxiety Disorder, Panic Disorder with Agoraphobia, and Major Depressive Disorder. AR 8, 56-65. He assigned Plaintiff a nominal score indicating "[s]ome impairment in reality testing or communication; or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood." AR 106.

Continuing the separation process, Plaintiff underwent a separation physical in February 2013. AR 188. During that exam, Plaintiff reported having an "excellent general overall feeling." AR 8, 99. He reported "[n]o decreased functioning ability" and "[n]o sensory disturbances," *id.*, and he was observed as having a "normal" affect. AR 100. He was "released w/o limitations," AR 103, and separated with a RE-1A code, indicating that he was qualified for service, separation, or to reenlist. AR 193, 481. He was honorably discharged from service on April 1, 2013, and received $106,956.18 in separation pay pursuant to the Voluntary Separation Program. AR 9, 195.

In October 2013, the VA issued a Rating Decision based on a review of records from the January C&P exam. AR 104. The decision found that Plaintiff's TBI and PTSD were "service connected" and rated each condition at 70%. AR 104-15. Plaintiff was also rated for other conditions and received an overall disability rating of 100%. AR 115. Several years later, Plaintiff also underwent an exam by a private physician, Dr. Michael Blumenfield, who opined that Plaintiff was not fit for service at the time of his discharge. AR 163-66.

In April 2018, Plaintiff applied to the Board for Correction of Naval Records (the Board) requesting that his naval records be corrected to reflect that his April 1, 2013, discharge was the result of a medical retirement rather than a voluntary separation. AR 29. The Board obtained advisory opinions from the Senior Medical Advisor to the Secretary

of the Navy Council for Review Boards (CORB) and the Director of the CORB, who recommended that Plaintiff be denied relief. AR 5-8. These opinions were provided to Plaintiff in advance of the Board's decision, and Plaintiff submitted briefing to the Board in July 2019. AR 567-584.

The Board denied Plaintiff's claim in August 2019. AR 1-3. In October 2021, Plaintiff filed his original complaint in this case alleging that the Board's decision was arbitrary, capricious, or otherwise contrary to law. ECF 1. The parties filed cross motions for judgment on the administrative record (ECF 20, 23), and the Government moved to dismiss the complaint (ECF 23). Following oral argument, the parties sought, and the Court granted, a remand to the Board. *See* ECF 36. The Board obtained another advisory opinion from its Physician Advisor, AR 509-519, and Plaintiff submitted a supplemental brief. AR 537-53.

On May 5, 2023, the Board issued a new decision, which again denied Plaintiff's request for corrective action. AR 470-488. On July 7, 2023, Plaintiff filed an amended complaint (ECF 42), and the parties filed new cross motions for judgment on the administrative record (ECF 47, 54). The Government also filed a Motion to Dismiss pursuant to Rule 12(b)(1) (ECF 54).

DISCUSSION

This opinion is divided into two parts. Part I addresses the threshold jurisdictional statute of limitation argument raised in the Government's Motion to Dismiss. Part II addresses the merits of Plaintiff's case.

I. The Court has Jurisdiction over Plaintiff's Claims

The Court begins by addressing Defendant's Motion to Dismiss the Complaint as untimely under the pertinent six-year statute of limitations. Rule 12(b)(1) permits dismissal for lack of subject-matter jurisdiction.[2] This Court's jurisdiction is dependent on an unequivocal waiver of sovereign immunity by the United States. *United States v. Testan*, 424 U.S. 392, 399 (1976). The plaintiff bears the burden to demonstrate that jurisdiction is proper by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). When considering a motion to dismiss under Rule 12(b)(1), "a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). If the Court determines that it lacks subject-matter jurisdiction, it must dismiss the action. Rule 12(h)(3); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Under the Tucker Act, "[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

[2] Court of Federal Claims Rule 12(b)(1) is the same as Federal Rule of Civil Procedure 12(b)(1). *Compare* RCFC 12(b)(1) *with* Fed. R. Civ. P. 12(b)(1).

after such claim first accrues." 28 U.S.C. § 2501. Section 2501 "is jurisdictional in nature and, as an express limitation on the waiver of sovereign immunity, may not be waived." *Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990).[3] Nor may the Court consider whether certain equitable considerations warrant extending the limitations period under Section 2501. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008).

Where, as here, "a service member has not been considered or has been rejected for disability retirement prior to leaving active service, the service member can pursue disability retirement before a [Record Correction B]oard." *LaBonte v. United States*, 43 F.4th 1357, 1361 n.4 (Fed. Cir. 2022) (citing *Chambers v. United States*, 417 F.3d 1218, 1225 (Fed. Cir. 2005)). In such cases, the general rule is that the six-year statute of limitations runs from "[t]he decision by the first statutorily authorized board that hears or refuses to hear the claim[.]" *Chambers*, 417 F.3d at 1224. But there is an exception—the *Real* exception—which applies when "the veteran's knowledge of the existence and extent of his condition at the time of his discharge [is] sufficient to justify concluding that he waived the right to board review." *Chambers*, 417 F.3d at 1226 (quoting *Real v. United States*, 906 F.2d 1557, 1562 (Fed. Cir. 1990)). Stated differently, the *Real* exception applies when the service member knew at the time of his separation from the military, "that he was entitled to disability retirement due to a permanent disability that was not a result of his intentional misconduct and was service-connected." *Chambers*, 417 F.3d at 1226. In such a case, the statute of limitations runs from the time of discharge. *See id.*

It is undisputed that Plaintiff had been diagnosed with TBI and PTSD and was aware of those diagnoses immediately before discharge. However, caselaw from this Court suggests that mere awareness of a disability is insufficient to invoke the *Real* exception. *See Johnson v. United States*, 123 Fed. Cl. 174, 179 (2015). Indeed, for a claim to accrue at discharge, *Real* itself suggests that a service-member must "underst[and] the full extent" of his disabilities. *See Real*, 906 F.2d at 1563 (declining to apply the *Real* exception where "no one knew exactly what was wrong with [Plaintiff] or understood the *full extent* of his mental problem at the time of his discharge" (emphasis added)). Here, Plaintiff likely did not understand the "full extent" of his TBI and PTSD before discharge because the degree of his disability—a 70% rating for PTSD and a 70% rating for TBI (100% total)—was not established until six months after his separation. In fact, his medical evaluations before discharge repeatedly rated him "fit for duty" with no limitations. AR 179-81. As such, it is reasonable to conclude that these positive evaluations, whether accurate or not, led Plaintiff

[3] In the last twenty years, the Supreme Court has repeatedly admonished courts for attaching jurisdictional labels to minor procedural requirements that can be characterized as "claim-processing rules." *See Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). However, the Supreme Court has maintained that Section 2501 is "more absolute" in nature, suggesting that it remains a prerequisite for Tucker Act jurisdiction. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-35 (2008). As such, this Court has continued to use Rule 12(b)(1) to resolve questions of timeliness under the Tucker Act. *See, e.g., Henderson v. United States*, 152 Fed. Cl. 460, 465 (2021).

to believe that his disabilities were of a less serious nature and that he was not "entitled to disability retirement."

Relatedly, the Court has also refused to apply the *Real* exception in cases where the service member was generally able to perform his duties at the time of discharge. For example, in *O'Hare v. United States*, the plaintiff was aware of his injury and diagnosis and had been placed on limited duty at the time of discharge. 155 Fed. Cl. 364, 373 (2021). Nevertheless, the Court declined to find that the veteran "*knew* he had a *permanent* disability that *entitled* him to disability retirement" because "he was able to perform his assigned duties, at least at certain times, and had reason to expect continued recovery." *Id.* The same is true here. Before his separation, Plaintiff was serving as an instructor for religious and medical personnel, and his fitness reports indicate that he performed adequately in this assignment. Given the general stability of Plaintiff's situation immediately before discharge, the Court is not convinced that he was aware "that he was entitled to disability retirement."

This is not to decide the ultimate merits question of Plaintiff's entitlement to disability retirement, which concerns Plaintiff's "unfitness to perform the duties of office, grade, rank or rating." Secretary of the Navy Instruction (SECNAVINST) 1850.4E, § 3301. As discussed below, the fact that a service member performs adequately within a particular billet does not necessarily mean that he is able to perform the broader duties of his office grade, rank, or rating. *See Kelly v. United States*, 157 Fed. Cl. 114, 125 (2021) ("[A] mere review of whether a member was adequately performing duties—regardless of what those were—immediately before separation is not sufficient."). For purposes of what Plaintiff knew or should have known, however, Plaintiff's adequate performance in his billet immediately before discharge weighs heavily against him knowing that he was entitled to medical retirement.

Having determined that the *Real* exception does not apply, the Tucker Act's six-year statute of limitations runs from "[t]he decision by the first statutorily authorized board that hears or refuses to hear the claim[.]" *Chambers*, 417 F.3d at 1224. Because the Board denied Plaintiff's claim on August 5, 2019—less than six years ago—Plaintiff's claim is timely.

II. The Board's Decision Was Well-Reasoned, Consistent with Law, and Supported by Substantial Evidence

Turning to the merits, the Court reviews the Board's decision "to determine whether it is arbitrary, capricious, unsupported by substantial evidence, or contrary to law." *Lewis v. United States*, 458 F.3d 1372, 1376 (Fed. Cir. 2006). The Court does not reweigh the evidence, but rather considers whether the conclusion under review is supported by substantial evidence. *Riser v. United States*, 97 Fed. Cl. 679, 683-84 (2011). If the Board considered the relevant evidence and came to a reasonable conclusion, the Court will not disturb the Board's decision. *Id.* This lenient standard of review is violated, however, where the Board "entirely failed to consider an important aspect of the problem, offered an

explanation for its decision that runs counter to the evidence before the [Board], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

To qualify for disability retirement, a service member must (1) be determined "unfit to perform the duties of the member's office, grade, rank, or rating because of a physical disability" and (2) have at least 20 years of service *or* a disability rating greater than 30%. *Kelly v. United States*, 69 F.4th 887, 889 (Fed. Cir. 2023) (citing 10 U.S.C. § 1201). "A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties)[.]" Department of Defense Instruction (DoDI) 1332.38, E3.P3.2.1. In determining whether a service member can reasonably perform his or her duties, the following four factors should be considered: "(1) common military tasks, *i.e.*, whether the member is unable to reasonably perform routine assignments expected of his or her office, grade, rank or rating; (2) physical readiness/fitness tests, *i.e.*, whether the member's condition prohibits him or her from taking all or part of physical readiness/fitness tests; (3) deployability, *i.e.*, whether the member's condition prevents him or her from being positioned outside the [contiguous United States] for an unspecified amount of time; and (4) special qualifications, *i.e.*, whether the member's condition causes the loss of any specialized qualifications." *Ford v. United States*, 170 Fed. Cl. 458, 469 (2024) (citing SECNAVINST 1850.4E, § 3304).[4] The first factor, common military tasks, is dispositive on the ultimate question of the member's unfitness. By contrast, the remaining three factors cannot be used individually as the sole basis for a finding of unfitness. *See* SECNAVIST 1850.4E, § 3307.

The remainder of this section is organized into three parts. First, the Court briefly summarizes the Board's decision. Second, the Court addresses Plaintiff's argument that the Board committed clear legal error by failing to apply various laws and regulations. The Court pays particular attention to Plaintiff's argument that the Board withheld liberal consideration—a thinly veiled request for the Court to reweigh the evidence. Third, the Court addresses Plaintiff's argument that the Board either improperly relied on or discounted key pieces of evidence—an explicit request for the Court to reweigh the evidence.

A. Overview of the Board's Decision

The Board's comprehensive, 19-page decision correctly states that "the sole standard to be used in making determinations of physical disability as a basis for retirement or separation is unfitness to perform the duties of office, grade, rank or rating because of

[4] The Board must apply the regulations that existed at the time of the member's discharge. *Chambers*, 417 F.3d at 1227 ("[T]he Army regulations in effect at the time of Chambers' discharge in 1970, rather than current regulations, guide our analysis."). At the time of Plaintiff's discharge, DoDI 1332.38, E3.P3.2.1. and SECNAVINST 1850.4E were controlling (SECNAVINST 1850.4E was replaced by SECNAVINST 1850.4F on June 17, 2019).

disease or injury incurred or aggravated while entitled to basic pay." AR 482, 488 (citing SECNAVINST 1850.4E, § 3301). Applying this standard, the Board found that although Plaintiff suffered from PTSD and TBI during service, "[t]he evidence simply does not support [the] contention that [Plaintiff was reasonably unable to perform the duties of [his] office, grade, rank, or rating as a result of those conditions." AR 488.

The Board's assessment of Plaintiff's fitness is supported by substantial evidence. Under the Administrative Procedure Act (APA), the Court reviews the Board's factual findings for substantial evidence. *OSI Pharms., LLC v. Apotex, Inc.*, 939 F.3d 1375, 1381–82 (Fed. Cir. 2019). "The substantial evidence standard asks 'whether a reasonable fact finder could have arrived at the agency's decision,' and 'involves examination of the record as a whole, taking into account evidence that both justifies and detracts from the agency's decision.'" *Id.* (quoting *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000)).

Analyzing Plaintiff's numerous fitness reports from the years directly preceding his voluntary separation, the Board found that they "conclusively demonstrated" that Plaintiff was "capable of performing the duties of [his] office, grade, rank, or rating despite [his] medical conditions." AR 485. Significantly, the Board cited his 2011 and 2012 fitness reports, noting that they "reflect that [he] successful[ly] trained thousands of Navy Medical Department and Religious Program personnel in the knowledge, skills, and abilities necessary to serve with and support the Marine Corps, which specifically included land navigation skills." AR 480. The Board recognized that Plaintiff's leadership lauded him for "maintaining 'flawless accountability of personnel, weapons, and equipment for [his] platoons,' for [his] 'leadership, professional knowledge, and meticulous attention to detail [which] earned [him] the respect and admiration of students and staff[],' and for developing 'field exercises that more accurately represent current tactics, techniques, and procedures currently being experienced in current operational theaters.'" *Id*. The Board also quoted Plaintiff's company commander's assessment of him from his 2012 fitness report:

> [A]n outstanding Marine who I have relied upon heavily to accomplish the mission of leading and training our Sailor and Marines at [the Field Medical Training Battalion]. His performance has had force-wide impact and significantly enhanced the quality, character, capabilities, and attitudes of thousands of Hospital Corpsmen, Religious Program Specialists, Chaplains, and Navy Medical Department Officers now serving with the Marine Corps operating forces world-wide. AR 485.

Capturing the crux of the case, the Board stated to Plaintiff: "The most compelling evidence that you were fully capable of performing the duties of your office, grade, rank, or rating was that you were, in fact, capably performing the duties of your office, grade, rank, or rating as an Instructor at [the Field Medical Training Battalion]." AR 483. The bulk of Plaintiff's arguments, addressed in detail below, essentially ask the Court to ignore the Board's conclusion that Plaintiff was successfully performing in his office, grade, rank,

and rating prior to his voluntary retirement and reweigh the evidence in Plaintiff's favor. As explained below, the Court declines to do so.

B. The Board Complied with Controlling Law

1. 10 U.S.C. § 1552(h) & Liberal Consideration

First, Plaintiff contends that the Board's "most obvious legal violation" was its failure to treat his application with "liberal consideration." ECF 47 at 29. The liberal consideration standard was first articulated in 2014 through a memorandum issued by Secretary of Defense Chuck Hagel. Acknowledging that "PTSD was not recognized as a diagnosis at the time of service" for Vietnam veterans, the Hagel Memo instructed correction boards to give liberal consideration to "petitions for changes in characterization of service" when the former service member's records indicated one or more symptoms of PTSD. Memorandum for Secretaries of the Military Departments from Secretary of Defense Charles Hagel (Sept. 3, 2014) (Hagel Memo) at 1, 3. Under the Hagel Memo, liberal consideration was limited to review of discharge characterizations—*i.e.*, "Honorable," "General (Under Honorable Conditions)," and "Under Other Than Honorable Conditions." *Doyon v. United States*, 58 F.4th 1235, 1238 (Fed. Cir. 2023).

Additional guidance was issued on August 25, 2017, by Under Secretary of Defense Anthony Kurta, for the purpose of expanding on the Hagel Memo and promoting "greater uniformity amongst the review boards." Memorandum for Secretaries of the Military Departments from Under Secretary of Defense for Personnel and Readiness (Performing the Duties of) Anthony Kurta (Aug. 25, 2017) (Kurta Memo) at 1. Unlike the Hagel Memo, the Kurta Memo did not limit its guidance to discharge characterization upgrades but extended to "any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations." *Id.* at 3.

On December 12, 2017, Congress codified the liberal consideration standard into the Board's authorizing statute by amending 10 U.S.C. § 1552 to add sub-section (h). *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 520, 131 Stat. 1283, 1379 (2017). Section 1552(h) states in full:

> (1) This subsection applies to a former member of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale, or as justification for priority consideration, and whose post-traumatic stress disorder or traumatic brain injury is related to combat or military sexual trauma, as determined by the Secretary concerned.
>
> (2) In the case of a claimant described in paragraph (1), a board established under subsection (a)(1) shall—

> (A) review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the claimant; and
>
> (B) review the claim with liberal consideration to the claimant that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal.

10 U.S.C. § 1552(h).

The scope of liberal consideration under 10 U.S.C. § 1552(h) and the Kurta memo was recently addressed by the Federal Circuit in *Doyon v. United States*, 58 F.4th 1235 (Fed. Cir. 2023). There, the plaintiff, who had been discharged due to a personality disorder, requested that his records be corrected to reflect a medical discharge due to service-related PTSD. *Id.* at 1237. The Federal Circuit discerned two separate issues, the first being whether the plaintiff's military records should be changed to reflect a discharge due to PTSD instead of a personality disorder or, more specifically, whether the narrative reason for his discharge, as represented in his DD-214 form, should be corrected from the "BUPERSMAN Art. C-10310, 265" separation code (*i.e.*, unsuitability due to personality disorder) to the "BUPERSMAN C-10305" separation code (*i.e.*, separation due to physical disability). *Id.* at 1244. The second issue, which the Federal Circuit declined to address, involved a larger underlying dispute about whether the plaintiff was unfit, rather than unsuitable,[5] for service at the time of his discharge from the Navy and therefore entitled to disability retirement. *Id.* at 1248.

Regarding the first issue, the Federal Circuit held that the liberal consideration applied to the plaintiff's request to correct his DD-214 to reflect a discharge due to PTSD instead of a personality disorder. *Id.* at 1237. According to the Federal Circuit, liberal consideration under 10 U.S.C. § 1552(h) and the Kurta memo is not limited to misconduct-based discharge upgrades or modifications but also applies to requests seeking to correct the narrative reason for a service member's discharge. *Id.* at 1247-48. Because Plaintiff's request to change his DD-214 was "a challenge to the accuracy of the narrative reason listed on his DD-214 form," the Federal Circuit concluded that the Board was required to review the plaintiff's application with liberal consideration. *Id.* at 1244.

[5] Under controlling naval regulations at the time of plaintiff's discharge, service members could be "separated [from military service], by reason of *unsuitability*, with an honorable or general discharge" for, among other reasons, character and behavioral disorders "[a]s determined by medical authority." Military disability retirement, on the other hand, is governed by 10 U.S.C. § 1201, which provides: "[U]pon the Secretary's determination that a service member is 'unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay,' the service member may retire for disability." *Chambers*, 417 F.3d at 1223, 1224 (quoting 10 U.S.C. § 1201(a)).

The Federal Circuit's analysis ended there. *Id.* at 1248. Although the Federal Circuit acknowledged the second "underlying dispute about whether Mr. Doyon was unfit, rather than unsuitable, for service at the time of his discharge from the Navy," the Federal Circuit determined that "[t]his unfitness dispute between the parties is not properly before us at this stage and can be addressed, if necessary, on remand." *Id.* The Federal Circuit emphasized that the case was only "narrowly about correcting Mr. Doyon's military records to reflect a discharge due to PTSD instead of a personality disorder." *Id.*

The instant case arrives in a different posture and is purely limited to the second, underlying issue in *Doyon*—whether Plaintiff was unfit for service at the time of his discharge from the Navy. There is no partial relief requested in this case—that is, Plaintiff does not ask that his DD-214 read anything other than medical retirement and *unfitness* due to PTSD and TBI. Unlike in *Doyon*, Plaintiff does not quarrel with the accuracy of the narrative reason for his discharge (voluntary separation), nor does he ask that the Board correct this reason regardless of whether it grants his disability retirement claim. Ultimately, Plaintiff's request to correct his records, including his DD-214, is entirely coextensive with his disability retirement claim.

The question remains whether liberal consideration applies to fitness determinations. According to Plaintiff, a straightforward application of *Doyon* suggests that it does. *Doyon* held that liberal consideration under 10 U.S.C. § 1552(h) applies to requests seeking to correct the narrative reason for a service member's discharge. *Doyon*, 58 F.4th at 1248. And here, Plaintiff essentially seeks to change the "Narrative Reason for Separation" block on his DD-214 from "FORCE SHAPING-VSP" to "medical retirement." AR 193; Am. Compl. at 46. As Plaintiff's fitness is a factual determination necessary to correcting the narrative reason for discharge, liberal consideration would necessarily extend to that question as well. *See Doyon*, 58 F.4th at 1244 ("[A] veteran's challenge to the recorded narrative reason for discharge necessarily encompasses the factual determinations necessary to correct or maintain the narrative reason."). On the other hand, the Government insists that liberal consideration does not apply to fitness determinations, relying in part on a memo issued on April 4, 2024, by Ashish S. Vazirani, the Under Secretary of Defense, Personnel and Readiness (Acting) (Vazirani Memo). ECF 70-1 at 3-4.[6] The Vazirani Memo states that "the application of liberal consideration does not apply to fitness determinations" and that corrections boards "should not apply liberal consideration to retroactively assess the Applicant's medical fitness for continued service prior to discharge." *Id.* at 31.

Even accepting Plaintiff's argument that liberal consideration applies to fitness determinations, which the Federal Circuit declined to answer in *Doyon*, the Court is

[6] The Vazirani Memo was issued after the decision on review and, thus, was not binding on the Board. ECF 70-1 at 31; AR 3. Nor is it due any deference from the Court in interpreting Section 1552(h). *See Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2273 (2024) ("… courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous").

satisfied that the Board liberally considered the evidence submitted by Plaintiff in support of his unfitness. Although the Board did not use the phrase "liberal consideration" in its decision, the presence or absence the phrase "liberal consideration" should not dictate whether liberal consideration was actually applied. Indeed, the Federal Circuit has regularly eschewed "magic words" requirements. *See, e.g.*, *Pickett v. McDonough*, 64 F.4th 1342, 1347 (Fed. Cir. 2023) ("[T]here must be some indication that the proper analysis under the regulation occurred, but we hold that § 3.156(b) does not require the VA to invoke certain "magic words" in its decision). Here, the Board issued a comprehensive 19-page opinion that fully grappled with the evidence both for and against Plaintiff's claim. This is not a case, for example, where the Board failed to consider and weigh medical evidence submitted by the claimant, including opinions by civilian doctors post-dating a veteran's service. *See Labonte v. United States*, No. 18-1784C, 2023 WL 3197825, at *9 (Fed. Cl. May 2, 2023) (finding that the Board withheld liberal consideration where it "did not wrestle with or seek to explain why [certain] medical opinions should not be followed); *Hassay v. United States*, 150 Fed. Cl. 467, 484 (2020) (finding the Board withheld liberal consideration where it did not consider the VA's determination that the veteran's mental health condition was connected to military service). Indeed, the Board fully wrestled with and explained its reasoning for discounting the medical evidence submitted by Plaintiff—particularly, the opinions of Dr. Blumenfield and Dr. Vogle. AR 478-81. The Board provided detailed analysis of each opinion but ultimately found that such evidence was less probative on the question of fitness than Plaintiff's fitness reports showing that Plaintiff was successfully performing his duties prior to discharge. *Id.* Nor is this a case where the Board failed to consider personal testimony submitted by the claimant. *See Hassay*, 150 Fed. Cl. at 484 (2020) (finding the Board withheld liberal consideration where it did not have in front of it the "transcript of [plaintiff's] testimony before the Board of Veterans Appeals … describ[ing] the assaults and harassment"). The Board duly considered affidavits submitted by Plaintiff and his wife but, again, did not find that such testimony reflected upon Plaintiff's ability to perform the duties of his office, grade, rank, or rating. AR 483. Although liberal consideration may in certain cases alleviate a claimant from the normal burden of proof, it does not prevent the Board from weighing the evidence or discounting evidence in support of Plaintiff's disability retirement claim if the Board in fact provides articulable and legitimate reasons for doing so.

Because the Board applied liberal consideration in all but name, to the extent that it was required to apply liberal consideration, the Court finds it did so. In fact, the Court strains to understand how the Board could more liberally consider Plaintiff's disability retirement claim short of simply abdicating its fact finder duties and taking all evidence of Plaintiff's unfitness as irrefutable without further examination or weighing of contrary evidence. More generally, liberal consideration is an invitation to robustly engage with the evidence specifically affecting the veteran, not run away from it. *See Doyon.* And the Court finds that the Board accepted that invitation here.

2. DoDI 1332.38 & SECNAVINST 1850.4E

Plaintiff further argues that the Board opened its decision by broadly disclaiming its intention to not follow DoDI 1332.38 and SECNAVINST 1850.4E. ECF 47 at 28-29. This assertion appears to be based on the Board's statement that "[n]either DoDI 1332.38 nor SECNAVINST 1850.4E applies to this Board; rather, they provide regulatory guidelines for the Board to use in assessing whether there exists an error or injustice in your naval record." ECF 47 at 28; AR 472. However, this language, while perhaps inartful, hardly evidences an intention to not follow controlling legal authority. The Court reads such language as simply making the modest and correct point that the regulations at issue were intended to be implemented by the Physical Evaluation Board (PEB) in the first instance.[7] Ultimately, there is little point in quibbling over the Board's wording because the Board in fact applied both DoDI 1332.38 and SECNAVINST 1850.4E throughout its opinion. Indeed, the Board quoted in full SECNAVINST 1850.4E, § 3301, stating "[t]he sole standard to be used in making determinations of physical disability as a basis for retirement or separation is unfitness to perform the duties of office, grade, rank or rating." AR 473. The Board not only laid out this standard but repeated its operative language no less than 25 times. AR 473-488.

Plaintiff also contends that the Board overlooked the "deployability" factor set out in SECNAVINST 1850.4E, § 3304. ECF 47 at 32-35. As discussed above, that regulation states that determining whether a member can reasonably perform his or her duties includes consideration of four factors pertaining to (1) common military tasks; (2) physical readiness/fitness tests; (3) deployability; and (4) special qualifications. Of these four factors, Plaintiff argues that the Board expressly declined to address the issue of deployability and, instead, considered only Plaintiff's fitness to serve in a "garrison environment." ECF 47 at 33 (quoting AR 484).

Plaintiff is correct that the Board did not explicitly address the issue of deployability but this omission is not a point of error. Navy regulations were clear at the time of Plaintiff's discharge that the issue of deployability could not serve as the sole basis for involuntary discharge: A key regulation then in existence, SECNAVINST 1850.4E, § 2051, recognized that "non-deployability alone will not normally constitute a basis for a finding of Unfit." Similarly, SECNAVINST 1850.4E, § 3307a provides that "[i]nability to perform the duties of his or her office, grade, rank, or rating in every geographic location and under every conceivable circumstance will not be the sole basis for a finding of Unfitness." *See also* § 3304(3). The Board expressly cited this regulation in limiting its analysis to whether Plaintiff could serve in a non-deployment setting or "garrison

[7] Under the Navy's regulations, the PEB is the entity responsible for making "determinations of fitness to continue naval service, entitlement to benefits, disability ratings, and disposition of service members referred' to it from the Navy." SECNAVINST 1850.4E at 3. Although Plaintiff was never referred to the PEB for evaluation before being discharged, the standards established in DoDI 1332.38 and SECNAVINST 1850.4E apply to both the Board and this Court in evaluating Plaintiff's claim. *See Ford v. United States*, 170 Fed. Cl. 458, 469-70 (2024).

environment." AR 484-86. Because the Board found no other basis for finding Plaintiff unfit, it had no reason to consider the issue of deployability as it alone could not have affected the outcome of the Board's decision. AR 484-85.

As for the remaining three factors, the Court is satisfied that the Board considered and addressed them in its opinion. Plaintiff does not argue otherwise. Regarding the first factor, common military tasks, the Board detailed Plaintiff's duties in his instructor billet at the Field Medical Training Battalion and relating those tasks to the broader duties of an infantry unit leader. AR 484-84. As for the second factor, physical readiness/fitness tests, the Board found that Plaintiff "performed first-class physical and combat fitness tests" while serving as instructor at the Field Medical Training Billion. AR 484. Finally, the Court is satisfied that the Board considered the fourth factor, special qualifications, which concerns "[t]he inability to perform specialized duties or loss of special qualification, i.e., aviation, parachuting or diving qualifications, etc." SECNAVINST 1850.4E, § 3307c. Although the Board did not address such a factor by name, it noted that Plaintiff maintained "the capabilities of core and core plus skills for a 0300 Basic Infantry Marine," AR 484, which include training and qualification for standard service weapons. Infantry Training & Readiness Manual from Commandant of the Marine Corps (Aug. 30, 2013), NAVMC 3500.44B at 8-3 to 8-6 (T&R Manual). The Board also noted that Plaintiff "instructed and maintained marksmanship with the M9 service pistol and the M4 carbine." AR 484. For his part, Plaintiff does not contend that he ever lost or lacked a required special qualification. And any argument as to this factor is deemed waived as it was neither raised by Plaintiff before the Board (despite being ably represented) nor in his briefings to this Court post-remand. *Christian v. United States*, 46 Fed. Cl. 793, 802 (2000) ("issues and arguments not made before the relevant military correction board or administrative agency are deemed waived and [cannot] be raised in a judicial tribunal"). The Court is satisfied that the Board correctly considered and construed the controlling regulations and so turns to the Board's weighing of the evidence.

B. The Board's Factual Findings are Supported by Substantial Evidence

Plaintiff's remaining arguments, detailed below, ask the Court to modify the weight assigned by the Board to each piece of evidence. Plaintiff argues that the Board assigned too much weight to his fitness reports and his separation physical while incorrectly discounting the reports of Drs. Vogel and Blumenfield. The Court addresses each piece of evidence in turn.

1. Fitness Reports

First, Plaintiff argues that the Board improperly relied on fitness reports describing his positive performance in his instructor billet without giving any consideration to whether he was capable of performing the duties of his broader rating of infantry unit leader. ECF 47 at 35-36. According to Plaintiff, these fitness reports were prepared by non-Marines, evaluated his performance in a non-combat role, and did not reflect his fitness to perform the broader duties of an infantry unit leader. *Id.* Plaintiff cites *Kelly* for the proposition that

"a mere review of whether a member was adequately performing duties—regardless of what those were—immediately before separation is not sufficient." *Id.* at 36 (quoting 157 Fed. Cl. at 125).[8]

However, Plaintiff's reliance on *Kelly* is misplaced. There, the Board found that the plaintiff was fit to serve as a Second-Class Navy Diver at the E4 grade based on two performance evaluations conducted while he was serving in an administrative role. 157 Fed. Cl. at 126. The Board erred, the Court concluded, because it "made no explicit or implicit finding regarding what duties a Second-Class Navy Diver at the E4 grade is reasonably expected to perform or finding that the duties Plaintiff was performing during the periods covered by the two evaluation reports included such duties." *Id.* In other words, the Board failed to consider whether the duties that the plaintiff was performing immediately before separation overlapped with the duties expected of his grade, rank, and rating. *See id.*

Here, however, the Board did exactly that. Specifically, the Board determined that "the duties that [Plaintiff] performed in [the instructor] billet were substantially the same as [he] would have been performing as an Infantry Unit Leader assigned to an operational Marine combat unit in a garrison environment." AR 484. In fact, the Board found that "[t]he only appreciable difference between [Plaintiff's] duties as a FMTB-E Instructor and those [he] would have had if assigned to a operational Marine Corps unit in garrison … was in the responsibilities, qualifications, and uniforms worn by the Service members operating under [Plaintiff's] supervision at FMTB-E and the uniform worn by the officer to whom [he] reported." AR 484-85.

This finding is supported by substantial evidence. Although Plaintiff's instructor billet focused on teaching Navy medics and chaplains, he was not teaching medicine or theology. AR 1314. Rather, the purpose of Plaintiff's instructor billet was to train and prepare Navy personnel for serving in the field with operational Marine combat units. AR 1314, 1316, 1321, 1326. Essentially, Plaintiff was an infantry instructor for non-infantry personnel actively serving with and supporting infantry Marines. *See id*; *see also* AR 1320 ("[Plaintiff's] combat and infantry experience are the backbone for the highly successful training program provided to the Hospital Corpsmen as we prepare them for combat duty with the Marine Corps."). As the Board recognized, Plaintiff "performed first-class physical and combat fitness tests; instructed and maintained marksmanship with the M9 service pistol and the M4 carbine; and instructed personnel on land navigation, offensive

[8] The parties disagree as to whether Plaintiff's instructor billet was coded for his rating of infantry unit leader (PMOS 0369). ECF 54 at 16 n.5. The Board found that it was after noting that three of the four fitness reports Plaintiff received while assigned as an instructor at FMTB-E listed 0369 as the billet PMOS while the outlier fitness report, which listed 3529 (Motor Transport Maintenance Chief) as the billet PMOS, reflected clear clerical error as the duties performed had no relation whatsoever to that PMOS. AR 484. This point of contention is ultimately of little consequence, however, because the primary question is whether Plaintiff's duties in his instructor billet were substantially similar to those of his broader rating, regardless of how that billet was coded.

and defensive attacks, and ambushes." AR 484; *see also* AR 1316. Plaintiff instructed his students in "combat leadership" and developed field exercises that more accurately reflected "current tactics, techniques and procedures used in the Fleet Marine Force." AR 1321. These combat-related activities are a far cry from the administrative duties that the Board improperly focused on in *Kelly*.

Further, the nature of Plaintiff's students hardly detracts from his capabilities as an instructor. Plaintiff seemingly suggests that he was assigned to teach chaplains and medics because he could not cut it teaching normal Marines. ECF 47 at 37. But this reasoning seems backwards in many ways. As the Board reasoned, anyone who can teach non-infantry, non-Marine personnel to become proficient in infantry tactics is just as if not more capable of doing the same for actual Marines. AR 485. Plaintiff makes much of the fact that he was training non-combatants at the Field Medical Training Battalion, arguing that "[t]here is simply no comparison between training infantry Marines, who are combatants, and training Navy Medical Department and Religious Program personnel, who expressly are not combatants." ECF 47 at 37. However, Plaintiff did in fact train combatants in his instructor billet—the Religious Program Specialists (RPs) serving with combat Marines are combatants. *See* SECNAVINST 1730.7E at 4 ("RPs are combatants and will bear arms in connection with their military duties."). Moreover, while Navy Combat Corpsmen serving with Marine Corps units are non-combatants, they are permitted under the Laws of War to be armed and to use deadly force in self-defense and in defense of their patients against unlawful attacks. *See* Department of Defense Law of War Manual, § 4.10.1. The very essence of Plaintiff's job was to prepare such personnel for combat should such circumstances arise. AR 1320 (explaining that Plaintiff's role in the "highly successful training program provided to the Hospital Corpsmen" was to "prepare them for combat duty with the Marine Corps.").

Plaintiff also contends that the Board's findings are erroneous because it never recited the requirements and duties of an infantry unit leader at the E6 grade. ECF 47 at 32-33. The Court disagrees. The Board noted that, per the Marine Corps Infantry Training and Readiness Manual, every billet coded for an infantry unit leader must "maintain the capabilities of core and core plus skills for a 0300 Basic Infantry Marine." AR 484. And the Board addressed the substance (if not the exact wording) of the Training and Readiness Manual throughout its opinion. For example, the Training and Readiness Manual provides that infantry Marines must be able to navigate with a map and compass and conduct land navigation. T&R Manual at 8-4, 9-11 to 9-21. In this regard, the Board found that Plaintiff successfully trained thousands of Navy medical and religious personnel in land navigation skills. AR 480. The Manual also provides that infantry unit leaders must be able to lead units in offensive and defensive operations. T&R Manual at 9-50 to 9-58, 9-98 to 9-103. And the Board found that Plaintiff instructed personnel on "offensive and defensive attacks[] and ambushes." AR 484.

If Plaintiff's argument is that the Board should have exhaustively catalogued the duties of an infantry unit leader at the E6 grade, the Court is aware of no such requirement.

Rather, the Board must "consider[] the relevant evidence and [come] to a reasonable conclusion." *Riser*, 97 Fed. Cl. at 683–84. Here, the Board did both. The Board certainly considered the relevant duties of an infantry unit leader at the E6 grade. In addition to the duties described in the Training and Readiness Manual, the Board considered the duties set forth in the Marine Corps MOS Manual, which the Board found to be "remarkably similar" to the duties of Plaintiff's instructor billet. AR 484. And for the reasons discussed above, the Board came to a reasonable conclusion in finding that the duties Plaintiff performed in his instructor billet were "substantially the same" as he would have been performing as an infantry unit leader in a garrison environment. AR 484.

Resisting this reasoning, Plaintiff argues that the Board reached this conclusion without considering any duties or common military tasks involving active engagement in combat. ECF 47 at 32-34. Plaintiff contends that "preparing for and engaging in operational, deployable *combat* duty are the core common military tasks that an Infantry Unit Leader 'could reasonably be expected to perform'". ECF 47 at 34. Plaintiff points out that the Marine Corps MOS manual requires that infantry unit leaders be able "supervise and coordinate… the fire and movement between tactical units, the fire of supporting arms, and the unit resupply and casualty evacuation effort." *Id.* at 32.

This argument, however, simply rehashes the issue of deployability. As discussed, controlling regulations at the time of Plaintiff's discharge recognized that "non-deployability alone will not normally constitute a basis for a finding of Unfit." SECNAVIST 1850.4E, § 2051. If not explicit in the text of § 2051, it is at least strongly implied that the ability to engage in combat, like the ability to deploy, cannot serve as the sole basis for a finding of unfit. Although Plaintiff argues that combat falls within the "common military tasks" of an infantry unit leader, the term "common military task" must be read in conjunction with § 2051. In other words, because deployability cannot serve as the sole basis for a finding of unfit, neither can a member's inability to perform "common military tasks" that are only prevalent in a deployment setting. And given the rarity of military engagements on American soil, combat is not a "common military task" for soldiers in a stateside environment. Indeed, it is difficult to conceive of a circumstance in which a soldier who is not deployed can reasonably expect to engage in combat with the enemy. In sum, the Board did not err by failing to consider military tasks related to direct engagement in combat.

Nonetheless, Plaintiff contends that § 2051 should not be read as applying to Marines with combat ratings but only certain non-combatants who can perform their normal duties without leaving the country. ECF 57 at 26. However, Plaintiff's selective application of § 2051 is wholly atextual and would essentially swallow the rule. In providing that "non-deployability alone will not normally constitute a basis for a finding of Unfit," nowhere does § 2051 caveat "unless that service member is a rifleman, pilot, or other member with a combat-related rating or who can expect to deploy." In the absence of any limiting language, the Court presumes that § 2051 was intended to apply to all Marine Corps and Navy personnel regardless of rating. Plaintiff may take issue with the

prudence of such a regulation, but it is not for this Court to second guess the rules promulgated by the Secretary. It is well settled that "the military is entitled to substantial deference in the governance of its affairs." *Dodson v. United States Gov't, Dep't of the Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993); *see also Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army.").

Even so, the facts of this case evince the very purpose and wisdom behind such a rule. Plaintiff provided enormous value to the Navy and Marine Corps by readying other personnel to deploy and serve in the field alongside combat units, regardless of whether he himself could deploy. In treating the issue of deployability as non-dispositive, the Secretary of the Navy recognized the value that countless service members, including Plaintiff, have added to the Navy and Marine Corps outside a deployment setting. Consider the following commendation Plaintiff received a year before his separation:

> [Staff Sergeant] Bee is an outstanding Marine who I have relied upon heavily to accomplish the mission of leading and training our Sailor and Marines at [the Field Medical Training Battalion]. His performance has had force-wide impact and significantly enhanced the quality, character, capabilities, and attitudes of thousands of Hospital Corpsmen, Religious Program Specialists, Chaplains, and Navy Medical Department Officers now serving with the Marine Corps operating forces world-wide.

AR 1325. In another fitness report, the reviewing officer stated that "[a]lthough [Plaintiff] is leaving active duty, if he ever returns and I was given the opportunity, I would actively seek him out to serve with anywhere at any time." AR 1330. To be sure, the weight of the evidence suggests that our military would not have been better served by involuntarily discharging Plaintiff.

2. Separation Physical

Plaintiff next argues that the Board improperly relied on his separation physical, which as discussed, deemed him "qualified for service" and released him "w/o limitations." AR 103, 189. Plaintiff contends that the Board improperly assigned the presumption of regularity to this physical, which he argues, failed to comply with standard procedure. ECF 47 at 38-39. Binding guidance at the time required that separation physicals "include … a review of the individual medical history and medical record … [and] any indicated specialty consultations." *See* Policy Guidance for Separation Physical Examinations (Oct. 14, 2005), ECF 42-1 at 3. According to Plaintiff, although the separation physical ordered a general neurology consult referral "there is no record evidence of such a follow-[up] evaluation, and the examiner did not wait to give Plaintiff an opportunity to pursue such specialty consultation before signing off on the separation physical." ECF 47 at 39. Guidance also required that separation physicals include an assessment regarding a member's worldwide qualifications for retention (according to service guidelines) or need

for referral to a Medical Evaluation Board (MEB). ECF 42-1 at 3. Plaintiff contends that the separation physical inexplicably failed to make such an assessment. ECF 47 at 39.

Even if the separation exam was irregular, however, the Court applies the rule of harmless error. *See* 5 U.S.C. §706(a) ("due account shall be taken of the rule of prejudicial error"); *Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004) "[S]trict compliance with procedural requirements is not required where the error is deemed harmless."). Whether Plaintiff should have been referred to a MEB is not determinative of whether he would have ultimately been found unfit for duty. *See Qoye v. United States*, No. 20-1388C, 2024 WL 1435060, at *4 (Fed. Cl. April 3, 2024). The issue here is "not whether the Navy's treatment of Plaintiff's disability retirement request was procedurally perfect, but whether the [Board's] ultimate determination that he was ineligible for medical retirement should be upheld." *Id.* The Board "is empowered to make disability determinations in the first instance, even if additional medical processing at the time of discharge would have been appropriate." *Id.* Because the Board denied Plaintiff's claim after a full review of the evidence, any procedural error regarding the separation exam was harmless.

Of course, the Board relied on the separation physical in deciding the ultimate question of fitness, noting it "to be persuasive evidence of [Plaintiff's] medical fitness at the time of [his] discharge." AR 486. The Court, however, must view both the record and the Board's decision as a whole. *In re Gartside*, 203 F.3d at1312. As has been discussed at length, the Board primarily based its decision on Plaintiff's performance evaluations showing that he could perform duties substantially similar to those of a Marine rifleman in a garrison environment. *See* AR 482-89. The Board explicitly favored this form of evidence over the medical evidence. AR 483 ("The most compelling evidence that you were fully capable of performing the duties of your office, grade, rank, or rating was that you were, in fact, capably performing the duties of your office, grade, rank, or rating as an Instructor at [the Field Medical Training Battalion]"). Even without the separation physical weighing against Plaintiff's claim, a reasonable fact finder could have nevertheless arrived at the Board's decision as Plaintiff's fitness reports constitute substantial evidence sufficient to uphold the Board's opinion. *See In re Gartside*, 203 F.3d at 1312 (explaining that the substantial evidence standard asks "whether a reasonable fact finder could have arrived at the agency's decision" and "involves examination of the record as a whole, taking into account evidence that both justifies and detracts from an agency's decision").

Plaintiff also argues that the Board more generally considered the absence of a referral pre-discharge in deciding the ultimate question of fitness. ECF 47 at 40-41. This assertion appears to be based on the following statement by the Board:

> This medical record would not likely result in the referral of any Marine to a MEB. It is unlikely that any physician would, and apparently none among the numerous different specialty clinics and primary care providers that you visited at different locations after incurring your final TBI in June 2010 did,

> believe that your medical conditions significantly interfered with the performance of duties appropriate to your office, grade, rank or rating. This is not surprising since, as discussed further below, you were, in fact, successfully performing duties appropriate to your office, grade, rank, or rating despite your medical conditions.

AR 478. According to Plaintiff, the Board's reasoning amounts to little more than "Mr. Bee was fit because no one found him to be unfit." ECF 47 at 41. Plaintiff cites *Hassay v. United States* for the proposition that "[the Navy] should not be permitted to rely on the absence of contemporaneous evidence" that a service member's condition made him unfit for service "to the extent that the Navy violated its own regulations by not referring him to the Disability Evaluation System." 150 Fed. Cl. 467, 482 (2020).

As a threshold issue, however, the Board did not generally rely on Plaintiff's non-referral in deciding the question of fitness. The previous excerpt simply notes that Plaintiff's non-referral was not "not surprising" and consistent with the evidence that he was successfully performing the duties of his office, grade, rank, and rating. AR 478. Further, even if the Board did rely more generally on the absence of a referral, the Court is not convinced that such a consideration was inappropriate. Even assuming that the separation exam was irregular, Plaintiff underwent numerous other exams before discharge. The Board "applied the presumption of regularity to the assessments made by [Plaintiff's] numerous medical providers between [his] TBI in June 2010 and [his] discharge in April 2013." AR 478. Apart from the separation physical, Plaintiff does not allege that any of these exams failed to comply with standard policy or were otherwise irregular. In sum, one irregular exam should not prevent the Board from considering the fact that none of the medical professionals over a roughly three-year period leading up to Plaintiff's discharge found it necessary to refer him to a MEB.

3. C&P Exam by Dr. Vogel

Next, Plaintiff argues that the Board inappropriately discounted his VA disability ratings and the C&P exam on which they were based. ECF 47 at 47. According to Plaintiff, the Board failed to even reference or acknowledge his VA disability ratings of 70% for PTSD and 70% for TBI—both of which considerably exceed the 30% threshold to qualify for disability retirement. *Id.*

Section 1201 of Title 10 provides that military personnel who become disabled in service with at least a 30% disability rating are eligible to receive disability retirement pay from the Department of Defense. 10 U.S.C. § 1201(a), (b)(3)(B). However, this Court has held that VA disability ratings are not binding on the service branches and are "in no way ultimately determinative of claims for military disability retirement." *Hinkle v. United States*, 229 Ct. Cl. 801, 805 (1982). The sole standard remains that of fitness to perform the duties of the office, grade, rank or rating. SECNAVINST 1850.4E, § 3302; *see also Gossage v. United States*, 91 Fed. Cl. 101, 110 (Fed. Cl. 2010) (quoting DoD Directive

1332.18, ¶ 3.3). Of course, VA disability ratings and the exams on which they are based constitute relevant evidence that must be considered in determining unfitness for duty. *Valles-Prieto v. United States*, 159 Fed. Cl. 611, 618 (2022) (citing *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983)). And to be sure, two 70% disability ratings based on an exam conducted immediately before discharge, as is the case here, are not to be easily outweighed or discounted by any of the service branches. *See id.*

Here, however, the Court is satisfied that the Board appropriately weighed this evidence. As discussed, Plaintiff's VA ratings were initially based on Dr. Vogel's C&P exam from January 2013. AR 104-115. The Board fully dissected Dr. Vogel's report and found that it was outweighed by contrary evidence. The Board stated of the report:

> [Dr. Vogel's] conclusions … were not supported by the objective evidence regarding your performance. Dr. Vogel reported that your suffered numerous functional impairments resulting from your TBI and/or PTSD conditions, but for every impairment that he noted there was objective evidence that such impairments were not nearly as debilitating as he reported them to be and/or that they did not impede your performance of duties. For example, he reported that you usually get "lost in unfamiliar surroundings, [have] difficulty reading maps, following directions and judging distances," but your [fitness reports] reflect that you successful trained thousands of Navy Medical Department and Religious Program personnel in the knowledge, skills, and abilities necessary to serve with and support the Marine Corps, which specifically included land navigation skills. He reported cognitive function deficits affecting your memory and difficulty learning new material, planning and organizing, and maintaining attention or concentration on a task, but you were lauded during the period in question specifically for your maintaining "flawless accountability of personnel, weapons, and equipment for [your] platoons," for your "leadership, professional knowledge, and *meticulous attention to detail* [which] earned [you] the respect and admiration of students and staff (*emphasis added*)," and for developing "field exercises that more accurately represent current tactics, techniques, and procedures currently being experienced in current operational theaters." He reported that you experienced difficulty in communicating with others, but you somehow effectively trained thousands of Navy Medical Department and Religious Program personnel to successfully serve with and support Marine Corps operational units.

AR 480.

As is clear, the Board found it nearly impossible to square Dr. Vogel's opinion with Plaintiff's documented performance in his fitness reports. The Board rightly determined that something must give, that something being the C&P exam. *See id.* That the Board put greater weight on Plaintiff's fitness exams comports with SECNAVINST 1850.4E, § 3205a, which recognizes that "an assessment of the member's performance of duty by his or her chain of command may provide better evidence of the member's ability to perform his or her duties than a clinical estimate by a physician." Indeed, as the Board acknowledged, Plaintiff's fitness reports were based on direct observation of Plaintiff's performance, whereas his degree of impairment as described in Dr. Vogel's opinion was informed by his own self report. AR 479-80. This is not to question Plaintiff's truthfulness, nor is it necessary to do so.[9] There are a variety of reasons Plaintiff may have overreported his symptomology during the C&P exam. It is also possible, as the Board acknowledged, that Plaintiff's symptomology was accurately reported but simply did not affect his work performance in the way one might have predicted. *Id.* ("[F]or every impairment that [Dr. Vogel] noted there was objective evidence that such impairments were not nearly as debilitating as he reported them to be and/or that they did not impede your performance of duties."). Either way, the Board did not err in finding that the probative value of the C&P exam was outweighed by Plaintiff's fitness reports.[10]

Of course, the Board's treatment of Dr. Vogel's opinion is not without misstep. At one point, the Board described in its view "the inherent unreliability and irrelevance of a VA C&P examination toward fitness determinations in general." AR 485. This statement is erroneous because, as already discussed, VA C&P exams are relevant evidence to be considered in deciding fitness. *Valles-Prieto*, 159 Fed. Cl. at 618. However, such a statement is not reversable error. If the Board believed that C&P exams do not need to be considered or weighed against contrary evidence, it made absolutely no attempt to follow through on that belief. As is clear from the above excerpt, the Board thoroughly considered and weighed Dr. Vogel's exam but simply found it to be less probative than contrary evidence speaking directly to the question of Plaintiff's fitness (*i.e.*, Plaintiff's fitness reports). AR 480.

4. Report of Dr. Blumenfield

Plaintiff further challenges the Board's negative treatment of Dr. Blumenfield's report, which was conducted roughly five years after Plaintiff left service and found him

[9] Further, like the Board, this Court does not question the current severity of Plaintiff's conditions or his entitlement to the disability compensation he is currently receiving.

[10] Notably, Plaintiff never argues that his fitness reports painted an inaccurate picture of his performance. Nor could such an allegation be supported by the evidence. By all accounts, Plaintiff performed admirably in his instructor billet and any argument to the contrary would invoke the unsavory charge that Plaintiff's superiors were misreporting his performance over a two-and-a-half-year period to the detriment of his peers and those under his instruction. *See, e.g.,* AR 385-86, 391, 392.

unfit for duty at the time of discharge. In assessing the report, the Board "did not doubt Dr. Blumenfield's credentials or qualifications" but "did not find his report to be particularly persuasive." AR 479. Plaintiff argues that the Board discounted Dr. Blumenfield's opinion for three inappropriate reasons.

First, Plaintiff disputes the Board's finding that Dr. Blumenfield "'provided nothing to support his conclusion.'" ECF 47 at 46. Plaintiff contends that Dr. Blumenfield reviewed thousands of pages of medical records, including the Dr. Johnson and Dr. Vogel reports, personally interviewed Plaintiff and his wife, and performed diagnostic tests on Plaintiff. *Id.* (citing AR 163–66).

The Court disagrees. The Board did not state that Dr. Blumenfield provided no explanation whatsoever. Rather, the Board stated that Dr. Blumenfield "provided nothing to support his conclusion that [Plaintiff's] conditions interfered with [his] ability to perform duties appropriate to [his] office, grade, rank or rating" and that his conclusions in this regard "were not explained or supported by any analysis." AR 479. This is a fair characterization of the report. "[T]he question of fitness is … not merely a medical one," and a medical examiner who opines on the question of fitness is no longer acting solely in his medical capacity. *Ferrell v. United States*, 23 Cl. Ct. 562, 571 (1991). Dr. Blumenfield failed to explain how he jumped from point A, Plaintiff's medical conditions, to point B, Plaintiff's unfitness. The report simply catalogues Plaintiff's medical history and symptomology as though it is self-evident that a person with Plaintiff's conditions cannot serve as a Marine rifleman. AR. 163-166. Dr. Blumenfield never addressed any of the duties of a Marine rifleman, as the Board pointed out, nor did he explain how Plaintiff's conditions might impede performance of those duties. *Id.* Further, even if Dr. Blumenfield provided such explanation, his conclusion is severely undermined by his failure to consider evidence to the contrary. Indeed, the Board found it difficult to credit the report as Dr. Blumenfield did not review any contemporaneous records describing [Plaintiff's] *performance of duties* during the period in question" (*i.e.*, Plaintiff's fitness reports). AR 479 (emphasis added). The Board may certainly discredit a conclusion that is reached without consideration of key conflicting evidence.

Second, Plaintiff takes issue with the Board's reasoning that "it was not even clear … that [Dr. Blumenfield] knew the duties of a Marine rifleman or understood and applied the standard for a finding of medical unfitness in making these conclusions." AR 479. *See also* ECF 47 at 47. According to Plaintiff, this criticism ignores Dr. Blumenfield's explanation that Plaintiff had described his history and role in the Marine Corps. ECF 47 at 47; AR 163–64

That may be. However, Plaintiff's description of his history in the Marine Corps, which presumably included his numerous deployments, only raises additional concerns. It is unclear whether Dr. Blumenfield limited his analysis to Plaintiff's role in a garrison environment or whether he disproportionately considered Plaintiff's numerous deployments and impermissibly rested his conclusion on Plaintiff's deployability and ability to engage in combat. Like the Board, the Court cannot assess Dr. Blumenfield's

analysis because it is not in his report. When a medical professional opines on the ultimate question of fitness, his opinion (like any opinion) is only as persuasive as the force of its reasoning. Because Dr. Blumenfield did not discuss the duties of a Marine rifleman or even reference the correct standard for determining fitness, the Board had sufficient reason to assign his opinion little weight.

Third, Plaintiff argues that the Board acted inappropriately by considering the for-profit nature of Dr. Blumenfield's services. ECF 47 at 46. Specifically, the Board found that Dr. Blumenfield possessed a "financial incentive to reach a particular result." AR 479. According to Plaintiff, the Board had no basis in the record to speculate that Dr. Blumenfield's compensation was in any way tied to the result of his examination. ECF 47 at 46. Plaintiff cites two cases for the proposition that the Board cannot dismiss a medical opinion merely because the physician was paid for his services. *Id.* (citing *Hassay*, 150 Fed. Cl. at 480; *Ferrell*, 23 Cl. Ct. at 571).

These citations do not touch upon the cited proposition, however, and appear to have been made in error. The Court is not aware of any prohibition on the Board considering, among other things, the financial incentive of a private medical examiner. And even if such a consideration is impermissible, Plaintiff has not shown that he was prejudiced by such an error. *See* 5 U.S.C. § 706. Financial incentive aside, the Board had a sufficient basis to discount Dr. Blumenfield's opinion based on his failure to consider key evidence and to articulate the applicable standards.

5. Other Factual Findings

Finally, the Board considered two additional factors set forth in SECNAVINST 1850.4E, § 3302b, namely whether Plaintiff's medical conditions: (1) "represent[ed] a decided medical risk to the health of the member or to the welfare of other members were the member to continue on active duty;" and (2) "impose[d] unreasonable requirements on the military to maintain or protect the member." AR 486 n.35. The Board expressly found that neither factor supported Plaintiff's claim, citing substantial evidence to support its conclusion. *See* AR 481-82.

Plaintiff argues that the Board made incorrect factual assertions in considering the first factor. In relevant part, the Board stated that "there simply was no evidence to support a belief that [Plaintiff's] conditions would seriously compromise [his] health or well-being if [he] were to remain in the Marine Corps" because after "being removed from LIMDU status in October 2010, [Plaintiff] had only two medical encounters related to [his] TBI and PTSD conditions over the next two years." AR 481. Plaintiff argues that he had at least seven medical encounters related to his PTSD and TBI during the time period outlined by the Board.[11] AR 47 at 43.

[11] Plaintiff also contends that the Board understated his limited duty status by two months. ECF 47 at 35. The record is admittedly unclear on this point (in fact, Plaintiff previously told the Board that his limited

How Plaintiff arrives at these seven encounters, however, is far from clear. Rather than list them with any specificity, Plaintiff merely cites to various sections of the administrative record in cursory fashion. ECF 47 at 35 (citing AR 179-81, 426-27; Am. Compl. at 21-22).[12] Even if the Board overlooked a particular medical encounter, the Board's reasoning was informed more by the outcome than the number of such encounters. AR 481. In finding that Plaintiff's condition did not seriously compromise his health, the Board placed particular weight on the fact Plaintiff was "returned to duty with no medical restrictions" after each encounter and that at no point did Plaintiff's conditions "require close medical supervision or hospitalization." *Id.* Ultimately, the Court is satisfied that the Board considered and articulated a fair and accurate view of Plaintiff's medical record and history.

C. Totality of the Record Supports the Board's Conclusion

In sum, the Court does not review the record in piecemeal fashion but "as a whole, taking into account evidence that both justifies and detracts from the [Board's] decision.'" *OSI Pharms.*, 939 F.3d at 1381-82 (Fed. Cir. 2019) (citing *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000)). Here, when considering the record as a whole, there is substantial evidence to support the Board's conclusion that Plaintiff was fit to perform the duties of his office, grade, rank, and rating. Although there is evidence in favor of Plaintiff's claim, it is not enough for this Court to overturn the Board's weighing of the evidence. *Ford v. United States*, 150 Fed. Cl. 220, 224 (2020) ("If the Court finds that the [B]oard's decision was reasonable and supported by substantial evidence, it will not overturn the [B]oard's decision."). Ultimately, the Court agrees with the Board that the most probative evidence of Plaintiff's fitness is his fitness reports speaking directly on the question. To paraphrase the Board, the most compelling evidence that Plaintiff could perform the duties of his office, grade, rank, or rating, at the time of discharge, is that he was, in fact, capably performing the duties of his office, grade, rank, or rating at the time of discharge. AR 483.

CONCLUSION

For the foregoing reasons, the Government's Motion for Judgment on the Administrative Record (ECF 54) is **GRANTED**. Plaintiff's Motion for Judgment on the Administrative Record (ECF 47) and the Government's Motion to Dismiss (ECF 54) are **DENIED**. The Clerk of Court is directed to enter judgment accordingly.

duty status was terminated in September 2010). At least one notation in Plaintiff's medical records indicates that he was "returned" to his previous active-duty status as of October 26, 2010. AR 179. At any rate the Court finds this exact factual dispute to be purely peripheral to the Board's weighing of the evidence.

[12] As an example of additional medical encounters, Plaintiff cites a portion of the AR showing his pharmaceutical history during that time. ECF 47 at 35 (citing AR 426–27). The Court does not interpret "medical encounters" as used by the Board to include pharmacy transactions.

IT IS SO ORDERED.

PHILIP S. HADJI
Judge

In the United States Court of Federal Claims

No. 21-1970 C
Filed: August 23, 2024

WILLIAM OLAS BEE
Plaintiff

JUDGMENT

v.

THE UNITED STATES
Defendant

Pursuant to the court's Opinion and Order, filed August 23, 2024, denying plaintiff's motion for judgment on the administrative record, denying defendant's motion to dismiss, and granting defendant's cross-motion for judgment on the administrative record,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

ADDENDUM
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 28(f)

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP 0 3 2014

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder

Recent attention has been focused upon the petitions of Vietnam veterans to Military Department Boards for Correction of Military/Naval Records (BCM/NR) for the purposes of upgrading their discharges based on claims of previously unrecognized Post Traumatic Stress Disorder (PTSD). In these cases, PTSD was not recognized as a diagnosis at the time of service and, in many cases, diagnoses were not made until decades after service was completed. To help ensure consistency across the Services, this memorandum provides supplemental policy guidance for BCMR/NRs on these applications.

BCM/NRs will fully and carefully consider every petition based on PTSD brought by each veteran. This includes a comprehensive review of all materials and evidence provided by the petitioner. Quite often, however, the records of Service members who served before PTSD was recognized, including those who served in the Vietnam theater, do not contain substantive information concerning medical conditions in either Service treatment records or personnel records. It has therefore been extremely difficult to document conditions that form a basis for mitigation in punitive, administrative, or other legal actions or to establish a nexus between PTSD and the misconduct underlying the Service member's discharge with a characterization of service of under other than honorable conditions.

BCM/NRs are not courts, nor are they investigative agencies. To assist the BCM/NRs in the review of records and to ensure fidelity of the review protocol in these cases, the supplemental policy guidance which details medical considerations, mitigating factors, and procedures for review is provided (Attachment). This guidance is not intended to interfere with or impede the Boards' statutory independence to correct errors or remove injustices through the correction of military records.

This policy guidance, which is intended to ease the application process for veterans who are seeking redress and assist the Boards in reaching fair and consistent results in these difficult cases, shall be accompanied by a public messaging campaign by the Services throughout 2014 and 2015 that is targeted toward veterans groups and leverages existing relationships with the Department of Veterans Affairs.

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days.

Thank you.

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Personnel and Readiness
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment
Supplemental Guidance to Military Boards for Correction of Military/Naval Records
Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder

Medical Guidance

Liberal consideration will be given in petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions.

Special consideration will be given to Department of Veterans Affairs (VA) determinations which document PTSD or PTSD-related conditions connected to military service.

In cases where Service records or any document from the period of service substantiate the existence of one or more symptoms of what is now recognized as PTSD or a PTSD-related condition during the time of service, liberal consideration will be given to finding that PTSD existed at the time of service.

Liberal consideration will also be given in cases where civilian providers confer diagnoses of PTSD or PTSD-related conditions, when case records contain narratives that support symptomatology at the time of service, or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service.

This guidance is not applicable to cases involving pre-existing conditions which are determined not to have been incurred or aggravated while in military service.

Consideration of Mitigating Factors

Conditions documented in the record that can reasonably be determined to have existed at the time of discharge will be considered to have existed at the time of discharge.

In cases in which PTSD or PTSD-related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

Corrections Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a characterization of service of under other than

honorable conditions. Potentially mitigating evidence of the existence of undiagnosed combat-related PTSD or PTSD-related conditions as a causative factor in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct.

PTSD is not a likely cause of premeditated misconduct. Corrections Boards will also exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.

Procedures

1. Time limits to reconsider decisions will be liberally waived for applications covered by this guidance.
2. Cases covered by this guidance will receive timely consideration, consistent with statutory timeliness standards.
3. Boards for Correction of Military Records (BCMRs) may obtain advisory opinions from Department of Defense mental health care professionals or otherwise use Department of Defense mental health care professionals or physicians in their consideration of cases to advise them on assessing the presence of PTSD and its potentially mitigating effects relating to the misconduct that formed the basis for the under other than honorable characterization of service.
4. The outreach and messaging plan conditions executed by the Military Departments will include detailed information on the BCMR's guidelines and procedures for handling these cases.

PERSONNEL AND READINESS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 25 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment

In December 2016, the Department announced a renewed effort to ensure veterans were aware of the opportunity to have their discharges and military records reviewed. As part of that effort, we noted the Department was currently reviewing our policies for the Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs) and considering whether further guidance was needed. We also invited feedback from the public on our policies and how we could improve the discharge review process.

As a result of that feedback and our internal review, we have determined that clarifications are needed regarding mental health conditions, sexual assault, and sexual harassment. To resolve lingering questions and potential ambiguities, clarifying guidance is attached to this memorandum. This guidance is not intended to interfere with or impede the Boards' statutory independence. Through this guidance, however, there should be greater uniformity amongst the review boards and veterans will be better informed about how to achieve relief in these types of cases.

To be sure, the BCM/NRs and DRBs are tasked with tremendous responsibility and they perform their tasks with remarkable professionalism. Invisible wounds, however, are some of the most difficult cases they review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions, or who experienced sexual assault or sexual harassment regardless of when they served or in which Military Department they served.

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days. My point of contact is Lieutenant Colonel Reggie Yager, Office of Legal Policy, (703) 571-9301 or reggie.d.yager.mil@mail.mil.

A. M. Kurta
Performing the Duties of the Under Secretary of Defense for Personnel and Readiness

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment

Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment

Generally

1. This document provides clarifying guidance to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault; or sexual harassment.

2. Requests for discharge relief typically involve four questions:

   a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
   b. Did that condition exist/ experience occur during military service?
   c. Does that condition or experience actually excuse or mitigate the discharge?
   d. Does that condition or experience outweigh the discharge?

3. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

4. Evidence may come from sources other than a veteran's service record and may include records from the DoD Sexual Assault Prevention and Response Program (DD Form 2910, *Victim Reporting Preference Statement*) and/or DD Form 2911, *DoD Sexual Assault Forensic Examination [SAFE] Report*), law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, friends, roommates, co-workers, fellow servicemembers, or clergy.

5. Evidence may also include changes in behavior; requests for transfer to another military duty assignment; deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction.

6. Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.

7. The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.

8. Cases falling under this guidance will receive timely consideration consistent with statutory requirements.

Was there a condition or experience?

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.

10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.

11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.

12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

Did it exist/occur during military service?

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.

14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.

15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.

17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally

construed as warranting a change in narrative reason to "Secretarial Authority," "Condition not a disability," or another appropriate basis.

Does the condition/experience outweigh the discharge?

18. In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

19. Premeditated misconduct is not generally excused by mental health conditions, including PTSD; TBI; or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

Additional Clarifications

20. Unless otherwise indicated, the term "discharge" includes the characterization, narrative reason, separation code, and re-enlistment code.

21. This guidance applies to both the BCM/NRs and DRBs.

22. The supplemental guidance provided by then-Secretary Hagel on September 3, 2014, as clarified in this guidance, also applies to both BCM/NRs and DRBs.

23. The guidance memorandum provided by then-Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness Brad Carson on February 24, 2016, applies in full to BCM/NRs but also applies to DRBs with regards to de novo reconsideration of petitions previously decided without the benefit of all applicable supplemental guidance.

24. These guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations.

25. Unless otherwise indicated, liberal consideration applies to applications based in whole or in part on matters related to diagnosed conditions, undiagnosed conditions, and misdiagnosed TBI or mental health conditions, including PTSD, as well as reported and unreported sexual assault and sexual harassment experiences asserted as justification or supporting rationale for discharge relief.

26. Liberal consideration includes but is not limited to the following concepts:

a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.

b. It is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

c. It is unreasonable to expect the same level of proof for injustices committed years ago when there is now restricted reporting, heightened protections for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment than ever before.

d. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported.

e. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.

f. Reviews involving diagnosed, undiagnosed, or misdiagnosed TBI or mental health conditions, such as PTSD, or reported or unreported sexual assault or sexual harassment experiences should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.

g. Veterans with mental health conditions, including PTSD; TBI; or who experienced sexual assault or sexual harassment may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran's life.

h. An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

i. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case. For example, marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

j. Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and characterization of service is appropriate. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.

k. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.