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SUITS FOR MILITARY PAY AND DISABILITY BENEFITS
IN THE COURT OF FEDERAL CLAIMS

As the Supreme Court has said, “judges are not given the task of running the Army [or any other military service],” *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). Additionally, “[t]he complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). That said, this court and its predecessors have for many years considered and decided military pay and disability cases.

In this court, claims made by current and former members of the military services necessarily depend upon the Tucker Act for jurisdiction. As such, they must focus on monetary relief, even though the claims may have a non-monetary impetus such as a contested separation, a failure of promotion, or a challenged court-martial conviction. To some extent, federal district courts share this caseload because purely equitable claims and monetary claims of \$10,000 or less may be brought in district courts.

For well over a century, a steady flow of these cases has reached the court, *see, e.g., United States v. Kelly*, 82 U.S. (15 Wall.) 34 (1872) (ruling on an appeal by the government from a judgment of the Court of Claims in a military pay case), and in the past few years an influx of cases stemming from military service in Iraq or Afghanistan has been evident:

Military Pay and Disability Cases Filed in the Court of Federal Claims

	<u>2000</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>
Back Pay	13	5	10	9	10	8
Correct Records & Reinstatement	18	10	12	12	21	17
Retirement, Disability, & Other	<u>20</u> 51	<u>7</u> 22	<u>16</u> 38	<u>19</u> 40	<u>17</u> 48	<u>24</u> 49

The role of the court in addressing these cases has changed markedly over a span of decades. Years ago, cases were brought as *de novo* actions in which the Court of Claims undertook a traditional fact-finding role. In practical terms, that changed when military correction and review boards were instituted in 1946. *See Martinez v. United States*, 333 F.3d 1295, 1306 (Fed. Cir. 2003) (en banc) (citing Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 207, 60 Stat. 812, 837). The formation of military correction boards was designed primarily to relieve Congress of the burden of considering private bills to correct claimed errors in military personnel actions. *Id.* at 1306-07. Service members had frequently turned to Congress as an alternative to this court's predecessor in seeking redress and relief. Congress' remedy, however, not only pushed many cases to a military administrative body and then to this court, but also worked a significant change in the court's posture in the cases. Relatively few cases were filed in court as *de novo* actions. Most cases came to the court after first being presented to a military board, and the court's function was largely converted into one of reviewing administrative action by boards. Even then, the court carried over some elements of *de novo* consideration of evidence, at least in certain circumstances. In recent years, however, many, if not all, of those elements have been removed.

Notwithstanding that procedural evolution, some principles have remained constant. The court accords a presumption of regularity to a military service's actions respecting military personnel, and, to prevail, a claimant must overcome that presumption. *See Melendez Camilo v. United States*, 642 F.3d 1040, 1045 (Fed. Cir. 2011). The most common ground for relief invoked by successful claimants involves a procedural irregularity or failure to comply with applicable regulations by a military authority, if the flaw has operated to the prejudice of the claimant. *See Fisher v. United States*, 402 F.3d 1167, 1176-77 (Fed. Cir. 2005) (“When the question is one of physical or mental fitness for service in the military, courts are loath to interfere with decisions made by the President and his designated agents. . . . This deference to Executive authority does not extend to ignoring basic due process considerations, however. When there is a question of whether reasonable process has been followed, and whether the decision maker has complied with established procedures, courts will intervene, though only to ensure that the decision is made in the proper manner.”).

I. STANDARDS FOR DECISION

In general, “a member of a uniformed service who is on active duty” is “entitled to the basic pay of the pay grade to which assigned.” 37 U.S.C. § 204(a). When a military pay claim is at issue, and the matter has been before a correctional board, “the scope of . . . review for [a] challenge[] to a military correction board decision[] is ‘limited to determining whether [the] decision . . . is arbitrary, capricious, unsupported by substantial evidence, or contrary to applicable statutes and regulations.’” *Melendez Camilo*, 642 F.3d at 1044 (quoting *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983)). In an appropriate case, the court may accompany an award of monetary relief with an order “directing restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records.” 28

U.S.C. § 1491(a)(2). Nonetheless, the Military Pay Act, with two exceptions, cannot be used to obtain the salary of a higher rank for which the claimant was not selected. *See Smith v. Secretary of the Army*, 384 F.3d 1288, 1294 (Fed. Cir. 2004). Instead, a service member “is entitled only to the salary of the rank to which he [or she] is appointed and in which he [or she] serves.” *Id.* The two exceptions occur when (1) “[the plaintiff] has satisfied all the legal requirements for promotion, but the military has refused to recognize his [or her] status,” or (2) “the decision not to promote the service member leads to the service member’s compelled discharge.” *Id.* at 1294-95.

Provisions of Chapter 5 of Title 37 of the United States Code authorizing “special and incentive pays” for members of the uniformed services, 37 U.S.C. ch. 5 (title), can pose significant issues of statutory interpretation. A number of those provisions state that an incentive pay or bonus “may” be made to a qualifying soldier. *See, e.g.*, 37 U.S.C. § 308i(a)(1) (providing that a prior-service enlistment bonus “may be paid” to a former enlisted member of an armed force who enlists in the Selected Reserve or Ready Reserve). Ordinarily, by using the permissive “may,” these statutory authorizations are presumptively discretionary, not mandatory. *See Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) (“There is a presumption that the use of the word ‘may’ in a statute creates discretion.”). Discretionary payments are not money mandating for purposes of the Tucker Act. Certain of these statutes have a long history, however, that rebuts this presumption. The Supreme Court drew upon that history in *United States v. Larionoff*, 431 U.S. 864 (1977), a military pay case in which the Court observed that “[f]rom early in our history, Congress has provided by statute for payment of a re-enlistment bonus to members of the Armed Services who re-enlisted upon expiration of their term of service, or who agreed to extend their period of service before its expiration.” *Id.* at 865.

Accordingly, the Court assumed that a statute providing for payment of a reenlistment bonus was money mandating and that eligible service members who met the statutory requirements for payment of the bonus were entitled to receive it. In short, some military pay statutes that use the permissive word “may” nonetheless qualify as money-mandating provisions for purposes of the Tucker Act, by virtue of long-standing usage and history.

Disability claims have a somewhat different footing than pay claims. To receive compensation or retirement benefits for military disability, a service member must suffer a permanent disability manifesting itself prior to the end of active service. *See* 10 U.S.C. § 1201(a), (b)(1)-(2). A service member has a physical examination prior to separation or discharge, but that may not be a sufficient basis for a decision regarding a disability determination. A Physical Examination Board (“PEB”), formerly known as a Retiring Board, determines a service member’s fitness for duty and entitlement to a disability separation payment or medical retirement after a Medical Evaluation Board finds the member does not meet military retention standards. *See Chambers v. United States*, 417 F.3d 1218, 1225, n.2 (Fed. Cir. 2005); *McHenry v. United States*, 367 F.3d 1370, 1373 (Fed. Cir. 2004) (“In order to determine the existence and extent of disability, the Secretary established a PEB in 1990 to act on behalf of the Secretary of the Navy . . . in making determinations of fitness for duty, entitlement to benefits, and disposition of service members referred to the Board.” (quotation marks omitted)). Often the dispute in military disability claims filed in court concerns whether the service member’s medical profile upon separation or discharge should have triggered an evaluation by a Medical Evaluation Board and a PEB. *See, e.g., Colon v. United States*, 71 Fed. Cl. 473 (2006), *aff’d*, 216 Fed. Appx. 977 (Fed. Cir. 2007). Where the service member has not had a PEB, his or her claim does not accrue until final action by a correction board, which has authority to act in the

place of a PEB as the proper tribunal to determine eligibility for a disability separation payment or retirement. *See* 10 U.S.C. § 1201. Although a corrections board is empowered to act as a PEB and make a fitness determination in the first instance, *see Barnick v. United States*, 591 F.3d 1372, 1380 (Fed. Cir. 2010), a correction board can refer a post-separation or post-discharge claim to a PEB for action, *see Sawyer v. United States*, 930 F.2d 1577, 1582 (Fed. Cir. 1991) (“There is sufficient flexibility in the system to permit the boards to complement or supplement one another in the interest of reaching a just result.”); *Peoples v. United States*, 101 Fed. Cl. 245, 263 (2011). If a service member’s condition is not “of a permanent nature and stable,” 10 U.S.C. § 1201(b)(1), a service may put the member on a temporary disability retired list, pending a further determination of permanency and stability, *see* 10 U.S.C. § 1202. A disability of less than 30 percent under the standard schedule of rating disabilities entitles the service member to a separation payment rather than a disability retirement benefit. *See* 10 U.S.C. § 1203(b)(4).

A number of recent cases have involved claims of improper separation or discharge of service members alleged to have suffered post-traumatic stress disorder or “PTSD.” These cases have focused on provisions of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1642, 122 Stat. 3, 456 (codified at 10 U.S.C. § 1216a(a)(1)). Those provisions specified that “[i]n making a determination of disability of a member of the armed forces for purposes of this chapter, the Secretary concerned . . . shall, to the extent feasible, utilize the schedule for rating disabilities in use by the Department of Veterans Affairs [(“VA”).]” *Id.* In effect, the statutory revision extends prior provisions that required the uniformed services to apply the Veterans Affairs Schedule for Rating Disabilities (“VASRD”) when assessing disability ratings. *See, e.g.*, Air Force Instruction 36-3212 § 1.7 (2006); Army Regulation 635-40 § 3-5(a) (2006); Navy Instruction 1850.4E 3801(b) (2002).

Consequently, for some time, the uniformed services have applied the same rating system as that developed by the Department of Veterans Affairs. The equivalence does not mean, however, that the results obtained will be the same. The military uses the VASRD “to determine fitness for performing the duties of office, grade, and rank, whereas . . . the VA uses the VASRD [after discharge] to determine the disability ratings based on an evaluation of the individual’s capacity to function and perform tasks in the civilian world.” *Sabree v. United States*, 90 Fed. Cl. 683, 695-96 (2009) (quoting *Haskins v. United States*, 51 Fed. Cl. 818, 826 (2002)).

II. PROCEDURES

A. *Discharge and Separation Back-Pay Claims*

In military board cases, the court has consistently employed a “substantial evidence” standard of review which “does not require a reweighing of the evidence, but a determination whether *the conclusion being reviewed* is supported by substantial evidence.” *Heisig*, 719 F.2d at 1157 (emphasis in the original). Under this standard, the court may not “substitute [its] judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence.” *Id.* at 1156.

In the years immediately following the establishment of military correction boards, the court clung to rudiments of its earlier *de novo* consideration of military pay and benefits claims. Specifically, the court often accepted and considered *de novo* evidence to supplement its review of the boards’ decisions, allowing it latitude to reach a conclusion contrary to that of the military board. *See Heisig*, 719 F.2d at 1157 (“[A]ll of the competent evidence must be considered, whether original or supplemental, and whether or not it supports the challenged conclusion [of the military board].” (emphasis in the original)); *see also Brown v. United States*, 396 F.2d 989, 991, 996 (Ct. Cl. 1968) (detailing the court’s “established practice of accepting *de novo* evidence

in [the military correction] area”). As the court explained in *Brown*, the boards served as non-adversarial, investigatory bodies — not as “tribunals adjudicating disputes between adverse parties.” *Id.* at 995. The court reasoned:

[T]he administrative system, as a whole, is not designed to collect and evaluate for itself all the evidence . . . nor is it geared to produce records comparable to those of the regulatory agencies. There is, in short, less need and less warrant for deferring to the administrative fact-finding process, as all-inclusive, self contained, and final.

Id. at 996. Thus, while the court exercised a limited power of review in military board cases, it had the freedom to accept *de novo* evidence and use a supplemented record when addressing a military board’s conclusions.

This procedure was altered after the Supreme Court explicitly stated that a lower court reviewing an agency action should generally remand the case to the agency to consider new evidence if the record before the court was incomplete. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”). In light of the *Florida Power* decision, the Federal Circuit modified its stance to require the court to remand a case to a board to consider relevant evidence that was omitted in the first instance, rather than continuing to allow the court to consider new evidence put forth in a supplemented record. *See Walls v. United States*, 582 F.3d 1358, 1367-68 (Fed. Cir. 2009). Under this procedural regimen, the court’s review is limited to the administrative record, and if the court finds that a particular claim was not adequately addressed, it may order a remand to the military board. *See Riser v. United States*, 93 Fed. Cl. 212, 217-18 (2010) (remanding a suit for

back pay to the Army Correction Board so it could consider relevant resignation correspondence); *see also Hale v. United States*, No. 10-822C, 2011 WL 2268961, at *2 (Fed. Cl. June 9, 2011) (remanding claims for back pay and medical disability payments to a military board because plaintiff raised procedural issues that had not been considered by a board).

Notably, any involvement of a military board may significantly limit a plaintiff's ability to raise new claims and arguments before the court. In *Metz v. United States*, 466 F.3d 991 (Fed. Cir. 2006), the Federal Circuit held that a plaintiff who brings a claim in court after a decision by a military board waives the claims or arguments he or she does not raise in initial or reconsideration petitions before the board. *Id.* at 999.

Former service members have another procedural option that they may pursue to allow the court to undertake a full evidentiary review. Since their inception, military boards have been regarded as a "permissive administrative remedy . . . [,] not a mandatory prerequisite to filing a Tucker Act suit challenging the discharge." *Martinez v. United States*, 333 F.3d 1295, 1303-04 (Fed. Cir. 2003). Therefore, a plaintiff may opt to file suit directly in the Court of Federal Claims instead of seeking relief first before a military correction board. *Id.* According to the decision in *Martinez*, this flexibility provides benefits to both parties:

[R]equiring resort to a correction board would necessarily extend the period within which a discharge claim for back pay could be brought. Such an extension would naturally increase the risk that discharge claims would be stale, along with the risk of lost evidence, unavailable witnesses, and faded memories. In addition, the passage of time would increase the potential liability of the United States for back pay and would make the availability of corrective action more difficult to effect. . . . Second, it is by no means clear that an exhaustion requirement would be favorable to service members generally. . . . [M]any service members might prefer to have the option of seeking an immediate judicial remedy rather than having to go through a correction board before having access to a court. A mandatory exhaustion requirement would make that course of action unavailable.

Id. at 1309 (citations omitted). A service member may preserve access to “both the judicial remedy and the right to a reviewable decision by the correction board [by filing suit] within six years of the date of discharge and request[ing] that the court action be stayed until the correction board proceeding is completed.” *Id.* *Metz* in effect would require that a service member file suit in this court before filing claims with a military board.

Additionally, because correction boards do not employ adversarial procedures, they are not well suited to handle certain types of claims. A personal appearance or argument may or may not be allowed by the board, at its discretion. As a result, fact finding may be problematic in some circumstances. The classic example is a claim by a service member of ineffective assistance of counsel in an administrative discharge hearing or courts-martial. In *Helferty v. United States*, 101 Fed. Cl. 224 (2011), the service member raised his claim of ineffective assistance of counsel before a correction board, which eventually requested a series of advisory opinions to assist in its review. Included in those opinions was a statement by the prior counsel who had been alleged to have been ineffective. Notwithstanding the bar on *ex parte* communications to the board, *see* 10 U.S.C. § 1556 (prohibiting *ex parte* communications to boards, subject to exceptions that include “[c]lassified information” or “[i]nformation the release of which is otherwise prohibited by law,” 10 U.S.C. § 1556(b)(1), (2)), the prior counsel’s statement was withheld from the claimant and his counsel on privacy grounds, *Helferty*, 101 Fed. Cl. at 226. In court, the government sought a remand to the board, attaching the prior counsel’s statement that previously had been provided to the board on an *ex parte* basis, and that motion was granted. *Id.* at 229. As the case has developed on remand, the board reportedly is struggling with competing affidavits, filed seriatim, one after the other, responsively describing and

contesting prior counsel's investigatory activities and actions at the administrative discharge hearing. As a result, the board is being faced with finding facts on a convoluted paper record, unaided by cross-examination or an opportunity to assess credibility. In short, as structured, the correction board cannot find facts in a typical trial-type setting, and the evident problems raise questions about the adequacy of its proceedings in certain situations.

B. Disability Retirement Pay Claims

In disability retirement pay cases, claims of entitlement to benefits do not accrue until the “appropriate [military] board either finally denies such a claim or refuses to hear it,” *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990), so the board proceeding “becomes a mandatory remedy.” *Chambers*, 417 F.3d at 1225 (citations omitted). Among other things, the six-year statute of limitations for this court's cases under the Tucker Act does not automatically begin to run upon the service member's discharge; rather, the “decision by the first statutorily authorized board which hears or refuses to hear the claim is the triggering event.” *Real*, 906 F.2d at 1560. However, a limited exception to this rule exists: if a service member “has sufficient actual or constructive notice of his disability, and hence, of his entitlement to disability retirement pay, at the time of discharge,” then “the service member's failure to request a hearing board prior to discharge has . . . the same effect as a refusal by the service to provide board review,” thus triggering the start of the six-year statute of limitations. *Chambers*, 417 F.3d at 1226 (citing *Real*, 906 F.2d at 1560, 1562). In such a case, the court must look to “[w]hether the veteran's knowledge of the existence and extent of his condition at the time of his discharge was sufficient to justify concluding that he waived the right to board review of the service's finding of fitness.” *Real*, 906 F.2d at 1562. The service member's knowledge is determined by

reference to the statutory requirements for disability retirement benefits, contained in 10 U.S.C. § 1201. *Id.* at 1562-63; *see also Chambers*, 417 F.3d at 1226.

As discussed *supra*, correction boards have had difficulty in addressing disability claims raised considerably after discharge or separation, where no PEB was convened prior to discharge and the medical information gathered before discharge was not comprehensive. *See, e.g., Peoples*, 101 Fed. Cl. at 263-65 (approving a board's denial of a disability retirement claim because the PEB did not have all of the information it needed to determine the claimant's fitness for duty at the time of discharge).

III. CLASS ACTIONS

In a few circumstances, prior service members have presented military pay or disability claims in suits that were certified as class actions under Rule 23 of the Rules of the Court of Federal Claims ("RCFC"). The most recent such case was *Sabo v. United States*, 102 Fed. Cl. 619 (2011), involving disabled veterans who had served in the wars in Iraq and Afghanistan and who suffered PTSD. Other examples occurred roughly ten years earlier, when military officers who were involuntarily separated or retired for failure of promotion successfully brought reverse-discrimination suits in this court that were also certified as class actions. *See Christian v. United States*, 337 F.3d 1338 (2d Cir. 2003); *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002); *Christensen v. United States*, 60 Fed. Cl. 19 (2004). The facts and procedural circumstances of the two types of cases are instructive for other situations in which a number of veterans may have similar claims arising out of their military service.

A. *The PTSD Class Action*

In *Sabo*, seven veterans filed suit, averring that they suffered from PTSD incurred as a result of their service in Iraq and Afghanistan and contending that their respective service

branches had not assigned sufficient disability ratings. *Sabo*, 102 Fed. Cl. at 623. The court granted plaintiffs' motion to proceed as a class action, certified the class, delineated the claims to be decided, appointed class counsel, and approved a notice to be supplied to all potential class members. *Id.* The court allows only opt-in class actions; opt-out class actions are not permitted. *See* Rule 23 of the Rules of the Court of Federal Claims, Rules Committee Note, 2002 revision. As in any class action, great care was taken to ensure that adequate notice be given to potential class members. Notices were directly sent to approximately 4,300 potential members, and a website was also established to expand the reach of information about the suit. *Id.* Given the issuance of new and more lenient criteria in 2008 for rating a disability based upon PTSD, *see supra*, at 6, the government enabled plaintiffs who opted in to apply for priority review by a Physical Disability Board of Review or a correction board, of their PTSD disability rating. *Id.* at 623-24. When that process proved to be slow and cumbersome, settlement discussions were undertaken. Ultimately, 2,176 individuals opted into the suit, and a proposed settlement was reached on conceptual terms for nine discrete categories of claimants, separated according to those who had or had not received a military board decision, had received severance pay or disability retirement or were placed on the Temporary Disability Retirement List ("TDRL"), or had received a disability rating from the Department of Veterans Affairs. *Id.* at 624-25. The proposed settlement agreement provided that each class member would at least be placed on the TDRL for the first six months after separation or retirement at a 50 percent disability rating and be granted additional relief dependent upon individual circumstances. *Id.* at 625.

The settlement was approved after each class member was given the opportunity to respond to the proposed settlement. *Sabo*, 102 Fed. Cl. at 629-30. Fourteen class members indicated disapproval, while seven responding members neither approved nor disapproved. *Id.* at

629. Attorneys' fees for class counsel were deferred, although the parties agreed that attorneys' fees would not be paid out of settlement proceeds to claimants. *Id.* at 630.

B. *The Reverse-Discrimination Class Actions*

Christian had involved male non-minority former lieutenant colonels in the Army who had been selectively retired early by a board that used race- and gender-based retention goals. *Christian*, 46 Fed. Cl. 793, 816-17 (2000). *Berkley* concerned a certified class comprised of Air Force officers who had been involuntarily separated based in part upon race- and gender-based criteria. *Berkley v. United States*, 45 Fed. Cl. 224 (1999). In *Christensen*, the class plaintiffs were colonels in the Air Force who had been selected for involuntary retirement on the basis of unconstitutional race and gender preferences. *Christensen*, 60 Fed. Cl. at 20.

In these three sets of reverse-discrimination cases, the disputes ultimately centered on remedy. The government urged that the cases should be remanded to the pertinent service secretaries for a "harmless error" analysis, calling for reconsideration by reconstituted service boards to make new separation and early retirement decisions using criteria that had no discriminatory elements. That remedial approach was adopted by the Federal Circuit in *Christian*, 337 F.3d 1338.

Subsequently, however, the parties reached settlement agreements which provided payments of standard lump-sum amounts to each class member and did not entail sets of "harmless error" determinations. *See, e.g., Christensen v. United States*, 65 Fed. Cl. 625, 627-28 (2005). Class counsel would be paid fees out of the total award but at rates that amounted to less than ten percent of the award. *Id.* at 628. In *Berkley*, some class plaintiffs elected to be considered by a special board, and some were granted retention, with back pay and allowances.

C. Remedial Issues

As the *Sabo* and reverse-discrimination cases illustrate, class actions can and should be certified in military pay and disability cases where liability issues apply broadly to all members of the class. Nonetheless, where liability is established in class actions, the remedial stage can be troublesome. Pay and declaratory relief in the form of correction of military records is heavily dependent upon the individual circumstances of class members. Despite that inherent difficulty, settlements were achieved in these exemplars, using a template that was either applicable to all class members or to members on a category-by-category basis, with individual adjustments as appropriate. Creative remedial solutions can ensure fairness for all class members.

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