In the United States Court of Federal Claims

No. 02-178C
(Filed October 2, 2002)
UNPUBLISHED

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REGINALD H. RUSSELL, *pro se*,	* Military pay; disability retirement; RCFC 56.1; backpay; *pro se* plaintiff; 10 U.S.C. § 1552(b) (2002); timeliness of application to board for correction of military records; 10 U.S.C. §§ 1201-1214 (2002); hearing before Physical Evaluation Board; 32 C.F.R. § 723.3(b) (2002); Veterans Administration disability ratings.
Plaintiff,	*
v.	*
THE UNITED STATES,	*
Defendant.	*
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Reginald H. Russell, plaintiff *pro se*, Tallahassee, FL.

Thomas L. Koger, for defendant, with whom was Assistant Attorney General Robert D. McCallum, Jr., for defendant. Lt. Art Record, U.S. Navy Litigation Division, of counsel.

OPINION

MILLER, Judge.

This case is before the court on cross-motions for summary judgment pursuant to RCFC 56.1. Plaintiff claims against the United States Navy to establish that a correction board abused its discretion in denying as untimely his application for correction of his naval record. Plaintiff also contests the board's refusal to award him disability retirement. Although plaintiff moved for oral argument, the court deems, having considered all the briefs filed by both parties, that argument is unnecessary.

FACTS

Unless otherwise noted, the relevant facts derive from the Administrative Record and are not disputed. Reginald H. Russell ("plaintiff") enlisted in the United States Army (the "Army") on July 1, 1987. During summer 1987 plaintiff complained to a fellow trainee that

he was thinking about suicide and was referred to the medical unit. The doctor's August 4, 1987 report from the examination noted that the "patient decided to tell one of his fellow trainees that he was thinking about suicide knowing that this would get a considerable response from the unit. He has perhaps gotten more of a response than he had anticipated . . . . It is clear that he is not and has not been suicidal but is rather endeavoring to manipulate into a better situation but is rather naive but [sic] the workings of the United States Army." Pl.'s Br. filed Aug. 8, 2002, Ex. A. Plaintiff was discharged from the Army on August 4, 1987, denominated as "Entry Level Discharge" with a personality disorder.

On December 30, 1988, plaintiff enlisted in the United States Navy's (the "Navy") Delayed Entry/Enlistment Program and entered active duty on February 8, 1989. In March 1990 plaintiff complained that he was being racially harassed by people in his command. On June 4, 1990, plaintiff was referred to the Mental Health Department of the Naval Hospital in Pensacola, Florida, for stress and possible homicidal ideation towards his co-workers. In his report dated June 8, 1990, the examining psychologist diagnosed plaintiff with an "Adjustment Disorder secondary to Occupational Maladjustment" and "highly recommended a transfer to another unit in order to resolve the problems." On June 28, 1990, plaintiff was re-evaluated by a clinical psychologist who diagnosed plaintiff with a severe personality disorder, and "strongly recommended expeditious administrative separation," noting that further retention on active duty carried with it "the omnipresent risk of suicide."

On July 26, 1990, plaintiff requested to see the Heltac Wing One Commander in Mast for problems at his command, a hearing before a Physical Examination Board (the "PEB"), a second military review of his mental health, and a transfer. On August 16, 1990, plaintiff made a second request to see the Heltac Wing One Commander in Mast for the same reasons. On September 6, 1990, plaintiff requested to make a statement objecting to his discharge. However, his commanding officer's recommendation for separation was forwarded one day later, on September 7, 1990, and plaintiff was not afforded an opportunity to make a statement. In addition, plaintiff's requests for Wing Commander's Mast were not forwarded to the Wing Commander for action.

On September 7, 1990, prior to his discharge, plaintiff was given a physical examination, where he complained of skin problems. He was determined to be physically fit. On September 11, 1990, plaintiff received low evaluations and requested to make a statement on his evaluations and performance report, but the report was entered into his service record before he had the opportunity to comment. On September 14, 1990, the Navy gave plaintiff a General Discharge Under Honorable Conditions; the stated reason for plaintiff's discharge was his personality disorder.

On July 7, 1991, plaintiff applied to the Naval Discharge Review Board (the "NDRB") to review his discharge requesting that the Navy remove "personality disorder" as the basis of his discharge and upgrade of the character of his discharge to Honorable. The NDRB reviewed plaintiff's record and in its decision dated May 29, 1992, determined that sufficient evidence was lacking to support changing the reason for his discharge (personality disorder), but that the character of plaintiff's discharge should have been "Honorable," instead of merely "General Discharge under Honorable Conditions."

In upgrading plaintiff's discharge, the NDRB's decision noted "several improprieties in the applicant's processing." The NDRB agreed with plaintiff's contentions that he was not given the proper amount of time to rebut his separation, that he was not granted the right to make a statement regarding his commanding officer's recommendation for separation, and that plaintiff's request for Wing Commander's Mast was not forwarded to the Wing Commander for action. The NDRB also noted that plaintiff's final evaluation marks were too low and "did not accurately reflect his performance and behavior." The NDRB therefore revised plaintiff's discharge certificate on July 9, 1992, to reflect that his discharge had been upgraded to Honorable. Plaintiff made no attempt to seek disability from the NDRB.

On May 5, 1993, plaintiff applied to the Department of Veteran Affairs (the "VA") for disability benefits related to skin, mental, and lower-back conditions. On April 11, 1994, the VA granted plaintiff a disability rating of 0% for his skin condition and denied a disability rating for his personality disorder and back condition. Although plaintiff did not immediately appeal the decision related to his mental health, he did appeal the decisions relating to his lower back and skin conditions. On January 9, 1997, the VA awarded plaintiff a rating of 10% for his skin condition; his benefits were extended retroactively to May 5, 1993. On November 19, 1997, the VA awarded plaintiff a 30% disability rating for a psychiatric disorder. This award was made retroactive to May 23, 1997. Plaintiff applied for a review of the decision, and the rating was made retroactive to October 29, 1996. On February 15, 2000, plaintiff requested an upgrade of his disability rating, and on March 24, 2000, he was awarded a 100% disability rating for his mental condition.

On October 16, 2000, plaintiff applied to the Board for Correction of Naval Records (the "BCNR" or "Board") for correction of his naval records, pursuant to 10 U.S.C. § 1552 (2002), to reflect a medical discharge for delusional disorders and a skin disorder and an award of disability retirement from the date of his discharge, September 14, 1990, to the present. Plaintiff contended that he had proved, in the years since his discharge, that the mental and physical conditions from which he suffers resulted from his service to the Navy and that he suffered from the conditions while in the Navy. To support his claim, plaintiff submitted the opinions of several doctors, as well as the VA rating. Plaintiff challenged the Navy's failure to refer his case to the PEB before his discharge. He requested a hearing on

his application for a change to his record and for back pay. On his application plaintiff listed the "date of discovery" of the "alleged error or injustice" as 1998. Plaintiff did not request a waiver of the three-year filing period established by the BCNR's controlling statute, 10 U.S.C. § 1552.

The BCNR solicited an advisory opinion from the Department of Psychiatry, Naval Medical Center in Portsmouth, Virginia. The advisory opinion, dated January 26, 2001, concluded that, at the time of his discharge, plaintiff had a personality disorder, but was not suffering from a disability. The advisory opinion found that the medical evidence did not support changing the basis of plaintiff's discharge and recommended no change to the naval record. */ The BCNR afforded plaintiff an opportunity to respond to the advisory opinion and considered plaintiff's rebuttal before rendering its decision.

Plaintiff responded to the advisory opinion by letter dated May 22, 2001, contending that he had submitted evidence to prove that he was under stress from his superiors; he also submitted the VA findings as evidence. Plaintiff estimated that his delusions began a week after his discharge from the Navy, but stated "[h]owever, I am not sure of the exact time line." Plaintiff disputed the physician's report which recorded that plaintiff had alleged that Germans were out to get him, but said, "I believe and still do believe that the Government is trying to destroy me." Plaintiff suggested that a lack of evidence that he was delusional was attributable to the fact that, at the time of his discharge, plaintiff thought the Government was "after me" and therefore he "didn't want to tell the same people whom [sic] had destroyed me anything."

On June 19, 2001, the BCNR denied as untimely plaintiff's request to change the reasons for his naval discharge, adding that "it would not be in the interest of justice to excuse your failure to submit your application in a timely manner." In reaching its decision, the BCNR stated that it reviewed documentary evidence in plaintiff's case, including plaintiff's application to the Navy; plaintiff's naval record; applicable statutes, regulations and policies; and the advisory opinion. The BCNR found, and plaintiff agreed, that plaintiff was aware of the alleged error or injustice at the time of plaintiff's September 14, 1990 discharge for personality disorder. See Pl.'s Br. filed Aug. 5, 2002, at 4. Concluding that the evidence plaintiff submitted was insufficient to establish the existence of probable material error or injustice, the Board characterized plaintiff's application to the Navy as

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*/ Had a PEB examined him, plaintiff contends that it would have found that he had a mental disability, not merely a personality disorder and that the PEB findings would have constituted evidence of his medical condition that the BCNR ultimately found lacking in his application.

fraudulent, because it did not reflect his prior service in the Army. The BCNR informed plaintiff that the names of the panel members who decided his case would be furnished to him upon his request.

On June 22, 2001, plaintiff wrote to the BCNR expressing his disagreement with its decision, disputing that his Navy application was fraudulent, and requesting the names of the panel members who decided his case. In a letter dated June 28, 2001, the BCNR declined to furnish the names of the panel members because of the "threatening tone" of plaintiff's request letter. Plaintiff provided affidavits and medical records to the BCNR on July 20, 2001, and included a cable from the Navy recruitment office stating that plaintiff had not fraudulently enlisted in the Navy. He also disputed the allegation that his prior letter had been written in a threatening tone.

Plaintiff sent the BCNR another letter on December 8, 2001, containing diagnoses from more doctors which he alleged supported his claim. The Board treated this letter as a request for reconsideration. By letter dated March 8, 2002, the BCNR informed plaintiff that his request had been denied. The new evidence was deemed not material. The Board stated that, "even if this material [had been] presented to the Board [before it made its original determination], the decision would inevitably be the same." Plaintiff thereafter filed this suit.

DISCUSSION

Although motions for summary judgment upon the administrative record pursuant to RCFC 56.1 are treated as motions for summary judgment under Rule 56, they are of the same genus, but not species. A Rule 56 motion will be denied if the opponent raises a genuine issue of material fact, whereas a motion under Rule 56.1 will be granted, even if material facts are disputed, if the reviewing authority did not act arbitrarily, capriciously, unreasonably, or in contravention of controlling law or statute. In the case at bar, for example, the parties dispute the state of plaintiff's mental health at discharge. However, the issue for decision is not whether plaintiff's evidence is sufficient to deny defendant's motion and grant his own as a matter of fact and law, RCFC 56(c), but whether the BCNR, based on all the evidence available to reflect plaintiff's condition at the time of discharge and plaintiff's proffer of the date he discovered the nature of his condition, decided the issue within the standards that delimit its review. That the parties are required to submit statements of facts and counter-statements pursuant to RCFC 56.1(b) serves the salutary purpose of extracting from the record those facts that each party deems material to pointing out the merits or deficiencies in the record.

1. Timeliness

Plaintiff challenges the BCNR's decision to deny his application as untimely. Recognizing that plaintiff's arguments should be reviewed under less stringent standards than formal briefs by attorneys at law, Hughes v. Rowe, 449 U.S. 5, 9 (1980), the court nonetheless does not review the record as a matter of first instance – that is the purview of a correction board – and the BCNR's findings are subject to a conservative standard of review. Moreover, the governing issue presented is whether the BCNR abused its discretion in declining to waive the limitations period for considering plaintiff's claim. If it did not, then this court need not proceed to the secondary issue of the Board's decision on the merits.

The Board's decision on timeliness is subject to judicial review and can be set aside only if it is arbitrary and capricious, not based on substantial evidence, or contrary to applicable laws or regulations. Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983). Evidence advanced to upset a correction board's finding must be "clear and convincing." Finn v. United States, 212 Cl. Ct. 353, 356, 548 F.2d 340, 342 (1971).

The limited standard of review applicable "does not require a re-weighing of the evidence, but a determination as to whether the *conclusion being reviewed* is supported by substantial evidence." Heisig, 719 F.2d at 1157. This court "cannot substitute [its] judgment for that of the [BCNR] when reasonable minds could reach differing conclusions on the same evidence." Id. at 1156. Rather, the court may consider only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

The BCNR's controlling statute, 10 U.S.C. § 1552, states that "[n]o correction may be made . . . unless the claimant . . . files a request for correction within three years after he discovers the error or injustice." 10 U.S.C. § 1552(b) (2002). The Navy's implementing regulations require the untimely applicant to "set forth the reason why the Board should find it in the interest of justice to excuse the failure to file the application within the time prescribed." 32 C.F.R. § 723.3(b) (2002). The BCNR may then excuse a failure to file within three years if it determines that the applicant has met his or her burden of establishing that an exemption would be in the interest of justice. 10 U.S.C. § 1552(b).

> Strong policies compel the court to allow the widest possible latitude to the armed services in their administration of personnel matters . . . . Although correction board decisions with pay consequences are reviewable here, it cannot be forgotten that Congress entrusted primary responsibility for the record-correction function to the service Secretaries acting through correction

> boards. Thus, while we may disagree with a correction board about whether or not a specific situation was unjust, we will not substitute our judgment for the board's when reasonable minds could reach differing conclusions.

Sanders v. United States, 219 Ct. Cl. 285, 302, 594 F.2d 804, 813 (1979) (internal citations omitted), cited with approval in Porter v. United States, 163 F.3d 1304, 1315-16 (Fed. Cir. 1998).

For plaintiff's claim to avoid the time bar, he must have applied to the BCNR within three years of discovering the alleged error or injustice -- in this case, no earlier than October 16, 1997, which, assuming that plaintiff cannot show discovery at a later date, is three years before his application to the BCNR. However, the Board found that plaintiff was aware of the alleged error or injustice in his record when he was discharged for a personality disorder on September 14, 1990. Although plaintiff agrees that the alleged error or injustice occurred in 1990 when the physician who examined him prior to his separation mis-diagnosed him with a personality disorder, instead of a full mental disability, he excuses his failure to act by claiming that he did not discover the true nature of his mental disorder until later.

The evidence does not support plaintiff's contention. Plaintiff's 1992 application to the NDRB indicated that he thought he had been mis-diagnosed upon discharge in 1990; the NDRB's May 29, 1992 decision rejected this assertion, stating that plaintiff had "failed to provide sufficient evidence to support this contention." Regardless of whether plaintiff had sufficient evidence to support his claim, the fact remains that he knew of the mis-diagnosis–the alleged error or injustice–as early as May 1992. Therefore, his right to make a timely application to the BCNR terminated in May 1995, more than five years before he actually submitted an application.

In his October 2000 application to the BCNR requesting a change of reason for his discharge, plaintiff lists 1998 as the year that he discovered the alleged error or injustice. Plaintiff does not give any reason for selecting 1998 as the year of discovery, although he argues that he "did not know what he was suffering from until sometime after November 19, 1997, when he revived [sic] his award of (30) [sic] percent disability rating from the VA." Pl.'s Br. filed Aug. 5, 2002, at 3. On November 19, 1997, the VA awarded plaintiff a 30% disability rating for his psychiatric disorder. Plaintiff's allegation that he did not discover the error or injustice until late 1997 or 1998 directly conflicts with the plaintiff's 1992 NDRB application, which indicates that he suspected he had been mis-diagnosed upon discharge. It also conflicts with the fact that plaintiff had been applying for a disability rating from the VA since 1993, which suggests that plaintiff suspected he had a disability at least as early as his first VA application.

In determining whether the BCNR abused its discretion in denying plaintiff's action as untimely, this court looks at three factors: the length of the delay, the reason for the delay, and the ostensible merit of the allegation of error or injustice. Miller v. United States, 29 Fed. Cl. 107, 121 (1993). Although the record indicates that plaintiff knew of the alleged error or injustice as early as 1992, he did not file an application to the Board until 2000–eight years after the discovery and five years after the limitations period expired. At the time of his application, plaintiff gave no reason for the delay. Later, plaintiff attempted to mitigate his delay in seeking a record change by explaining that the delay was caused by his condition, which made him wary of disclosing information to government workers. Indeed, plaintiff states that he "still's [sic] believes the Government is out to get him." Pl.'s Br. filed Aug. 5, 2002, at 4.

In Miller plaintiff requested a waiver of the three-year limit, arguing that his military duties impaired his ability to file timely. The court upheld the correction board's decision to deny relief based on the untimely submission, because plaintiff "had demonstrated no circumstances which impaired his ability to file within the three-year limit." 29 Fed. Cl. at 110, 122 (internal quotations omitted). That also can be said of the case at bar. The court concludes that the Board did not abuse its discretion in finding that plaintiff had not demonstrated a reason for not applying to the BCNR to correct his record within the limitations period, and therefore finding plaintiff's application untimely.

2. Plaintiff's claim on the merits

The BCNR's decision also addressed plaintiff's claim on the merits. Assuming, *arguendo*, that the Board abused its discretion in failing to waive the time bar, the court may review this claim.

Plaintiff makes two claims on the merits: 1) that the Navy mis-diagnosed his mental disorder in 1990 and 2) that the Navy denied his due process rights by not following the processing requirements required by Navy regulations. The court will discuss both, in turn.

1) Alleged mis-diagnosis

The Navy doctors who examined plaintiff prior to his separation did not find any disability and declared him fit for discharge. Plaintiff's VA records revealed that even plaintiff's VA psychiatrist determined on February 27, 1998, that plaintiff had no disability on September 14, 1990, the date of his discharge; that he had no disability as of April 1994; and that he did not develop one until much later.

Plaintiff admits that the Navy conducted a pre-separation physical examination, but contends that the Navy doctor who examined him prior to his discharge was not thorough in his examination: "Plaintiff asserts that he was briefly looked over and complained to the doctor of several problems. However this doctor did not listen to Plaintiff's complaints." Pl.'s Br. filed Aug. 5, 2002, at 2. Plaintiff's allegation is not consistent with the four-page medical report that the doctor completed during the evaluation, which included notes addressing plaintiff's skin and mental conditions, as well as an elaboration on each of six data fields that plaintiff had reported as abnormal on the medical form.

Plaintiff's argument distills to a refutation of the administrative record, but he did not offer the Board evidence demonstrating that at the time of his discharge his condition was as he later claimed. Indeed, the detail of the pre-separation medical report suggests that the physician examining plaintiff gleaned the information recited in the report from interviewing plaintiff in some depth. The Board relied on this medical report when it rejected plaintiff's version of events. The court cannot rule that the BCNR's finding was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with the law.

Plaintiff has provided diagnoses of VA doctors as evidence that the Navy doctors mis-diagnosed him in 1990. Plaintiff submitted the November 6, 1997 diagnosis of one doctor who found that plaintiff's "paranoia definitely started in the service. In that respect, his current diagnosis of paranoid-delusional disorder appears to be a progression of his service-connected personality disorder." Pl.'s Br. filed Aug. 8, 2002, Ex. F.

Although it is true that both the military and the VA use the Veterans Administration Schedule of Rating Disabilities, the two agencies use the rating systems for different purposes. Champagne v. US, 35 Fed. Cl. 198, 211-12 (1996). "[D]ecisions by the Navy use a standard of review designed to determine unfitness to perform the duties of office, grade, rank, or rating because of disease or injury incurred or aggravated while entitled to basic pay." Id., construing 10 U.S.C. § 1201 (2002). In contrast, the VA "determines disability ratings based upon an evaluation of whether and how an individual's capacity to perform in the civilian world is diminished by a disability." Id. VA disability ratings are assigned under different statutory authority, and the VA does not make fitness-for-duty determinations. Walden v. United States, 22. Cl. Ct. 532, 539 (1991). VA ratings therefore are not binding on the Navy, although the court should consider the VA's decision along with other evidence. Champagne, 35 Fed. Cl. at 212, see also Finn, 212 Cl. Ct. at 357, 548 F.2d at 342; Aubre v. United States, 40 Fed. Cl. 371, 380 (1998).

In any event, VA doctors' diagnoses are not determinative of the question of whether a disability exists at all. In Lyons v. United States, 18 Cl. Ct. 723 (1989), aff'd, 907 F.2d 157

(Fed. Cir. 1990), plaintiff brought a military pay action *pro se*, seeking disability payments. At the time of his discharge, plaintiff was not classified as disabled and unfit for continued military service, but he later sought to have his classification changed. Three VA doctors said that plaintiff "had the onset of psychiatric disorder while on active duty . . . ." Id. at 728. Yet, even three diagnoses by VA doctors were insufficient to disturb the board's findings. The court in Lyons found that "the existence of medical opinions that tend to support a contrary conclusion does not render the [board's] decision arbitrary, capricious, or unsupported by substantial evidence . . . . The issue before this court is not which of the differing views is correct but rather whether the [board's] decision was arbitrary [or] capricious . . . ." Id. at 728-29.

Even if the VA physicians' findings were to carry weight in this case, they do not support plaintiff's claim. In 1994 the VA gave plaintiff a disability rating of 0%. In 1997 the VA gave plaintiff a disability rating of 10% for his mental condition, raising it to 30% after plaintiff applied for reconsideration. Finally in 1999 the VA awarded plaintiff a 100% disability rating. Insofar as the VA extended retroactive benefits, they were retroactive only to 1993. The BCNR took note of the VA ratings, but stated that the VA ratings were not conclusive of plaintiff's fitness for service in 1990. The Board commented:

> [T]he VA is permitted to rate any condition which was incurred in, aggravated by, or, as in [plaintiff's] case, merely traceable to a period of military service, without regard to the issue of fitness for military service at the time of separation from the service. In addition, the VA may raise or lower disability ratings throughout a veteran's life time, as the severity of the condition changes . . . . Unlike the VA, the military departments may rate only those conditions which render a service member unfit for duty at the time of separation or permanent retirement. Disability ratings may not be raised, lowered or otherwise amended thereafter, absent evidence of material error or injustice, and action by the Board.

The BCNR's statement is consistent with the law. The BCNR did not act arbitrarily and capriciously in its treatment of the VA ratings; its conclusion was in full accordance with applicable statutes and regulations.

The strongest evidence that plaintiff presented to the BCNR was the report of a VA doctor who diagnosed plaintiff on November 6, 1997, as having a disorder that had progressed from the time he was in the service. The doctor found that "[plaintiff's] paranoia definitely started in the service. In that respect, his current diagnosis of paranoid-delusional disorder appears to be a progression of his service-connected personality disorder." In its June 19, 2001 decision, the Board reviewed this evidence and found that, because plaintiff

had a history of manipulative behavior, it deemed any mental diagnosis suspect. The BCNR noted that in his pre-enlistment examination for the Navy plaintiff had denied a history of attempted suicide, nervous trouble, depression, excessive worry, trouble sleeping, treatment for a mental disorder, and being a patient in any type of hospital. Plaintiff's Army records present "a very different picture," the Board observed, indicating that plaintiff was hospitalized at an Army community hospital for psychiatric observation following a self-reported suicide attempt. The Board reviewed Army records showing plaintiff had claimed to be increasingly depressed and unable to handle the stress of training, as well as having difficulty sleeping. At the time of plaintiff's hospitalization, he disclosed that he had "been seen," presumably for psychiatric treatment, at the age of 16 because of threats of suicide. Shortly after being released from the Army hospital, plaintiff was re-admitted for emergency care after an alleged overdose of medication. The BCNR found this history to be evidence of plaintiff's manipulative behavior. The Board also noted that plaintiff had made misrepresentations during the course of the "favorable" October 29, 1997 VA evaluation by not disclosing his service in the Army and by denying previous inpatient psychiatric care or any prior history of suicide attempt. Based on this evidence, the BCNR concluded that plaintiff's other representations to the VA physician might also be less than forthright. The misrepresentations to the VA doctor, as well as plaintiff's history of manipulative behavior, constitute substantial evidence upon which the Board based its decision.

In short, the VA findings have no bearing on the question of plaintiff's condition in 1990, and even if they did, they do not support the claim that plaintiff was mis-diagnosed in 1990. The administrative record reveals that the BCNR considered plaintiff's evidence in support of his application, and its findings are well supported by the record. Plaintiff contends that he presented more than enough evidence to show that he had a disability while in the Navy or shortly thereafter. However, the court cannot engage in a re-weighing of the evidence to decide *de novo* whether plaintiff was disabled upon discharge. Rather, the court's role is more limited in that it can determine only whether the Board's conclusion was arbitrary or capricious, was against the weight of substantial evidence, or was contrary to law. The court will therefore not disturb the Board's determination regarding plaintiff's alleged mis-diagnosis.

2) Due process

Plaintiff also contends that the Navy denied him due process by not granting his requests to see the Heltac Wing One Commander in Mast for problems at his command, by not allowing him to make a statement objecting to his discharge, and by denying his request to see a PEB. "It has long been established that government officials must follow their own regulations, even if they were not compelled to have them at all, and certainly if directed to

promulgate them by Congress . . . ." Voge v. United States, 844 F.2d 776, 779 (Fed. Cir. 1988).

Plaintiff already has sought and received redress for the procedural violations surrounding his discharge. On July 3, 1991, plaintiff applied to the NDRB complaining of these procedural violations. The NDRB in its May 29, 1992 decision agreed that there were "several improprieties" with plaintiff's processing, noting that plaintiff:

> was not allowed the proper amount of time, a minimum of two days, to complete a written rebuttal to his separation . . . . Additionally, the applicant's request for Wing Commander's Mast was not forwarded to the Wing Commander for action. Finally, the Board opined the applicant's final evaluation marks were too low and did not accurately reflect his performance and behavior . . . . The Board, therefore, unanimously voted to change the characterization of the discharge to Honorable.

The NDRB granted plaintiff relief for the procedural violations surrounding his separation by upgrading the character of his discharge.

Had his requests for Wing Commander's Mast and a PEB been granted, plaintiff additionally argues that his discharge would have reflected the disability he alleges to have suffered from at that time. However, "even where a claimant establishes a clear violation of a specific objective requirement of a statute or regulation, . . . the claimant is not entitled to relief unless the claimant shows a 'nexus' between the error or injustice and the subsequent decision not to promote the officer or separate him or her from service." Lindsay v. United States, 295 F.3d 1252, 1259 (Fed. Cir. 2002) (citing Hary v. United States, 223 Ct. Cl. 10, 15, 618 F.2d 704, 706 (1980)). "The burden rests with the claimant to set forth a prima facie showing of substantial connection between the error and the adverse action, either by showing that the error substantially affected the decision in question, or at least setting forth enough material to impel the court to direct a further inquiry into the nexus between the error or injustice and the adverse action." Lindsay, 295 F.3d at 1259 (internal quotations omitted).

In Lindsay plaintiff brought suit after he was passed over for a promotion following a procedural violation in that his record lacked an officer effectiveness report. Plaintiff showed that there was a significant connection between the missing report and his not receiving a promotion. In the case at bar, plaintiff has not shown such a nexus. He presupposes that a PEB would have resulted in a diagnosis that would have earned him disability status. However, plaintiff has failed to show that, in fact, he was disabled at the time of his discharge in 1990, let alone that making a statement or meeting with the Heltac Wing Commander would have illuminated such a diagnosis or that a PEB necessarily would

have come to the same conclusion. The required nexus between the procedural violations and his discharge for a personality disorder is absent.

Plaintiff finally argues that his case should be remanded because he did not receive a PEB hearing before his discharge. Plaintiff relies on Lord v. United States, 227 Ct. Cl. 692 (1981), where the court remanded the case to a correction board because plaintiff had not been given a PEB, noting that strong evidence supported a finding that plaintiff suffered injuries more serious that what was diagnosed by Navy physicians. In Lord, however, the correction board's findings were inadequate to show how it arrived at its decision to deny plaintiff's benefits. The Board in this case recited in detail the evidence that it considered and explained precisely the reasons upon which it denied plaintiff's application.

It cannot be gainsaid that the statutory requirement for a hearing applies only to injuries that are incurred during the term of service and that are a result of a service-related injury. 10 U.S.C. § 1204 (2002). Thus, "for plaintiff to possess a right to a full and fair hearing, his disability must be permanent and must be the result of a service-related injury." Candelaria v. United States, 5 Cl. Ct. 266, 273 (1984) (construing 10 U.S.C. §§ 1204, 1214 (2000)). After careful consideration, the Board found that the record does not show that plaintiff's condition was a service-related injury. The court cannot re-diagnose plaintiff; "[t]he responsibility for determining physical fitness of service persons is that of the armed forces, not of the judiciary." Maier v. Orr, 754 F.2d 973, 984 (Fed. Cir. 1985).

3. New evidence

Plaintiff has submitted to the court documents that were not before the BCNR when it made its decision, including diagnoses from private doctors and Social Security Administration doctors, and statements from his family. The court cannot consider evidence that was not before the Board. In Long v. United States, 12 Cl. Ct. 174 (1987), the court construed jurisdictional statutes and relevant case law to limit judicial review to the evidence produced before a board. This is good case law, and the court follows it. Even if the court were to consider such evidence, when weighed against the record and the legal requirement that plaintiff must show his disability at the date of discharge, it does not constitute clear and convincing evidence that the Board acted in an arbitrary and capricious manner, lacked substantial evidence, abused its discretion, or failed to act in accordance with applicable law or regulation.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted, and plaintiff's cross-motion is denied. The Clerk of the Court shall enter judgment for defendant.

IT IS SO ORDERED.

No costs.

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Christine Odell Cook Miller
Judge