UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN W. SHEPHERD, JR., Plaintiff, v. JOHN MCHUGH, SECRETARY OF THE ARMY, Defendant.	Civil No.: 3:11-cv-00641 (AWT) November 10, 2011

MEMORANDUM OF LAW IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Rebecca Kraus, Law Student Intern
Dana Montalto, Law Student Intern
Michael Wishnie, ct27221
Fiona Doherty, ct28623
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090

Counsel for Plaintiff

Oral argument is respectfully requested.

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PRELIMINARY STATEMENT

John Shepherd served his country in Vietnam, where the U.S. Army recognized his bravery in combat by awarding him a Bronze Star with Valor Device—the Army's fourth highest combat award. Yet the very same combat heroism that brought Mr. Shepherd acclaim left him permanently wounded by Post-Traumatic Stress Disorder ("PTSD"). In 1969, while still in Vietnam, he manifested the direct effects of this trauma: he became visibly confused, was unable to resume the fight, and displayed other strange behaviors. The Army did not diagnose or treat his psychological injuries. Rather than help to heal him, the Army expelled Mr. Shepherd with an Other Than Honorable discharge. In this action, Mr. Shepherd seeks judicial review of the 2006 and 2007 decisions of the Army Board for Correction of Military Records ("ABCMR") denying him a discharge upgrade to General (Under Honorable Conditions), and asks this Court to correct the forty-year injustice of his Other than Honorable discharge

For decades, Mr. Shepherd struggled alone to cope with his combat wounds, growing estranged from his family, surviving on sporadic employment, and sleeping in his truck during periods of homelessness. Finally, in 2003, doctors at the U.S. Department of Veterans Affairs ("VA") diagnosed Mr. Shepherd with PTSD, rated him at 100% disabled, and concluded that the PTSD was caused by his combat experiences in Vietnam. Because of his discharge status, however, Mr. Shepherd is ineligible for the VA disability benefits he has otherwise earned.

Since discovering his PTSD in 2003, Mr. Shepherd has sought to upgrade his discharge administratively in order to remove the shame and dishonor it conveys, and in the hope that he might receive disability benefits for his service-connected wounds. In 2006, ABCMR denied Mr. Shepherd's application to upgrade his discharge status. The ABCMR's 2006 decision ignores important evidence, fails to connect the facts and conclusions, strays from established precedent,

and bases its determination on vague and ambiguous grounds. The ABCMR also denied Mr. Shepherd's 2007 request for reconsideration. This decision likewise fails to consider all the evidence, veers from precedent, and lacks clarity.

In its motion, the government is dismissive of Mr. Shepherd's sacrifice, emphasizing his "short tenure" in the Army (Defendant's Memorandum of Law (hereafter "Govt. Br.") at 1), and that he fought in Vietnam for "less than two full months of combat duty" before his injury. (*Id*. at 4.) The government willfully ignores the intensity of combat Mr. Shepherd saw, the sacrifice that earned him his Bronze Star with Valor Device, and the severity of his service-connected injury. Mr. Shepherd has suffered from the wounds of combat long enough; he deserves the recognition of an honorable discharge. He respectfully requests that this Court deny the government's motion for summary judgment, and grant his cross motion for summary judgment, directing the Secretary of the Army to upgrade his discharge to General (Under Honorable Conditions), or in the alternative, to vacate and remand for further proceedings before the ABCMR.

FACTS AND PROCEEDINGS

I. Mr. Shepherd Voluntarily Enlists in the Military and Serves Bravely in Vietnam

Mr. Shepherd was born and raised in Mount Vernon, Ohio. (Administrative Record, ECF No. 16 (hereafter "AR") 175, 183.) As a teenager, he moved with his parents and three siblings first to Paoli, Pennsylvania and then to Westport, Connecticut. (*Id*.) In 1968, on the day after his twenty-first birthday, Mr. Shepherd left his job as an appliance serviceman at Sears, Roebuck and enlisted in the Army. (AR 84, 201.)

Less than one month later, Mr. Shepherd began Basic Training at Fort Gordon, Georgia. (AR 174.) Mr. Shepherd received a two-week leave to visit his family, and then was absent without leave (AWOL) for an additional three weeks. (AR 87.) After voluntarily returning to

Fort Gordon, he accepted responsibility for his actions and received a court-martial. (AR 167.) The Army suspended Mr. Shepherd's five-month sentence of hard labor, and he continued on to complete Advanced Infantry Training. (AR 158, 168.) Mr. Shepherd's Commanding Officer at Fort Gordon, Colonel Robert F. Radcliffe (ret.), then a Captain, described him shortly thereafter as an "outstanding soldier." (AR 115.) In November 1968, Mr. Shepherd declined his option to enter the airborne division. (AR 158.) Of the soldiers in Mr. Shepherd's training class—all of whom were volunteers for the airborne division—"[n]inety percent or more . . . were assigned to infantry units as individual replacements in Vietnam," like Mr. Shepherd. (Affidavit of Robert Radcliffe dated October 29, 2011 (hereafter "R. Radcliffe Aff.") ¶ 4.) Around December 20, 1968, Mr. Shepherd was ordered to deploy to Vietnam. (AR 164.)

Having never before traveled abroad, Mr. Shepherd arrived in Vietnam on or about January 22, 1969. (AR 155, 174.) First, he trained at Reliable Academy at Dong Tam Base in the Mekong Delta. (AR 152.) Records indicate that Mr. Shepherd was absent from classes on January 28, violating Article 89 of the Uniform Code of Military Justice (UCMJ). (AR 19, 151.) He was given the relatively light, non-judicial punishment of forfeiting $25 pay. (AR 152.)

Mr. Shepherd was then attached to Company C of the 2nd Battalion of the 39th Infantry Regiment of the 9th Infantry Division. (AR 138, 145.) He was stationed at Fire Support Base Dirk, renamed Fire Support Base Schroeder in March 1969 after the 2/39th Battalion's Commander, Lieutenant-Colonel Donald B. Schroeder, was killed. (Affidavit of John Shepherd dated November 8, 2011 (hereafter "J. Shepherd Aff.") ¶ 8.) Mr. Shepherd experienced combat almost daily, either heading out on search and destroy patrols or helping defend the base from attack from rockets and mortars. (AR 13; J. Shepherd Aff. ¶¶ 8, 11.) He constantly thought he "was going to expire from fright." (Affidavit of Rebecca Kraus dated November 10, 2011

(hereafter "Kraus Aff."), Ex. A, VA Stress Disorder Examination at 1.) He saw fellow soldiers, including close friends, killed or wounded during this period of intense fighting. (AR 13; Kraus Aff., Ex. A, VA Stress Disorder Examination at 1; J. Shepherd Aff. ¶ 9.) For satisfactorily performing in combat, Mr. Shepherd earned the Combat Infantryman Badge. (AR 147.)

Two experiences then fundamentally changed Mr. Shepherd. First, his Company went out on a mission around February 1969, traveling by helicopter. As they landed, the enemy opened fire. (J. Shepherd Aff. ¶ 11.) Mr. Shepherd jumped out, grabbing his M16 and a grenade, and he headed straight into the shooting. (*Id.*) He surged forward, adrenaline rushing through his body. (*Id.*) He ran into the bunker, threw a grenade, and leapt back out. (*Id.*) While in midair, he felt the concussive force of the explosion behind him. (*Id.*) Regaining his footing, Mr. Shepherd saw that his grenade had killed all the enemy soldiers except one, who emerged covered in blood. (*Id.*) As Mr. Shepherd aimed his gun at this last enemy, someone yelled not to shoot. (*Id.*) Mr. Shepherd put down his weapon, and other members of his unit rushed forward to take the enemy captive. (*Id.*) Afterward, the unit dug through the top of the bunker, and Mr. Shepherd saw the mangled bodies of the people he had killed. (J. Shepherd Aff. ¶ 11; Kraus Aff., Ex. A, VA Stress Disorder Examination at 1.) He remembers thinking afterward about his mother, and then about how the men he killed had mothers, too. (J. Shepherd Aff. ¶ 12.) For Mr. Shepherd's heroic actions on this day—risking his own life and saving the lives of his fellow soldiers—the Army awarded him a Bronze Star with Valor Device. (AR 119; J. Shepherd Aff. ¶ 13.)

Second, shortly after the fight at the bunker, Mr. Shepherd and his unit were on a sweep. (J. Shepherd Aff. ¶ 15.) As he was wading through the jungle, directly behind his Commanding Officer—the same lieutenant who had nominated him for the Bronze Star—the officer reached back to help Mr. Shepherd climb the slick side of a canal. (*Id*; AR 13.) At that moment, with

their hands clasped, the officer was hit in the chest by five rounds from a sniper. (*Id.*) Mr. Shepherd saw the bullets tear through his body. (*Id.*) The lieutenant collapsed into Mr. Shepherd's arms. (*Id.*) People around them started shouting for a medic, but Mr. Shepherd knew it was no use. (J. Shepherd Aff. ¶ 15.) He recalls, "I saw his spirit leave his body." (*Id.*)

The experience of these two harrowing events debilitated Mr. Shepherd. They mark the beginning of his intense fear and anxiety, of nightmares and flashbacks. (AR 13; J. Shepherd Aff. ¶¶ 15-17.) He began acting differently. An officer found him wandering around the base in a confused state; he had trouble getting along with the newly-assigned Commanding Officer; and then he refused that officer's order to secure his gear and head into the field. (AR 145; J. Shepherd Aff. ¶¶ 15-17.) He was mentally incapacitated—unable to experience combat again. (AR 13.)

In 1969, when Mr. Shepherd suffered his combat wounds, medicine had not yet defined and classified PTSD as a mental health disorder. Indeed, PTSD was not included in the Diagnostic and Statistical Manual of Mental Disorders ("DSM") until 1980. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders § 309.81, at 236-38 (3d ed. 1980). In 1969, the Army did not understand Mr. Shepherd's behavior or attempt to assist him. Col. Radcliffe, Mr. Shepherd's Commanding Officer at Ft. Gordon, remembers that he himself "was not trained to recognize PTSD and to appreciate the debilitating effect it could have on a soldier." (Radcliffe Aff. ¶ 8.) Back then, he "would much more likely associate refusal to go to the field with cowardice than to a mental health situation." (*Id.*)

The Army charged Mr. Shepherd with violating Article 90 of the UCMJ. (AR 145.) There was no time to convene a regular court-martial, because Mr. Shepherd's Company was about to be withdrawn from Vietnam. (AR 87-88.) Mr. Shepherd waived his right to a regular

court-martial and appeared instead before a special court-martial. (*Id.*) Neither Mr. Shepherd nor his legal counsel nor the members of the court-martial understood his mental state or its effects on his behaviors. (J. Shepherd Aff. ¶ 18-19.) The special court-martial found him guilty and sentenced him to six months hard labor and forfeiture of pay. (AR 145-46.)

However, the court-martial suspended the sentence, and Mr. Shepherd rejoined his Company. (AR 146.) The Army provided him with no psychiatric counseling and made no attempt to heal his psychological wounds. (AR 106; *see* J. Shepherd Aff. ¶¶ 16-20) Instead, his Commanding Officer again ordered him to head into the field. (AR 96.) And again, Mr. Shepherd's combat wounds—his severe, undiagnosed PTSD—prevented him from doing so. (AR 13, 96.) Only then, when Mr. Shepherd was clearly no longer able to fight, did the Army begin administrative procedures to discharge him. (AR 5, 144.) On August 4, 1969, Mr. Shepherd was given a discharge under Other Than Honorable conditions. (AR 141.)

II. Mr. Shepherd Receives a Discharge Upgrade But Is Denied Benefits

Mr. Shepherd returned from Vietnam a different man. (Affidavit of Stephen Shepherd dated November 9, 2011 (hereafter "S. Shepherd Aff.") ¶¶ 2-3.) He could no longer focus on the technical electronic work that he used to find so interesting. (AR 89.) He sometimes "freaked out" and "lost complete control." (AR 90, 101.) He had trouble maintaining relationships with his family and friends. (Kraus Aff., Ex. A, VA Stress Disorder Examination at 2; S. Shepherd Aff. ¶ 10.) Even the sound of a pop-gun made him dive to the ground for cover. (J. Shepherd Aff. ¶ 28.) On his birthday, which is the Fourth of July, when "he should enjoy himself and feel connected to his country, he feels neither." (Kraus Aff., Ex. A, VA Stress Disorder Examination at 2; J. Shepherd Aff. ¶ 32.) The fireworks trigger flashbacks to Vietnam. (*Id.*) Mr. Shepherd sought psychiatric help (AR 91, 101), but a PTSD diagnosis did not exist at that time. (AR 13;

Affidavit of Amy Monteiro Radivoy dated November 1, 2011 (hereafter "Radivoy Aff.") ¶ 7.)

In 1972, Mr. Shepherd applied to the Army Discharge Review Board ("ADRB") for a discharge upgrade. (AR 80-110.) At his August 10 hearing, he discussed the effects the war had on him and his confusion during the court-martial process that led to his discharge. (*Id.*) He stated that he didn't "think that [he] was aware that [he] was waiving [his] rights." (AR 97.) Like many people at the time, he expressed doubt about the goals of the Vietnam War and questioned his role in it. (AR 96.) He tried to explain that his "Commanding Officer . . . was killed in an operation" and that the new Commanding Officer, who called him "unfit to serve" in his discharge report, "didn't know [him] well enough to make that statement." (AR 100, 107.) Nonetheless, on September 5, 1972, the ADRB denied his application. (AR 80.)

President Gerald Ford then extended clemency to soldiers who, for certain reasons, had received less than honorable discharges. Pursuant to the September 16, 1974 Proclamation, Mr. Shepherd received a Clemency Discharge. (AR 21, 74-76.)

In March 1977, the Department of Defense ("DOD"), under orders from President Jimmy Carter, established the Special Discharge Review Program ("SDRP") to provide a more stream-lined discharge upgrade process for certain people with Vietnam-era, less than honorable discharges. On June 1, 1977, the SDRP granted Mr. Shepherd a discharge upgrade to General (Under Honorable Conditions). (AR 70-78.) With this upgraded discharge status, Mr. Shepherd was eligible for Veterans Administration benefits. (AR 68-69.) However, in October 1977, Congress passed a law requiring each service to affirm SDRP discharge upgrades in order for those veterans to receive compensation benefits. P.L. 95-126. In 1978, the ADRB declined to affirm Mr. Shepherd's discharge. (AR 43-44.) The Board noted that Mr. Shepherd "received 2 SPCMs [Special Court Martials] during his 8 months in RVN [Republic of Vietnam]." (AR 53.)

It did not consider evidence of Mr. Shepherd's PTSD. *(Id.)*

III. Mr. Shepherd Is Diagnosed with PTSD Caused by His Service in Vietnam

Since his return, Mr. Shepherd has struggled to cope with the psychological damage he suffered in Vietnam. (AR 13; Kraus Aff., Ex. A, VA Stress Disorder Examination; J. Shepherd Aff. ¶¶ 29-33; S. Shepherd Aff. ¶¶ 5-8.) He felt totally alone and deeply ashamed of his discharge. He was estranged not only from his friends and family (J. Shepherd Aff. ¶ 30), but even from other veterans. He was occasionally invited to participate in veterans parades but always refused; he felt he was not welcome because of the shame of his discharge. (*Id.* ¶ 32.) Mr. Shepherd had difficulty holding down a job, and he battled with alcohol and substance abuse. (*Id.* ¶ 30; S. Shepherd Aff. ¶¶ 3, 11; Kraus Aff., Ex. A, VA Stress Disorder Examination; *id.*, Ex. B, West Haven Medical Records Excerpt at 2-10; *id.*, Ex. C, Perry Point Medical Records Excerpt at 3.) He experienced nightmares and flashbacks. (J. Shepherd Aff. ¶ 30; S. Shepherd Aff. ¶ 8; Kraus Aff., Ex. A, VA Stress Disorder Examination; *id.*, Ex. C, Perry Point Medical Records Excerpt at 1-2.) He sometimes considered taking his own life. (J. Shepherd Aff. ¶ 30; S. Shepherd Aff. ¶ 5; Kraus Aff., Ex. B, West Haven Medical Records Excerpt, 2-7.)

After the terrorist attacks of September 11, 2001, Mr. Shepherd's mental state worsened. (S. Shepherd Aff. ¶ 8.) While he was driving his truck, he would sometimes imagine that he saw his friends who died in Vietnam lying in the road. (Kraus Aff., Ex. A, VA Stress Disorder Examination at 2-3; J. Shepherd Aff. ¶ 33.) Mr. Shepherd had to stop driving trucks because he constantly "th[ought]of Vietnam and . . . [could] not pay attention to driving, as well as he th[ought] he need[ed] to be safe." (Kraus Aff., Ex. A, VA Stress Disorder Examination at 2-3.)

In 2003, he sought help at the New Haven Veterans Center and a licensed mental health counselor, Amy Monteiro Radivoy, diagnosed him with chronic, severe, and unremitting PTSD.

(AR 13.) She drew a direct connection from Mr. Shepherd's experiences in Vietnam to his PTSD; the psychological stress of warfare "immobilized him," leading to his refusals to obey his commander's orders to head into combat. (*Id.*) Prior to this time, Mr. Shepherd had never heard of PTSD. (J. Shepherd Aff. ¶ 35.)

After learning that he appeared to have PTSD, on August 20, 2003, Mr. Shepherd promptly applied to VA for service-connected healthcare, that is, treatment for injuries resulting from military service. (AR 36.) On July 22, 2004, Dr. Elbert Richardson, MD, administered a Stress Disorder Examination and diagnosed Mr. Shepherd with chronic PTSD. (AR 37; Kraus Aff., Ex. A, VA Stress Disorder Examination at 3.) VA reviewed Dr. Richardson's report, as well as Mr. Shepherd's treatment records from the New Haven Veterans Center and May 17, 2004 VA PTSD stressor questionnaire. On November 30, 2004, VA granted Mr. Shepherd's claim and approved his application for health care. (AR 36-39.) VA's letter stated that "[t]he evidence from the Vet Center shows an assessment of post-traumatic stress disorder [and] [t]he VA Stress Disorder Examination shows a confirmed diagnosis of post-traumatic stress disorder, *based on your combat-related stressors*." (AR 37 (emphasis added).)

IV. The Army Refuses To Credit Mr. Shepherd's Service, Sacrifice, and Diagnosis

With the newly-discovered understanding of his disability and its effects on his behavior, on May 25, 2005, Mr. Shepherd applied *pro se* to the ABCMR, requesting an upgrade of his discharge to General (Under Honorable Conditions). (AR 26-33.) On April 18, 2006, the ABCMR denied his application, holding that "there is no evidence provided which shows that it would be in the interest of justice to excuse the applicant's failure to timely file this application within the 3-year statute of limitations prescribed by the law." (AR 23.) The ABCMR overlooked evidence that Mr. Shepherd presented and omitted any analysis. (AR 19-23.)

On February 27, 2007, Mr. Shepherd, with the assistance of *pro bono* counsel, asked the ABCMR to reconsider its previous decision in light of new evidence he submitted, linking Mr. Shepherd's combat experiences and PTSD to his actions leading to unfavorable discharge. (AR 10-14.) The ABCMR denied the request for reconsideration, stating in its June 21, 2007 decision that the new evidence did not support a finding of error or injustice. (AR 1.) In reaching this conclusion, it misstated aspects of Mr. Shepherd's service, misunderstood his argument, failed to reconsider waiving the statute of limitations in the interest of justice, and did not review the merits of the first decision. (AR 1-7.) In the letter conveying its denial of his motion to reconsider, the ABCMR advised Mr. Shepherd that he had no further administrative remedies, and that his only recourse was to seek judicial review in this Court. (AR 1.)

On April 21, 2011, Mr. Shepherd timely filed a complaint in this Court alleging that his applications to the ABCMR were within the three-year statute of limitations; that, alternatively, the ABCMR's refusals to waive the statute of limitations were arbitrary, capricious, and an abuse of discretion; and that he had demonstrated the injustice of his discharge status.

ARGUMENT

Mr. Shepherd's Other than Honorable discharge is an injustice. It fails to reflect the honor and sacrifice of his service, the connection between his PTSD and discharge, and his forty years of suffering. The ABCMR erred in concluding his application was time-barred, and it acted arbitrarily and capriciously in denying him a discharge upgrade—on both his original *pro se* application and his request for reconsideration. Summary judgment for Mr. Shepherd is warranted.

I. Standard of Review

The ABCMR is empowered to "correct any military record" where "sufficient evidence"

establishes it is "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552; 32 C.F.R. § 581.3. When a person "discovers [an] error or injustice" in his record, he must apply to the ABCMR for a correction within three years of this discovery, or request that the ABCMR waive the three-year statute of limitations "in the interest of justice." 10 U.S.C. § 1552(b). The applicant must prove the error or injustice by "a preponderance of the evidence." 32 C.F.R. § 581.3(e)(2). If the ABCMR denies an application, the applicant may file for reconsideration within one year, and the ABCMR will review any new evidence submitted to determine whether it is new and whether it is sufficient to show material error or injustice. *Id.* § 581.3(g)(4). The ABCMR's denial of an application is "final." *Id.* § 581.3(g)(2)(i)(A).

The Administrative Procedure Act ("APA") provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. The court must examine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). After reviewing the "whole record," the reviewing court may set aside an agency's decision where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a); *see Blassingame v. Sec'y of the Navy*, 866 F.2d 556, 559 (2d Cir. 1989) (in discharge upgrade case, vacating district court order granting summary judgment to Navy as arbitrary and capricious). Agencies have an "obligation to publish a statement of reasons that will be sufficiently detailed to permit judicial review." *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975) (citations omitted). "[E]ven under the 'arbitrary, capricious' standard agency action will not be upheld where inadequacy of explanation frustrates review." *Id.*

Under the APA, a court may review the ABCMR's decision not to waive the statute of

limitations in the interest of justice. *See Boruski v. U.S. Gov't,* 493 F.2d 301, 304 (2d Cir. 1974) (reviewing Air Force BCMR decision not to waive three-year statute of limitations); *see also Evans v. Marsh*, 835 F.2d 609 (5th Cir. 1988); *Guerrero v. Stone*, 970 F.2d 626 (9th Cir. 1992); *Dickson v. Sec'y of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995).

As a remedy for an arbitrary and capricious denial, a court may set aside the final decision of the ABCMR and order that a veteran be given a discharge upgrade. 5 U.S.C. § 706(2)(a). As an alternative, the court may remand "for additional investigation or explanation" where (i) "the record before the agency does not support the agency action," (ii) "the agency has not considered all relevant factors," or (iii) "the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

Summary judgment is appropriate where "there is no genuine dispute as to any material fact" and where the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The "substantive law" applicable to the case is used to determine "which facts are material." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). "All of the evidence in the record," not just isolated facts, must be considered. *In re Dana Corp*., 574 F.3d 129, 152 (2d Cir. 2009).

II. The ABCMR's April 24, 2006 Decision Was Arbitrary and Capricious, and Mr. Shepherd's Application Should Be Granted on Grounds of Justice and Equity

Mr. Shepherd service, sacrifice, and decades of suffering from his undiagnosed war wounds merit correction of the injustice of his discharge status. Mr. Shepherd is now sixty-four years old, severely disabled, and unable to support himself. He has earned the VA disability benefits that his discharge status prevent him from receiving, so that in his final years he need not sleep in his truck.[1] If the ABCMR did deny his application on the merits, as the government

[1] If upgraded, Mr. Shepherd would be entitled to up to $2,673 per month. 38 C.F.R. § 321; Veterans Benefits . . .

contends (Govt. Br. at 13, 17), that decision was arbitrary and capricious. However, it appears that the ABCMR performed only a cursory review of the merits of Mr. Shepherd's application in order to make its determination not to waive the three-year statute of limitations in the interest of justice. The Board failed to recognize that Mr. Shepherd's application was timely filed within three years of discovering the injustice in his military record and, even if this were not the case, Mr. Shepherd merits a waiver in the interest of justice.

A. The Record Shows That Mr. Shepherd's Application Should Be Granted

Mr. Shepherd's application for a discharge upgrade to General (Under Honorable Conditions) should be granted because his discharge is unjust as it stands. 10 U.S.C. § 1552. The ABCMR's decisions to deny Mr. Shepherd's discharge upgrade were arbitrary, capricious, and an abuse of discretion because the Board failed to consider the injustice of Mr. Shepherd's discharge in light of his service-connected PTSD. First, had there been an understanding of PTSD in 1969 and had the Army's current policies and procedures relating to PTSD been in place, Mr. Shepherd would have received different treatment. Second, Mr. Shepherd has lived his adult life suffering from the trauma of combat and, with the clarity of diagnosis and proper care, has started moving forward at last. Therefore, in order to remove the injustice of Mr. Shepherd's discharge, this Court should grant Mr. Shepherd's application.

Initially, "[t]he requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result," *Public Citizen, Inc. v. FAA,* 988 F.2d 186, 197 (D.C. Cir. 1993), and the Board's 2006 decision utterly fails to do so. The Board completely ignores the evidence of Mr. Shepherd's PTSD and fails to make "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. at 43. The Board stated facts and conclusions but did not

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Administration Manual M21-1, Appx. B, Section IX, *available at* http://www.vba.va.gov/bln/21/Rates/comp01.htm.

connect them. It noted that Mr. Shepherd submitted "several character reference letters attesting to his being a good citizen, of his service to the community and his church, and of his being a trustworthy and honorable man" as well as "a copy of his Department of Veterans Affairs (VA) rating decision which show his entitlement for medical care for post-traumatic stress disorder." (AR 22.) The decision then does not go on to evaluate the letters or discuss the diagnosis. Without explaining the basis of its decision, the Board concludes that "the evidence presented does not demonstrate the existence of a probable error or injustice." (AR 23.)

The administrative record clearly demonstrates that Mr. Shepherd has PTSD and that it was caused by his combat experiences. (AR 13, 36-39.) Both a VA licensed mental health counselor and Dr. Richardson of the VA diagnosed him with PTSD. (*Id.*) There is no contrary evidence in the record, nor could there be. These diagnoses causally linked Mr. Shepherd's combat experiences in Vietnam with his mental health issues. (*Id.*) Even prior to any diagnosis, the record shows that Mr. Shepherd was changed by the war and exhibited signs of trauma while still in Vietnam. Mr. Shepherd went from "polite," "cooperative," and "respectful," before the war (AR 116-18) to being a person who "lost complete control" and "freaked out." (AR 90, 101.) When he completed training at Fort Gordon, his Commanding Officer called him an "outstanding soldier" (AR 115); after experiencing intense combat and seeing his friends killed, his new Commanding Officer described him as "unfit to serve." (AR 107.)

Additionally, evidence in the record suggests that Mr. Shepherd's discharge was based on his two refusals to secure his gear and head into the field *after* he had braved intense combat and developed PTSD. (AR 20, 31.) He was discharged "for unfitness due to an established pattern of shirking" after "disobeying lawful orders on two occasions to secure his gear and report to the fire support base." (AR 5.) These two refusals are the "pattern."

Moreover, having a court-martial conviction was not incompatible with honorable service.[2] A month after Mr. Shepherd's first court-martial, his Commanding Officer called him an "outstanding soldier" (AR 115), and soon after his Article 15, he received the Combat Infantryman's Badge. The sentences of confinement in each of Mr. Shepherd's prior court-martials were suspended (AR 106), reflecting that the Army did not consider them serious. The May 1969 special court-martial's statement that "no previous convictions" were considered in making its determination (AR 146) further establishes that the two previous violations were minor. Only when Mr. Shepherd twice refused to go into battle was he deemed unfit to serve; only then did the Army begin discharge procedures.

In 2003, a licensed mental health counselor at the New Haven Veterans Center concluded that Mr. Shepherd's refusals were symptomatic of his combat trauma—the psychological stress of warfare had "immobilized him." (AR 13.) The Army would not have sent a soldier who suffered a physical injury back into battle. But because Mr. Shepherd's wound was psychological—not only invisible to the naked eye but an unknown illness at the time—he was considered unfit and discharged with an unfavorable status.

Moreover, Mr. Shepherd's discharge is unjust because had the Army's current policies been in place in 1969, the Army would have recognized his PTSD and discharged him differently. In the analogous context of the Discharge Review Board ("DRB"),[3] regulations

[2] Five-star Fleet Admiral Chester Nimitz and Civil War General Winfield Scott were both convicted by court-martial. *See* E.B. Potter, Nimitz 61 (1988); Timothy D. Johnson, Winfield Scott: The Quest for Military Glory 17 (1998). Additionally, Sergeant Alvin York, the most decorated American veteran of World War I, initially doubted the war and wrote on his draft registration form, "Don't Want to Fight." David D. Lee, Sergeant York: An American Hero 17 (2002). York had a very difficult time adjusting to his training at Fort Gordon and his Commanding Officer granted him a ten-day leave from his training to "go home and collect his thoughts." *Id.* at 18-19.

[3] Both the DRB and the BCMR have the authority to change a service member's discharge. 10 U.S.C. §§ 1552(a)(1), 1553(b). The BCMR has the authority to "correct any military record," including an unjust discharge, while the DRB may only correct a "discharge or dismissal." *Id.* A service member must apply to the DRB "within 15 years after the date of the discharge or dismissal," while the BCMR has a three-year statue of limitations, which may be waived "in the interest of justice." 10 U.S.C. § 1552(b); *id.* § 1553(a).

provide that equitable grounds for a discharge upgrade exist where "the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable," these policies "represent a substantial enhancement of rights," and "[t]here is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration." 32 C.F.R. § 70.9(c).

The Army now treats soldiers with PTSD substantially better than in 1969. Prior to administrative separation, if (i) a soldier is receiving a less than Honorable discharge and (ii) has a PTSD diagnosis, or "reasonably alleges the influence of PTSD" based on recent combat experience, DOD requires that he "receive a medical examination to assess whether the effects of post-traumatic stress disorder . . . constitute matters in extenuation that relate to the basis for administrative separation . . . ." (Kraus Aff., Ex. D, DOD Instruction 1332.14 at 2-3.) Mr. Shepherd exhibited symptoms of PTSD when he refused to go into the field, including "[i]ntense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event" and "[e]fforts to avoid activities, places, or people that arouse recollections of the trauma." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders § 309.81 at 463-68 (4th ed. 2000). However, the DSM in 1969 did not identify PTSD as a diagnosis. *Cf.* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual (2d ed. 1968). Thus, the Army was not able to recognize those symptoms. Under current policies, Mr. Shepherd would have been able to "reasonably allege[] the influence of PTSD" (Kraus Aff., Ex. D, DODI 1332.14 at 3), and been entitled to a medical examination specifically evaluating whether PTSD related to his discharge.

Laudably, "Army leadership is taking aggressive, far-reaching steps to ensure an array of

behavioral health services are available to Soldiers and their Families to help those dealing with PTSD and other psychological effects of war." (Kraus Aff., Ex. E, U.S. Army, Psychological Health Care Fact Sheet (2010) at 1.) For example, under the 250-page DOD and VA 2010 Clinical Practice Guideline for the Management of Post-Traumatic Stress, Mr. Shepherd would have received PTSD screenings by medical professionals before, during, and after service. (Kraus Aff., Ex. F.) These would have uncovered in him the symptoms of chronic PTSD: persistently re-experiencing the traumatic event; feeling estranged from others; difficulty concentrating; outbursts of anger; and a sense of foreshortened future. (*Id.* at 2-3; *see also* Kraus Aff., Ex. G, Gen. Richard A. Cody, Vice Chief of Staff of the U.S. Army, Memorandum, Post Deployment Health Reassessment (June 18, 2007).)

The ADRB has also improved its procedures on PTSD since Mr. Shepherd applied for a discharge upgrade in 1972. At that time, there was no provision that the ADRB "include a member who is a physician, clinical psychologist, or psychiatrist" where an applicant has been diagnosed "as experiencing post-traumatic stress disorder . . . as a consequence of [] deployment" to a combat zone. 10 U.S.C.A. § 1553 (West). A greater understanding now of PTSD and its effects on behavior counsels in favor of reevaluating Mr. Shepherd's actions and the Army's discharge, as a matter of justice.

Since Vietnam, Mr. Shepherd's life has been devastated by "chronic and severe" PTSD. (AR 35.) This illness went undiagnosed and untreated until 2003, and Mr. Shepherd did not receive VA healthcare benefits for his service-connected PTSD until 2004. (AR 11, 13, 36-39.) Without this support, Mr. Shepherd has been fighting his battle alone. Had Mr. Shepherd died on the mission that simultaneously earned him a Bronze Star and left him 100% disabled, the Army would have buried him with honor and pride in Arlington National Cemetery. 38 U.S.C. § 2402.

Instead he survived, and returned home to life as an outcast.

The ABCMR's decision was arbitrary, capricious, and an abuse of discretion because it failed to consider that under current policies, Mr. Shepherd would not have received an Other than Honorable discharge, and that Mr. Shepherd has been suffering from his service injury for decades. As a matter of justice, therefore, Mr. Shepherd's application should be granted.

B. The Court May Consider Evidence Outside the Record That Confirms Mr. Shepherd's Application Should Be Granted

In the narrow circumstances of this case, the Court may consider evidence outside the formal record, specifically Mr. Shepherd's medical records, affidavits of a VA mental health counselor, of Mr. Shepherd, of Mr. Shepherd's brother, and of his Commanding Officer at Fort Gordon, and an article by the Associated Press.

Review under the APA is generally restricted to the administrative record—the "record rule"—but courts have recognized that, in limited cases, it is appropriate to look beyond the record compiled by the agency. "Courts cannot intelligently perform their reviewing function if an administrative record is inadequate, incomplete or [] inconsistent." *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1052 (2d Cir. 1985); *see also National Audubon Society v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997) (stating that the court will "consider additional information obtained from the parties through affidavits . . . when the administrative record is so inadequate as to prevent the reviewing court from effectively determining whether the agency considered all [] consequences of its proposed action"). In order for the inquiry to be "plenary, careful and searching," *Blassingame*, 866 F.2d at 559, reviewing courts will look beyond the administrative record. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

One indication that the record here is incomplete is that it omits part of Shepherd's original application to the ABCMR. As supporting evidence, Mr. Shepherd submitted "character

references and newspaper articles to help in making [a] decision." (AR 28.) Yet, no newspaper clippings are included in the administrative record filed with the Court. (*See* AR, ECF No. 16.) While the decision briefly acknowledges the character references, the ABCMR made no mention of the newspaper articles in its decision (AR 22) and failed to provide them to the Court in the certified administrative record. This incomplete record hampers the Court's ability to assess the agency's decisions and militates in favor of examining additional evidence to fill in the gaps.

Further, the record is inadequate because the ABCMR should have sought these medical records and supplementary affidavits from VA and Mr. Shepherd to adjudicate its first decision, as Mr. Shepherd was *pro se*. The court has a special obligation to ensure due process for *pro se* applicants, in part by helping them appropriately develop the record. *See Hankerson v. Harris, 636* F.2d 893, 895 (2d Cir. 1980) (finding that administrative law judge "did not adequately protect the rights of [a] *pro se* litigant by ensuring that all of the relevant facts were sufficiently developed and considered"). Remand is appropriate when an agency fails adequately to help develop the record, *id.* at 897, and this failure also counsels in favor of considering on review records the ABCMR should have sought in the first place.

1. The Court May Consider Mr. Shepherd's VA Medical Records

This Court may consider Mr. Shepherd's VA medical records for three reasons: (i) this case is analogous to military disability-retirement appeals, in which new evidence is admissible upon judicial review; (ii) VA medical records are themselves agency records, of which a court may take judicial notice if they are not included in the formal record; and (iii) the ABCMR should have sought to include them in the record.

First, the Court of Federal Claims, in which citizens may sue the government for monetary redress, has traditionally permitted a reviewing court to consider new evidence in

military disability-retirement cases. *Black v. United States*, 24 Cl. Ct. 465 (1991). "The character of the administrative process in military disability-retirement cases . . . strongly suggests the propriety of our established practice of accepting *de novo* evidence in this area." *Brown v. United States*, 184 Ct. Cl. 501, 511 (1968).[4]

Such cases are comparable to Mr. Shepherd's. First, the ABCMR did not hold an adversarial hearing, leaving the record "a miscellaneous collection of materials presented by the claimant and, to a much less extent, by the service." *Brown*, 184 Ct. Cl. at 512. Moreover, the ABCMR's determination does not reflect the "medical testing and evaluation" required to establish a disability. *Black v. United States*, 24 Cl. Ct. at 469. Because an adversarial process did not develop the record, particularly on Mr. Shepherd's original *pro se* application, and because Mr. Shepherd's claim is inherently medical, this Court should consider Mr. Shepherd's VA records. These records stand in for the "medical testing and evaluation," *id.*, that is critical to the proper adjudication of such medically-based cases. Here, Mr. Shepherd's VA records clearly evince the effects of PTSD: inability to maintain close relationships long-term; struggles with alcoholism and substance abuse; difficulty holding down a job; and occasional thoughts of suicide. (*See generally* Kraus Aff. Ex. A, VA Stress Disorder Examination; *id.*, Ex. B, West Haven Medical Records Excerpt; *id.*, Ex. C, Perry Point Medical Records Excerpt.) The VA records also demonstrate that Mr. Shepherd recognized the abnormality of his mental condition and repeatedly sought help from others. (*Id.*)

Second, on judicial review of an agency decision, a court may take "judicial notice of the agency's own records." *Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010). In *Dent*, the Ninth

[4] While a more recent Court of Federal Claims case, *Walls v. United States*, 582 F.3d 1358 (Fed. Cir. 2009), has cast doubt on the holding of *Brown*, *Brown* was not overruled. Moreover, the reasoning underlying the case—that the long timeline of developing and diagnosing an illness warrants admitting new evidence—is equally applicable in this case

Circuit, upon review of a deportation proceeding, considered naturalization records that had not been made a part of the formal administrative record before the Board of Immigration Appeals. The court reasoned that it was permissible to examine evidence not in the administrative record because "[t]he law does not [] interpret this rule absurdly, so that injustice may be done." *Id.* Importantly, the Ninth Circuit held that it could consider records of one federal agency, the Department of Homeland Security (which possessed the naturalization record), on review of the administrative decision of a different federal agency, the Department of Justice (whose Board of Immigration Appeals affirmed the removal order). *Id.*

Just as the Ninth Circuit did in *Dent*, this Court may consider records of one agency, the Department of Veterans Affairs, on review of the administrative decision of a different federal agency, the Department of the Army. Here, the VA hospitals and ABCMR are run by separate federal agencies, yet the connection between them is analogous to DHS's U.S. Citizenship and Immigration Services and DOJ's Board of Immigration Appeals. The ABCMR may seek records from VA that would assist in adjudicating a veteran's claim. 32 C.F.R. § 581.3(c)(2)(iii). That ABCMR regulations insist that "original records of the soldier or former soldier obtained from the Department of Veterans Affairs" be returned to VA, 32 C.F.R. § 581.3(b)(5), demonstrates the shared records policy and open communication between the two departments. The Court may therefore take judicial notice of Mr. Shepherd's VA medical records.

Third, the Board should have sought to include Mr. Shepherd's post-service medical records into the administrative record, in order to verify his argument that his PTSD diagnosis and decades of suffering warrant an upgrade. The ABCMR had the ability to request these records—either from Mr. Shepherd or VA—but it neglected to do so. "The director of an Army records holding agency will . . . [r]equest additional information from the applicant, if needed, to

assist the ABCMR in conducting a full and fair review of the matter" and "[r]eturn original records of the soldier or former soldier obtained from the Department of Veterans Affairs." 32 C.F.R. § 581.3(b)(5). The ABCMR can seek any records that would help in its decision-making, and VA records are specifically cited in this context as useful. Further, the Court of Federal Claims has held that a Board should "construe 'service records' broadly enough to include these [post-service] medical reports." *Hoppock v. United States*, 176 Ct.Cl. 1147, 1164 (Ct. Cl. 1966) (holding that the DRB abused its discretion by not considering post-service medical records as "service records"). In Mr. Shepherd's case, the Board should have sought his post-military health records to evaluate the injustice of his discharge, and the Court may consider them now.

2. The Court May Consider the Affidavit of Amy Monteiro Radivoy, LMHC

For the same reasons, this Court may consider the affidavit of Amy Monteiro Radivoy, who first diagnosed Mr. Shepherd with PTSD and provided counseling to him since. (AR 13; Radivoy Aff. ¶ 2.) Under the Court of Federal Claims disability-retirement precedent, Ms. Monteiro, who has the longest-standing clinical relationship with Mr. Shepherd, provides valuable medical testimony establishing his disability. Second, Ms. Radivoy is a VA employee (Radivoy Aff. ¶ 1) and prepared her affidavit in the course of her employment at the New Haven Veterans Center. (*Id.*) Accordingly, her testimony, memorialized in this affidavit, is an agency record, of which the Court may take judicial notice, *Dent*, 627 F.3d at 371, and which the ABCMR should have sought. *Hoppock*, 176 Ct.Cl. at 1164.

3. The Court May Consider the Affidavit of John Shepherd, Jr.

The Court should also accept the affidavit of Mr. Shepherd himself. In one sense, it acts as a medical record, thereby falling under the precedent of the Court of Federal Claims for disability-retirement cases. Mr. Shepherd's account of his experiences and symptoms provide

critical context for his diagnosis, and the affidavit assists the Court in evaluating this medically-based case. More importantly, the affidavit contains information that the ABCMR could have, and should have, sought. 32 C.F.R. § 581.3(c)(2)(iii) (permitting the ABCMR to request additional evidence from an applicant and to hold a hearing). Because Mr. Shepherd was *pro se*, the ABCMR had an additional duty to ensure that the record was complete, as discussed above. Had the ABCMR not neglected its responsibilities, it would have elicited the evidence contained in this affidavit. Without this testimony, the administrative record is "inadequate [and] incomplete." *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1052 (2d Cir. 1985). Therefore, this Court should consider it on review.

4. The Court May Consider the Affidavits of Col. Robert Radcliffe and Stephen Shepherd

For the same reasons, the Court should consider the Affidavit of Colonel Robert Radcliffe (Ret.), who was Mr. Shepherd's commanding officer during his training at Fort Gordon. Col. Radcliffe has extensive military experience and can offer another account of Mr. Shepherd's service—one that undermines the negative accounts of Mr. Shepherd's superior officers at discharge and thereby calls into question the ABCMR's reliance on those statements. Col. Radcliffe is a graduate of the United States Military Academy at West Point. (Radcliffe Aff. ¶ 2.) He served twenty-six years in the Army, earning numerous awards, among them a Bronze Star with Valor Device. (*Id.*) From January 1967 to January 1968, he served in Vietnam, where he experienced heavy combat. (*Id.* ¶ 3.) From 1968 to 1969, he served as the Company Commander of an Advanced Individual Training Infantry Company at Fort Gordon, Georgia, where he met Mr. Shepherd. (AR 115; Radcliffe Aff. ¶ 4.)

Informed by his extensive experience in the military, Colonel Radcliffe explains that if "I were sitting in judgment in this matter I would assign greater credence in [Mr. Shepherd's]

successful service and his demonstrated heroism, than to the weakness of his subsequent refusal to return to the field." (Radcliffe Aff. ¶ 11.) Col. Radcliffe explains further that "I would accept that his refusal to return to the field resulted from mental stress rather than cowardice." (*Id.*) Col. Radcliffe highlights the "singular honor" of Mr. Shepherd's Bronze Star with Valor Device. (*Id.* ¶ 6.) "Having received a Bronze Star for Valor myself, I understand the heroism that must be displayed to earn this award." (*Id.*) Col. Radcliffe also details the conditions of the war:

> Combat in Vietnam at the time when PVT Shepherd served was of extremely high intensity. It was not unusual to see two hundred soldiers killed in action in a week. It was a war where individual replacements entered combat units to maintain their field strength. This was particularly demanding, as the replacement knows no one in the unit, and it was often weeks or months before a strong cohesive bond with the other soldiers could be formed. This situation greatly added to the stress a combat infantryman would experience and is certainly the situation PVT Shepherd encountered when he arrived in country.

(*Id.* ¶ 10.) This affidavit contextualizes the unique challenges soldiers faced in combat in Vietnam. *Cf.* Govt. Br. at 4 (stating that Mr. Shepherd served "less than two full months" in combat). Mr. Shepherd himself remarked that "there were an awful lot of things that went on in Vietnam that aren't in these files." (AR 101.) The ABMCR made no effort to fill in these gaps in the record, despite its obligation to do so.

The Court may also consider the affidavit of Mr. Shepherd's brother, Stephen. He fills in the twenty-five-year gap in the administrative record—between 1978 and 2003—and provides important evidence about how his brother was changed by the war, how he has struggled since then, and the small triumphs he has made since his diagnosis and treatment. Mr. Stephen Shepherd attests, "when my brother stepped on the plane at JFK that afternoon [to depart for Vietnam], it was the last time I ever saw him." (S. Shepherd Aff. ¶ 2.) "[T]he war ravaged him. It snuffed out all the best parts and left the family with a man who had seen so much, maybe even more than someone is meant to see." (*Id.*)

In determining whether the ABCMR was correct in refusing to revise the discharge status of this severely disabled combat veteran, this Court should consider the affidavits of Col. Radcliffe and Mr. Stephen Shepherd, and it may properly rely on them to address deficiencies in the record that render it "incomplete" and "inadequate." *Sierra Club*, 772 F.2d at 1052.

5. The Court May Consider the Associated Press Article

The Court should also consider the Associated Press article about Mr. Shepherd in April 2011. (Kraus Aff., Ex. H.) Courts may look outside the formal administrative record to evidence that "is new to the case, not merely to the court." *De Cicco v. United States*, 677 F.2d 66 (Ct. Cl. 1982). Here, the Associated Press wrote the article after both decisions of the ABCMR. The article provides useful information for evaluating Mr. Shepherd's claim. For instance, Dr. Thomas Berger, executive director of Vietnam Veterans of America's Veterans Health Council, states, "During the Vietnam era, people did not understand when service members like John Shepherd developed PTSD." (Kraus Aff., Ex. H, AP Article.) The article also notes that the Connecticut Bar Association is beginning a program to train lawyers and other advocates to assist veterans in applying for discharge upgrades—a process it described as "complicated and time-consuming." (*Id.*) Both facts confirm the injustice of the ABCMR's refusal to upgrade Mr. Shepherd's discharge status, based on an outdated understanding of PTSD, and the inequity of its 2006 decision, founded on a *pro se* application that was not adequately developed or reviewed.

6. The Court May Take Judicial Notice of Important Background Facts

Courts have also recognized a limited exception to the record rule where taking judicial notice of matters outside of the administrative record is necessary to promote expediency or to avoid injustice. *Latifi v. Gonzales*, 430 F.3d 103, 106 n.1 (2d Cir. 2005) (per curiam) (taking judicial notice of changed country conditions based on evidence outside administrative record

and remanding for Board of Immigration Appeals to consider asylum application); *see also Dent v. Holder*, 627 F.3d at 371. Here, the Court may acknowledge important background facts, regarding the Vietnam War and PTSD, that appear nowhere in the record.

In regards to the war, the Court may acknowledge that the environment was terrifying and chaotic (*see* J. Shepherd Aff. ¶¶ 8-15); that the war was politically controversial (*see* S. Shepherd Aff. ¶ 4); and that many veterans suffer PTSD after experiencing intense combat (*see* Radcliffe Aff. ¶¶ 8, 10). In relation to PTSD, the Court may take judicial notice that it was not a diagnosis at the time of Mr. Shepherd's discharge (*see* Radivoy Aff. ¶ 7); that combat commonly causes of PTSD (*see* Radivoy Aff. ¶¶ 5-8; Radcliffe Aff. ¶¶ 10-11; Kraus Aff., Ex. H, AP Article); and that the injury causes behavioral changes (*see* Radivoy Aff. ¶¶ 6-8).

The Court may accept these general facts from the affidavits of Ms. Monteiro Radivoy, Mr. Stephen Shepherd, and Col. Radcliffe because it is more expedient to do so than to remand to the ABCMR so that they may be formally added to the record. Moreover, ignoring these facts would be an injustice, since they provide necessary background for evaluating Mr. Shepherd's case. Accordingly, this Court should take judicial notice of these facts.

In sum, for this Court to conduct a review of the ABCMR's decisions that is sufficiently "plenary, careful and searching," *Blassingame*, 866 F.2d at 559, it should consider Mr. Shepherd's VA medical records, the affidavits of Ms. Monteiro Radivoy, Col. Radcliffe, Mr. Shepherd, Mr. Stephen Shepherd, and the Associate Press article. The evidence therein documents the conditions of Mr. Shepherd's service, the nexus between his combat and his PTSD, and his lifelong battle with PTSD, providing a complete basis on which this Court may evaluate the ABCMR's decisions. The evidence underscores the injustice of Mr. Shepherd's current discharge status, which fails to acknowledge his courage and sacrifice in fighting for his

country, the injuries he incurred, and the decades of lonely suffering he has endured.

III. In the Alternative, the ABCMR's April 24, 2006 Decision Was Arbitrary and Capricious, and the Case Should be Remanded

Mr. Shepherd respectfully requests that this Court order his discharge upgraded, but in the alternative, asks that the Court remand his case to the ABCMR for further proceedings, including consideration in the first instance of the additional evidence set forth above. The Board made an error of law in deeming Mr. Shepherd's application time-barred or, alternatively, should have waived the statute of limitations in the interest of justice.

A. The ABCMR Erred in Concluding That Mr. Shepherd's Claim Was Not Within the Statute of Limitations

The ABCMR explicitly held that Mr. Shepherd's 2005 application was time barred. (AR 23 ("[T]he applicant did not file within the three-year statute of limitations"); *cf.* Govt. Br. at 13, 17-18 (contending ABCMR did not rule on statute of limitations grounds).) This was error. The ABCMR overlooked many of the foregoing facts about Mr. Shepherd's meritorious claims because, after mistakenly determining that Mr. Shepherd's application was outside the statute of limitations, it conducted only a "cursory review" of the merits, *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992) (holding that, to determine whether to waive three-year statute of limitations, ABCMR must undertake "cursory review" of merits).

A claim must be filed with the BCMR "within three years after [the claimant] discovers the error or injustice." 10 U.S.C. § 1552(b) . Mr. Shepherd's 2005 application was timely because it was based on his service-connected PTSD, which he discovered less than three years before filing his application. *See Mullen v. United States,* 19 Cl. Ct. 550, 551 (Cl. Ct. 1990) ("*Mullen II*"). Ms. Monteiro first advised Shepherd in 2003 that he may have PTSD (AR 31), and on July 22, 2004, VA's Dr. Elbert Richardson conclusively diagnosed Mr. Shepherd as

having service-connected PTSD. (AR 36-39; Kraus Aff., Ex. A, VA Stress Disorder Examination.) Mr. Shepherd applied for a discharge upgrade on June 22, 2005. Whether Shepherd's discovery dates to Ms. Monteiro's advice or the VA diagnosis is inapposite; both occurred within three years of his application. (AR 31, 36-39; J. Shepherd Aff. ¶¶ 34-39,42.) Accordingly, his 2005 application to the ABCMR was timely. *See Mullen II,* 19 Cl. Ct. at 551; *Allen*, 799 F. Supp. at 158. The ABCMR committed legal error in holding otherwise, and if it does not direct that his discharge status be upgraded outright, this Court should vacate and remand to the ABCMR to consider fully the merits of his application.

In *Mullen II*, Chief Judge Smith of the Federal Claims Court held the three-year statute of limitations began running when the plaintiff was diagnosed with PTSD, not at the time of his discharge. 19 Cl. Ct. at 551. The court found that "[a]lthough Mr. Mullen experienced depression and related psychopathological symptoms throughout the 1970s, it was not until 1981 that he was told by a [VA] physician that he suffered from PTSD." *Id.* Therefore, "Mr. Mullen's April 13, 1982 application fell within the three-year limit." *Id.* Like Mr. Mullen, Mr. Shepherd did not discover the injustice of his discharge until he was told he had service-connected PTSD around 2003 or received a VA diagnosis in 2004.

In *McFarlane v. Sec'y of Air Force*, 867 F. Supp. 405 (E.D. Va. 1994), the court ruled that a subjective rather than objective standard should be used to determine the discovery of error. "The plain language of this statutory provision indicates that the limitations period begins to run upon the applicant's *actual* discovery of the error or injustice. Nowhere does the statutory language suggest that the date of discovery should turn on when a *reasonable* person, rather than the applicant herself, would have found the mistake." *Id.* at 411 (emphasis in original). The court remanded "to the Board to conduct whatever further factual inquiry may be appropriate to

determine when [the plaintiff] first learned" that the relevant records were in error. *Id*. at 414. Similarly, discovery in Mr. Shepherd's case is the date that *he* discovered his PTSD, whether when first advised of the possibility in 2003 or first diagnosed by a psychiatrist in 2004.

B. In the Alternative, the ABCMR Should Have Waived the Three-Year Statute of Limitations in the Interest of Justice

If this Court concludes that Mr. Shepherd's 2005 application was not timely, it should nevertheless vacate and remand because it was arbitrary and capricious for the ABCMR to decline to waive the three-year statute of limitations in the interest of justice. (AR 23 ("[T]here is no evidence provided which shows that it would be in the interest of justice to excuse the applicant's failure to timely file this application within the 3-year statute of limitations prescribed by law.")) *See* 10 U.S.C. § 1552(b) ("[A] board . . . may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice"). "[T]he BCMR in assessing whether the interest of justice supports a waiver of the statute of limitations should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." *Allen*, 799 F. Supp. at 164. Here, the ABCMR failed to consider both the reasons for delay and the potential merits in its decision that "there is no evidence provided which shows that it would be in the interest of justice to excuse the applicant's failure to timely file this application within the 3-year statute of limitations prescribed by the law." (AR 23.) The ABCMR's decision not to waive the statute of limitations in Mr. Shepherd's case was arbitrary and capricious.

The *Mullen II* Court held that even if Mr. Mullen were not within the three-year statute of limitations, the Board acted arbitrarily and capriciously in not waiving the statute of limitations in the interest of justice. 19 Cl. Ct. at 551 (finding that, while the Board can determine "whether Mr. Mullen in fact suffered from PTSD during the 1970s," "there is sufficient reason to believe that Mr. Mullen may have suffered from PTSD" and "the Board should have waived the three-

year time limit in the interests of justice"). But unlike Mr. Mullen, who was applying for a disability discharge, Mr. Shepherd's claim does not rest solely on his undiagnosed PTSD at the time of his discharge: it also stems from his forty years of suffering from PTSD. Without the support of healthcare and other veterans benefits, Mr. Shepherd has battled the effects of his war wounds alone. (*See* AR 13; Kraus Aff., Exhibit B, West Haven Medical Records Excerpt.) As a matter of fairness, he presented sufficient evidence to merit a waiver of the statute of limitations.

What is more, the ABCMR failed to state a logical connection between the facts and its conclusions in its determinations on Mr. Shepherd's case. In *Dickson v. Sec'y of Defense*, the D.C. Circuit ruled that the BCMR's failure to waive the statute of limitations was an abuse of discretion because "[a]lthough the Board in each case briefly recited the facts alleged by petitioners, and then found that a waiver would not be in the interest of justice, it omitted the critical step—connecting the facts to the conclusion." 68 F.3d at 1405. The ABCMR has committed the same error here. Like in *Dickson*, "the boilerplate language used by the Board makes it impossible to discern the Board's 'path.'" *Id.* The Board lists as evidence "a copy of [Mr. Shepherd's] Department of Veterans Affairs (VA) rating decision which shows his entitlement for medical care for post-traumatic stress disorder" (AR 22), and then states in its "Discussion and Conclusions" that Mr. Shepherd "has not provided a compelling explanation or evidence to show that it would be in the interest of justice to excuse failure to timely file in this case." (AR 23.) The Board did not explain *why* the evidence Mr. Shepherd presented was not sufficient to warrant waiving the statute of limitations. Therefore, the Court does not have enough information to review the decision, and it should remand to the ABCMR.

C. The ABCMR Decision Did Not Review the Full Merits of Mr. Shepherd's Case

The ABCMR is required to do a "cursory" review of the merits to determine whether or

not the statute of limitations should be waived in the interest of justice. *Allen*, 799 F. Supp. at 164. That the ABCMR discussed some aspects of the merits of the case does not mean that it performed a full review. *Id.*; *Mullen v. United States* (*Mullen I*), 17 Cl. Ct. 578, 580 (Cl. Ct. 1989). The government erroneously claims that the ABCMR reached the merits and that judicial review is thus restricted to the merits of Mr. Shepherd's claim. (Govt. Br. at 13, 17-18.) The 2006 decision states that the Board reviewed "the merits of the case *to determine if it would be in the interest of justice to excuse the applicant's failure to timely file*." (AR 19 (emphasis added); Govt. Br. at 17.) The government fails to recognize that this "*cursory* review of the potential merits . . . falls far short of performing a full-blown analysis of the merits." *Allen*, 799 F. Supp. at 164 (emphasis in original). In *Allen*, the government argued that "[i]f in every case the BCMR were forced to look at the merits of the underlying claim, the statute of limitations would become a nullity." *Id*. Judge Flannery agreed that "this would be the result if the BCMR were required to perform a complete review of the merits prior to determining whether to waive the statute of limitations." *Id*. A full review of the merits in time-barred cases defeats the purpose of a statute of limitations. It follows that the ABCMR in Mr. Shepherd's case did not do a full review, despite its notation that "there is insufficient basis . . . for correction of the records." (AR 23.)

Similarly, in *Mullen I*, Chief Judge Smith stated that "the Board, consistent with 10 U.S.C. § 1552(b) (1982), examined the underlying merits of the application to determine whether it was in the interest of justice to waive the time limitation." 17 Cl. Ct. at 580. Yet, the court called for further briefing on the questions of: "(1) whether plaintiff was afflicted with PTSD at the time of his discharge in 1970; [and] (2) whether the recognition of PTSD in the late 1970's and the fact that plaintiff was diagnosed to have the illness in 1981 are sufficient reasons for the Board to waive the three year limit in the interest of justice." *Id.* The Court eventually held that

the Board abused its discretion in not waiving the statute of limitations, or, alternatively, that Mr. Mullen was actually within the statute of limitations. It remanded to the Board for consideration of the merits of Mr. Mullen's application. *Mullen II,* 19 Cl. Ct. at 551-552 .

The government cites the ABCMR's conclusions as evidence that "[t]he ABCMR fully evaluated the evidence presented in reaching its decision to deny the request for an upgrade." (Govt. Brief at 17.) Yet, these conclusions are boilerplate language and do not demonstrate the Board actually considered the merits of Mr. Shepherd's case. The ABCMR decision held:

> 1. The Board determined that the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.
> 2. As a result, the Board further determined that there is no evidence provided which shows that it would be in the interest of justice to excuse the applicant's failure to timely file this application within the 3-year statute of limitations prescribed by law. Therefore, there is insufficient basis to waive the statute of limitations for timely filing or for correction of the records of the individual concerned.

(AR 23.) The exact same language appears in numerous Board decisions. *See, e.g.*, ABCMR, AR20060012768 (20 March 2007); ABCMR, AR20050013625 (25 July 2006); ABCMR, AR20060001129 (12 Sept. 2006); ABCMR, AR20050004976 (13 Dec. 2005). In short, it is clear that the ABCMR's "cursory review" of the merits to determine whether to waive the statute of limitations in Mr. Shepherd's case does not mean the Board has reached the merits.

D. The ABCMR Decision Failed to Consider Arguments Fairly Raised

If the Court finds that the Board did reach the merits, the ABCMR's April 24, 2006 decision was arbitrary and capricious. It neither considered all of the arguments raised in Mr. Shepherd's *pro se* application nor did it seek out the information necessary to do so. "[T]he Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief."

Caddington v. United States, 178 F. Supp. 604, 607 (Ct. Cl. 1959).

The DC Circuit held that if the BCMR fails to respond to any arguments that the applicant raises "which do not appear frivolous on their face and could affect the Board's ultimate disposition," then its decision is arbitrary. *Frizelle v. Slater*, 111 F.3d 172, 176-77 (D.C. Cir. 1997) (remanding for Board to explicitly reconsider and respond to all of Plaintiff's arguments). *Frizelle* makes clear that "an agency's decision [need not] be a model of analytic precision to survive a challenge." *Id*. at 176. As long as there is "a rational connection between the facts found and the choice made," the decision will not be found to be an abuse of discretion. *Id*. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In Mr. Shepherd's case, the Board has not addressed all the arguments Mr. Shepherd raised, and "the Board has not given 'a reason that a court can measure' for its decision." *Id*.

Mr. Shepherd's 2005 application was filed without counsel and therefore the Board should have construed his arguments liberally. "A document filed *pro se* is to be liberally construed and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotations and citations omitted). A *pro se* applicant need not present arguments in perfectly clear terms. The court in *Calloway v. Brownlee* held that the plaintiff had raised an issue to which the Board had failed to respond and found that "[w]hile it is not entirely clear from the administrative record that this issue was raised at the administrative level, it does appear that it was." 366 F. Supp. 2d 43, 55 (D.D.C. 2005). The court added that "because the plaintiff was preceding *pro se* at the agency level, this Court and the agency must take pains to protect the rights of *pro se* parties against the consequences of technical errors." *Id*.

Most significantly, the ABCMR did not consider Mr. Shepherd's PTSD diagnosis. Mr.

Shepherd attached his VA diagnosis and a letter from his VA licensed mental health counselor. (AR 38-40.) The counselor related that Mr. Shepherd "has a diagnosis of chronic and severe Post Traumatic Stress Disorder" and that "Mr. Shepherd describes many of his behaviors during Vietnam as being consistent with combat stress." (AR 38.) Further, she wrote that his "acting out behaviors during Vietnam could greatly be attributed to combat stress." (*Id.*)

Additionally, then-U.S. Senator Christopher Dodd submitted a letter on Mr. Shepherd's behalf, which stated: "Mr. Shepherd, who suffers from Post Traumatic Stress Syndome [sic], is seeking to have his discharge restored to 'General/Under Honorable Conditions.' I would appreciate your review and consideration of his request." (AR 26.) In his letter to Senator Dodd, Mr. Shepherd explained, "I am a decorated Vietnam Veteran. I received a discharge upgrade under President Ford's Clemency Program. Under a second review, this discharge was denied and I was never informed. I am working . . . [to get a] discharge upgrade and PTSD claim. I am in desperate need of your help to upgrade my discharge." (AR 27.) Given the repeated reference to Mr. Shepherd's PTSD, the ABCMR abused its discretion in not considering Mr. Shepherd's service-connected PSTD in its decision on his 2005 *pro se* application.

The government ignores that Mr. Shepherd's 2005 application was *pro se*. That he "did not specifically ask the ABCMR to consider any impact his VA PTSD diagnosis might have on the appropriateness of his characterization of military service" (Govt. Br. at 17) does not permit the ABCMR to disregard the evidence Mr. Shepherd did present about his PTSD.

IV. The ABCMR's June 26, 2007 Decision Was Arbitrary and Capricious Because It Failed to Reconsider Waiving the Statute of Limitations in Light of New Evidence and Ignored Arguments Raised by Mr. Shepherd

The ABCMR's 2007 decision to affirm its 2006 findings in spite of new evidence was also arbitrary and capricious. "If new evidence has been submitted [in a request for

reconsideration], the request will be submitted to the ABCMR for its determination of whether the new evidence is sufficient to demonstrate material error or injustice." 32 C.F.R. § 581.3(g)(4)(i). The Board does not conduct a *de novo* review of an application; it examines only whether the new evidence is enough to establish "material error or injustice." *Id.* § 581.3. Mr. Shepherd asserts that both decisions were arbitrary and capricious. However, because the 2006 decision was an abuse of discretion and the Board did not reconsider that underlying evidence, the Court need not find that the June 26, 2007 decision was arbitrary and capricious to grant Mr. Shepherd's upgrade, or alternatively to remand to the ABCMR for further proceedings. *Id.*

A. The Board's 2007 Decision Failed To Consider That Mr. Shepherd's Initial Application Was Timely

As stated above, the Board had sufficient information in Mr. Shepherd's initial application to hold that the application was timely. With the new information regarding Mr. Shepherd's PTSD provided in his request for reconsideration through the letters of Mr. Upton and Ms. Monteiro (AR 10-13), the timeliness of his 2005 application was even more apparent.

First, Mr. Upton's letter presented new evidence of the effect Mr. Shepherd's PTSD had on his decision-making ability in Vietnam and throughout his life. Mr. Upton's letter explained that "only after Mr. Shepherd started to receive adequate and appropriate care and treatment of his PTSD" was he able to understand "the effect that PTSD played on the choices that he made or did not make." (AR 11.)

Second, Ms. Monteiro's letter stated, "Mr. John Shepherd has been seen for individual counseling at the New Haven Vet Center since April of 2003" and that he has "chronic, severe and unremitting PTSD." (AR 13.) In Ms. Monteiro's "professional clinical judgment and opinion," Mr. Shepherd's "service connection was the result of repeated exposures while serving as a combat infantryman during the Vietnam War." (*Id.*)

The Board should have recognized that, at the earliest, Mr. Shepherd discovered the injustice of his discharge in April 2003 (AR 13), less than three years before his initial filing on June 22, 2005. Alternatively, the Board could have concluded that Mr. Shepherd discovered that his PTSD was connected to his service on November 30, 2004, when VA issued its rating decision in his case. (AR 36.) Under either finding, Mr. Shepherd's 2005 application was within the three-year statute of limitations.

B. The Board Failed to Reconsider the Waiver of the Statute of Limitations in Light of New Evidence

The Board's 2007 decision is also arbitrary and capricious because it fails to reconsider its 2006 refusal to waive the statute of limitations in the interest of justice. Mr. Shepherd, through his *pro bono* counsel, explicitly raised this argument in his request for reconsideration. (AR 12 ("[I]t is manifestly in the interests of justice that Mr. Shepherd be excused from not timely filing an application within the 3-year Statute of Limitation otherwise provided by law.")) The Board did not address this argument, as it is required to do. *Frizelle*, 111 F.3d at 176-77. The Board merely concluded: "The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the [2006] decision." (AR 7.) As stated above, the Court may review the ABCMR's decision not to waive the statute of limitations. *See, e.g.*, *Boruski,* 493 F.2d 301; *Dickson*, 68 F.3d 1396. Because Mr. Upton's letter directly raises this point and the Board fails to respond to it, the Court may find that the Board's decision is arbitrary and capricious.

Mr. Upton's letter also specifically asserted that Mr. Shepherd's failure to respond to the government's 1978 letter (AR 59-63) notifying him that his discharge upgrade had not been affirmed was the result of Mr. Shepherd's PTSD symptoms. (AR 11 ("As the Vet Center report again indicates, this absence is a direct manifestation of PTSD"); *see also* AR 13 (stating that

"Mr. Shepherd in the 1970's was unable to react favorably to letters from the US Army in a timely fashion due to his PTSD. His symptoms of avoidance were evident here regarding the letters triggering an escalation of his PTSD symptoms.") Mr. Shepherd provided information to the Board about the reasons for his delay in applying; the ABCMR should have waived the statute of limitations to do a full review of this claim.

The *Mullen II* Court held that there was sufficient reason to believe that the veteran suffered from PTSD before filing his application for correction of his military records, and therefore the Board should have waived that statute of limitations in the interest of justice. 19 Cl. Ct. at 551. Similarly, Mr. Upton's letter presents evidence that Mr. Shepherd's PTSD had affected his decisions at the time of his discharge and throughout his post-military career. The ABCMR abused its discretion in failing to waive the statute of limitations in light of this fact.

C. If the ABCMR Did Address the Merits of the New Evidence in 2007, Its Decision Was Arbitrary and Capricious

If the Court finds that the ABCMR did address the merits of the new evidence in its 2007 denial of his request for reconsideration, then its decision was arbitrary and capricious because it did not respond to each new argument presented in Mr. Shepherd's appeal. *Frizelle*, 111 F.3d at 176-77 (holding that the Board must address each argument fairly presented).

First, the ABCMR fundamentally misconstrues Mr. Shepherd's claim. The Board stated that "[i]n the absence of evidence to the contrary, it is presumed that the discharge proceedings were conducted in accordance with law and regulations applicable at the time." (AR 6.) Mr. Shepherd does not allege that his discharge was incorrect at the time it was given, but rather that in light of the current evidence, it is unjust as it stands. The letters of both Mr. Upton and Ms. Monteiro emphasize that, during the Vietnam era, PTSD was not yet a diagnosis and its symptoms were often misunderstood. (AR 11, 13.) Mr. Upton's letter argued that "[h]ad more

been known then as it is now about PTSD and its effects on our combat Veterans, Mr. Shepherd —just as our combat veterans serving in Afghanistan and Iraq–would not have been punished, but would have been identified as with PTSD and treated with compassion and dignity." (AR 11-12.) The letter makes clear that Mr. Shepherd's application did not allege error at the time of his discharge. Moreover, as noted above, Army regulations for Discharge Review Boards instruct that where "[t]here is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration" an application may be deemed inequitable. 32 C.F.R. § 70.9(c). The ABCMR acted arbitrarily and capriciously in failing to address Mr. Upton's argument that if current policy were applied at the time of Mr. Shepherd's discharge, Mr. Shepherd would have received an upgrade, affirmed under uniform standards.

Second, the Board misunderstands the basic facts of Mr. Shepherd's service when it concludes that "[t]he character of the discharge appears to be commensurate with the applicant's overall record of service when considering the circumstances of the case and the fact that his pattern of misconduct began well before his service in Vietnam." (AR 6.) Mr. Shepherd did commit minor infractions during training and upon arrival in Vietnam, but his sentence of confinement was suspended and he went on to distinguish himself heroically in battle. (AR 106; J. Shepherd Aff. ¶ 14; Radcliffe Aff. ¶ 6.) Only after experiencing intense combat did Shepherd's behavior change, leading to his discharge for failing "on *two* occasions to secure his great and report to the fire support base." (AR 5 (emphasis added); *see* AR 11, 13; J. Shepherd Aff. ¶¶ 16-22; Radivoy Aff. ¶¶ 5-6.) The ABCMR stated that Mr. Shepherd's application failed to prove that "his discharge was based solely on one isolated incident of disobeying a direct order." (AR 6.) Yet, it is undisputed that Mr. Shepherd had *two* failures to report for duty, both

of which occurred after combat stress caused him to break down. In fact, as the VA has now diagnosed, Mr. Shepherd was severely wounded with incapacitating PTSD. The Board does not consider that these two incidents constitute the "pattern of shirking" that formed the basis for his discharge. As both of these incidents occurred after Mr. Shepherd's combat experience, his failure to report in both instances is consistent with Mr. Upton and Ms. Monteiro's argument that his combat experience and PTSD caused the actions that led to his discharge. (AR 11, 13.)

The Board also erred in concluding that "the statement from the counseling therapist appears to be based on events related by the applicant that are not corroborated by the evidence of record." (AR 6.) To the contrary, substantial evidence in the record corroborates Ms. Monteiro's professional assessment. First, Mr. Shepherd earned a Bronze Star with Valor Device (AR 106), indicating that he saw heavy combat and fought heroically. Second, Mr. Shepherd's VA diagnosis deemed his PTSD to be "service-connected"(AR 36-39), meaning that his PTSD was caused by events that occurred during his military service. Third, Congress has recognized that it is often difficult, if not impossible, for combat veterans to document their combat stressors because of the nature of combat: many of the witnesses are killed and much of the evidence is destroyed. For combat veterans, VA regulations accept as "sufficient proof of service-connection . . . lay or other evidence of service incurrence or aggravation of such injury or disease . . . notwithstanding the fact that there is no official record of such incurrence or aggravation in such service." 38 U.S.C. § 1154(b). Where there is doubt, it shall be resolved "in favor of the veteran." *Id.* The ABCMR should act in accordance with the approach Congress has mandated for VA in combat PTSD cases: "[i]n cases where proof of combat is shown, and the reported stressor is related to the combat, then the veteran's own testimony is considered sufficient evidence to verify the reported in service stressor." (AR 37.) *See* 38 C.F.R. § 3.304(f)(2).

Finally, had the ABCMR reached the merits, it would have recognized that its 2006 decision failed to evaluate the injustice of Mr. Shepherd's decades of suffering from his combat-related psychological wounds. Mr. Upton's letter did not present again the equity argument set forth in Mr. Shepherd's earlier *pro se* application. (AR 11 (" It is presumed that the Board considered this as evidence as it arrived at its decision.")) The Board's 2006 decision failed to consider this argument, which Mr. Shepherd raised in his initial application. Since the 2007 decision again ignores this argument, the Court should either order an upgrade of Mr. Shepherd's discharge or remand to the ABCMR with instructions to consider his arguments.

CONCLUSION

John W. Shepherd, Jr., respectfully requests that the Court deny the government's motion for summary judgment, grant his cross-motion, and order his discharge status be upgraded to Honorable, or General (Under Honorable Conditions). In the alternative, Mr. Shepherd requests that this Court hold that his 2005 application was timely and that the 2006 and 2007 decisions of the ABCMR were arbitrary and capricious, and remand for further proceedings consistent with this Court's order.

Dated: November 10, 2011
New Haven, Connecticut

Respectfully Submitted,

By: _____/s/_____

Rebecca Kraus, Law Student Intern
Dana Montalto, Law Student Intern
Michael Wishnie, Supervising Attorney, ct27221
Fiona Doherty, Supervising Attorney, ct28623
Jerome N. Frank Legal Services Organization
Veterans Legal Services Clinic
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

CERTIFICATE OF SERVICE

I hereby certify that, on November 10, 2011, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

The following parties or counsel were served by electronic means:

Lauren M. Nash
Assistant U.S. Attorney
United States Attorney's Office
Connecticut Financial Center
157 Church Street
New Haven, CT 06510
(203) 821-3807
lauren.nash@usdoj.gov

/s/
Michael J. Wishnie, ct 27221
Supervising Attorney
Jerome N. Frank Legal Services Organization
Veterans Legal Services Clinic
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800
michael.wishnie@yale.edu