UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONLEY MONK, KEVIN MARRET, GEORGE SIDERS, JAMES COTTAM, JAMES DAVIS, VIETNAM VETERANS OF AMERICA, VIETNAM VETERANS OF AMERICA CONNECTICUT STATE COUNCIL, and NATIONAL VETERANS COUNCIL FOR LEGAL REDRESS, on behalf of themselves and all others similarly situated, Plaintiffs,	)	
v.	)	Civil Action No. 3:14-CV-00260 (WWE)
RAY MABUS, Secretary of the Navy, JOHN MCHUGH, Secretary of the Army, and DEBORAH LEE JAMES, Secretary of the Air Force, Defendants.	)	

DEFENDANT SECRETARY OF THE NAVY'S AND DEFENDANT SECRETARY OF THE ARMY'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A VOLUNTARY REMAND

INTRODUCTION

A federal agency's motion for a voluntary remand is commonly granted because it allows an agency to correct its own potential errors without expending the resources of the court in reviewing a record that may be incorrect or incomplete. *See, e.g., Ethyl Corp v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 24-25 (D.D.C. 2008).

Consistent with this well-established principle of administrative law, Defendants Secretary of the Navy and Secretary of the Army respectfully request that the Court voluntarily remand the claims of three Plaintiffs in this action. As explained in Defendants' motion (ECF No. 18), a remand of the claims of Plaintiffs Marret and Siders to the Board for Correction of Naval Records ("BCNR") would allow its members, rather than the Executive Director, to consider the materiality of the evidence that Plaintiffs submitted with their request for reconsideration of previous BCNR decisions. *See* ECF No. 18 at 3-6. Similarly, a remand of Plaintiff Cottam's claim to the Army Board for Correction of Military Records ("ABCMR") would allow it to consider relevant documentation that was not before the Board when it made its previous decision. *Id.* at 7-8.

Plaintiffs oppose Defendants' request for remand. *See* ECF No. 27. In their opposition, Plaintiffs make many unfounded accusations, contending, without any factual basis, that Defendants' straightforward remand request is part of a "cynical strategy" to "avoid meaningful judicial consideration" of these Plaintiffs' claims and to "stymie judicial scrutiny" of Defendants' administrative decisions. This empty rhetoric, however, does not establish an actual

basis for departing from the general rule that remand is appropriate under the circumstances of this case.

Contrary to Plaintiffs' suggestion, a remand to the correction boards is not "futile." Remanding the claims of Plaintiffs Marret and Siders allows a completely different decisionmaker (BCNR members) to evaluate the materiality of the evidence that Plaintiffs submitted with their applications to correct their military records. Likewise, remanding Plaintiff Cottam's claims to the ABCMR allows the ABCMR to reconsider his application in the context of newly discovered evidence, a common basis for granting a voluntary remand.

Further, Plaintiffs' invocation of the "bad faith" exception to the remand rule is unfounded and misplaced. Defendants' remand request is not intended to preclude judicial review of Plaintiffs' claims. To the contrary, a remand will allow the corrections boards to consider the entire record, including any additional evidence each Plaintiff would like to submit. If the BCNR and ABCMR decide in Plaintiffs' favor, then their claims will likely be moot. Otherwise, Plaintiffs can seek review of the boards' decisions on a complete record.

Finally, claims of unreasonable delay lack merit. Defendants have proposed a reasonable timetable for deciding Plaintiffs' claims on remand, agreeing to conclude all administrative proceedings within six months. Given the interests of judicial economy and creating a full record prior to review of the agency's actions in this Court, a six-month delay does not present a clear reason to deny Defendants' motion for voluntary remand.

ARGUMENT[1]

I. DEFENDANT SECRETARYOF THE NAVY REQUESTS THAT THE COURT VOLUNTARILY REMAND THE CLAIMS OF PLAINTIFF MARRET AND PLAINTIFF SIDERS TO THE BOARD FOR CORRECTION OF NAVAL RECORDS.

Plaintiffs make three arguments in opposition to Defendant's motion to remand the claims of Plaintiffs Marret and Siders. All three lack merit.

Plaintiffs first argue that remanding these claims to the BCNR would be "futile" because "the process by which the Boards evaluate the applications of Vietnam veterans with PTSD and other than honorable discharges is discriminatory and constitutionally deficient." ECF No. 27 at 11. This contention misinterprets the futility exception to the remand rule. In a very small subset of administrative law cases, remand is unnecessary if it would be an "idle and useless formality" and "convert judicial review of agency action into a ping-pong game." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 545 (2008) (citation omitted). But a remand is futile only when an agency's decision on remand will not "differ in any way" from the previous decision, *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996), or when only "one disposition is possible as a matter of law," *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992), or when there is "no basis in fact" for the agency's action, *Watson v. Geren*, 569 F.3d 115, 129 (2d Cir. 2009).

[1] In their opposition, Plaintiffs spend a considerable amount of time discussing the factual nature of their claims and their general legal theories in this lawsuit. *See* ECF No. 27, at 2-9, 11-13. This discussion, however, has little, if anything, to do with the question at issue in this motion – whether the Court should remand the claims of Plaintiffs Marret, Siders, and Cottam to their respective military board for further consideration. Defendants, accordingly, focus their reply on the issues pertinent to the remand question.

See also Berge v. United States, 949 F. Supp. 2d 36, 43-44 (D.D.C. 2013). None of those circumstances are present here. If remand is granted, the BCNR members themselves, rather than the Executive Director, will consider the materiality of the evidence submitted by Siders and Marret. Because the identity of the decisionmaker will change, this is not a case where the proceedings on remand will not "differ in any way" from the prior proceedings. Indeed, the BCNR never considered the evidence, nor evaluated it in a particular manner. Therefore, there is no basis for Plaintiffs' statement that the proceedings before the BCNR are "preordained" such that a remand is futile.

Plaintiffs next contend that the Secretary of the Navy's remand motion should be denied because it is made in bad faith. ECF No. 27 at 13-15. The argument is meritless and has no basis in fact. Plaintiffs' bad-faith theory is that the BCNR's reconsideration regulation, 32 C.F.R. § 723.9, is currently "unlawful" and "invalid," and thus the BCNR's adherence to this regulation evidences that the agency is denying claims in bad faith. However, the reconsideration regulation is currently valid and effective. While one district court has invalidated the *Army*'s previous reconsideration regulation, *see Lipsman v. Secretary of the Army*, 335 F. Supp. 2d 48, 54 (D.D.C. 2004), which has prompted the Navy to revise its own reconsideration regulation, no court has ever declared that 32 C.F.R. § 723.9 is invalid or unlawful. As a result, the BCNR must follow the regulation as it reviews an applicant's request for reconsideration. In this particular case, the Secretary, in an effort to avoid unnecessary litigation over a threshold procedural matter, has proposed giving Plaintiffs Marret and Siders the benefit of full board consideration, even though this procedure is not required by regulation. The

Secretary's offer, which confers an additional procedural benefit on Plaintiffs, is not evidence of "bad faith."[2]

Plaintiffs finally contend that the Secretary's remand motion should be denied because it will cause undue delay. Given the reasonable timetable Defendants have proposed for completing the remand proceedings, any assertions of undue delay are unfounded. *See* ECF No. 18 at 9. In particular, the BCNR proposes giving Plaintiffs Marret and Siders sixty days to provide their submissions to the BCNR, and the BCNR plans to have a decision on whether it will grant reconsideration within ninety days from the date all submissions are received. If the BCNR grants reconsideration, a substantive decision will be issued within ninety days from the date reconsideration is granted.

The BCNR intends to comply with this timetable, whether or not the schedule is formalized in a court order. Nonetheless, Defendants have no objection if the Court would prefer to formalize these deadlines in the remand order. A proposed order including the above schedule is attached.

II. DEFENDANT SECRETARY OF THE ARMY REQUESTS THAT THE COURT VOLUNTARILY REMAND THE CLAIMS OF PLAINTIFF COTTAM TO THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS.

Plaintiff Cottam recycles the same deficient arguments that Plaintiffs Siders and Marret raise in their opposition to remand. He first states, without elaboration, that a remand would be

[2] As noted, Plaintiffs' "bad faith" theory fundamentally fails on its own terms. It also fails as an evidentiary matter: Well-settled is the principle that "[g]overnment officials are presumed to act in good faith . . . . [p]laintiff must present 'well-nigh irrefragable proof' of bad faith or bias on the part of governmental officials in order to overcome this presumption." *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) (citation omitted). *See also Dibble v. Fenimore*, 488 F. Supp. 2d 149, 155 (N.D.N.Y 2006); *Hoffman v. United States*, 894 F.2d 380, 385 (Fed. Cir. 1990). Plaintiffs have not, and cannot, make this showing.

"futile." However, reconsideration of an agency decision upon the discovery of new evidence, as is the case for Plaintiff Cottam, is "precisely the kind of reconsideration that courts typically permit." *Van Antwerp*, 560 F. Supp. at 24 (citing *Ethyl Corp.*, 989 F.2d at 523-24 & n. 3). He also claims that a remand would cause undue delay. Similar to the BCNR timetable, the ABCMR proposes giving Plaintiff Cottam sixty days to provide any submissions to the ABCMR, and a substantive decision will be issued within ninety days from the date all submissions are received. Given this reasonable timetable for remand proceedings, Plaintiffs' delay claim fails.[3]

III. PLAINTIFFS' REQUESTED REMAND CONDITIONS CANNOT BE IMPOSED ON THE ABCMR AND BCNR.

In the final section of their opposition, Plaintiffs ask the Court to impose an extensive number of conditions dictating how the ABCMR and BCNR should review Plaintiffs' applications on remand. *See* ECF No. 27 at 17-20. Plaintiffs' request to impose these conditions is without legal basis and should be denied.

First, Plaintiffs' request essentially asks the Court to impose all the relief they seek on the merits in this litigation, before the Court has even reviewed the merits of Plaintiffs' claims. They ask to Court to order the ABCMR and BCNR to conduct in-person hearings; "utilize medically appropriate standards on remand"; and comply with nonexistent "class-wide" relief. ECF No. 27 at 17-20. Plaintiffs' request for these remedies is quite presumptuous, given the Court has never ruled on the merits of their claims or on their motion for class certification. More fundamentally, these remedies are unavailable as a matter of law in a case reviewing agency action under the

[3] Plaintiff Cottam also complains in his opposition that he has not yet received the newly discovered documents. The ABCMR will provide these documents to Mr. Cottam on remand, and he can submit those documents, and any other material he may choose, to support his application for the correction of his military record.

Administrative Procedure Act ("APA): If a court determines that an agency's actions violate the APA, then the proper remedy is to vacate the agency's decision and remand to the agency to conduct further proceedings. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Ward v. Brown*, 22 F.3d 516, 522-23 (2d Cir. 1994); *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014). Courts cannot, as Plaintiffs request, direct the agency to evaluate a particular claim in a particular manner or to provide a particular benefit.

Plaintiffs' request also runs afoul of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523–25 (1978). In *Vermont Yankee*, the Supreme Court indicated that courts are without power to impose procedures on agencies that are not mandated by the Administrative Procedure Act or by other statute or regulation. *Id.* at 558. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Id.* at 524. In fact, the Second Circuit, applying the teachings of *Vermont Yankee*, has held that a plaintiff seeking to correct his military record is not entitled to "tailor-made procedures devised by the court" and instead must use the "procedures provided by relevant statute and regulation." *Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992). Here, Plaintiffs have requested additional administrative procedures – "medically appropriate standards" and mandatory in-person hearings – that the military record correction statute, 10 U.S.C. § 1552, its implementing regulations, and the APA do not require. Plaintiffs' request for the Court to engraft additional procedural requirements therefore is foreclosed by *Vermont Yankee* and Second Circuit precedent.

Finally, Plaintiffs' request for remand conditions reflects a fundamental misunderstanding of the nature of a motion for voluntary remand. In a motion for voluntary

remand, an agency requests a remand so that it may reconsider its administrative decision before judicial review of that decision. *See, e.g., SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("[T]he agency may request a remand (without confessing error) in order to reconsider its previous position."). Plaintiffs may object to the remand request, as Plaintiffs have done here, but they cannot dictate the terms in which the agency will voluntarily reconsider its own administrative decision. Defendants do not consent to Plaintiffs' extensive list of substantive conditions dictating how the corrections boards review applications, and thus they should not be imposed through a ruling on Defendants' motion for voluntary remand. If the Court denies Defendants' motion for a voluntary remand, then Defendants will proceed with filing motions for summary judgment on the current record.

CONCLUSION

For the foregoing reasons, Defendants' motion for voluntary remand should be granted.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Matthew A. Josephson
MATTHEW A. JOSEPHSON
GA Bar 367216
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Matthew.A.Josephson@usdoj.gov
Tel.: (202) 514-9237
Fax: (202) 616-8470
Counsel for Defendant

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CERTIFICATION OF SERVICE

I hereby certify that on June 16, 2014 the foregoing motion was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Matthew A. Josephson
Matthew A. Josephson