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.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs seek to certify a class of Vietnam-era veterans who, like the named Plaintiffs, were discharged under less than honorable conditions, were later diagnosed as having post-traumatic stress disorder ("PTSD"), and did not receive an upgrade to their discharge status when they applied to their respective service board. *See* ECF No. 24. Plaintiffs' motion should be denied for numerous reasons. First and most fundamentally, Plaintiffs' motion should be denied because this Court lacks jurisdiction to grant Plaintiffs' requested classwide injunction. In their motion, Plaintiffs seek a classwide injunction ordering the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force to adopt a host of additional administrative procedures – including "medically appropriate standards" (which Plaintiffs do not define), mandatory in-person hearings, expedited consideration of applications, and mandatory reconsideration of applications. None of these procedures are mandated by the Administrative Procedure Act or by other statute or regulation, and thus the Court does not have the jurisdictional authority to impose them in this case.

Second, even if Plaintiffs' injunction were jurisdictionally possible, their motion for class certification still should be denied because they cannot meet the requirements of Rule 23.

Plaintiffs cannot meet the commonality and typicality requirements of Rule 23(a) because resolution of Plaintiffs' claims requires a paradigmatically individualized, fact-intensive inquiry, making classwide treatment inappropriate. Plaintiffs contend that commonality and typicality are satisfied in this case because their purported injuries (which Plaintiffs do not clearly define) "derive from a unitary course of conduct by a single system." Congress, however, has specifically *not* required uniformity in the procedures applicable to the correction of military records. Instead, a different Secretary appoints different board members to follow different

regulations in determining whether different applicants have demonstrated by a preponderance of different evidence that his or her military records are in error or unjust. Nothing about the system is singular or unitary.

Further, each board's determination of whether "the interests of justice" support upgrading an individual's discharge status depends on numerous circumstances that vary from one applicant to the next. Such circumstances include a veteran's history of military service, the nature of a veteran's misconduct, the causal relationship between the veteran's alleged combat-related mental illness and the instances of misconduct, and the degree to which an individual's mental illness rendered him or her unfit for their specific duty. Thus, resolution of each Plaintiff's claim requires a fact-intensive, applicant-by-applicant inquiry. Plaintiffs, accordingly, cannot meet the commonality and typicality requirements of Rule 23(a).

Plaintiffs also fail to establish the requirements of Rule 23(b)(2). For certification to be appropriate under this provision, a single and indivisible injunction must be capable of providing relief to every member of the class. Such an injunction is not possible in this case for numerous reasons: (1) this Court lacks jurisdiction to grant Plaintiffs' requested injunction; (2) even if jurisdictionally possible, a single injunction is not conceivable in this case, which includes three separate Defendants administering three separate administrative systems pursuant to different regulations; and (3) even if Plaintiffs could surmount these hurdles, an injunction forcing each board to use "medically appropriate standards" cannot apply to all class members equally because what is medically appropriate will depend on facts submitted by a particular applicant.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The statutory and regulatory background, factual background, and procedural history of this case are described in Defendants' motion to dismiss and for summary judgment. *See* ECF No. 26-1 at 13-18.

In summary, the individual Plaintiffs are Vietnam veterans who each submitted individual applications to their respective board for the correction of military records seeking an upgrade in their discharge status. For reasons specific to each application, the correction boards determined that each Plaintiff did not meet his burden of demonstrating that his military records were in error or unjust. The five individual Plaintiffs each claim that, by declining to upgrade their discharge statuses, the correction boards violated the Administrative Procedure Act, the Fifth Amendment of the United States Constitution, and Section 504 of the Rehabilitation Act. Three organizational Plaintiffs – Vietnam Veterans of America, Vietnam Veterans of America Connecticut State Council, and National Veterans Council for Legal Redress – allege the same causes of action. Defendants filed a dispositive motion seeking dismissal of most claims in this case (ECF No. 26), and a motion to voluntarily remand all other claims for further administrative consideration (ECF No. 18). Plaintiffs oppose both motions (ECF Nos. 27 and 30), and have filed the present motion for class certification.

ARGUMENT

I. THIS COURT SHOULD RULE ON THE SECRETARIES' DISPOSITIVE MOTION AND REMAND MOTION BEFORE ADDRESSING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

Every court has the "inherent" power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In this case, the Court should exercise that discretion by

postponing any ruling on Plaintiffs' motion for class certification until the Court has considered and ruled upon the Defendants' Motion for Voluntary Remand (ECF No. 18) and Motion to Dismiss and for Summary Judgment (ECF No. 26).

Several reasons support deciding Defendants' two pending motions before addressing Plaintiffs' motion for class certification. First, Defendants contend that the Court lacks subject matter jurisdiction over numerous claims in this case – including all claims asserted by the three organizational plaintiffs and all claims asserted under Section 504 of the Rehabilitation Act. *See* ECF No. 26-1 at 19-36. Subject matter jurisdiction is a threshold inquiry that *must* be addressed before class certification. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); Section II, *infra*.

Second, if the Court grants Defendants' two pending motions, then those rulings likely will dispose of this entire case and render moot Plaintiffs' motion for class certification. *See, e.g., Meyers v. United States*, 96 Fed. Cl. 34, 42 n.6 (2010) (denying class certification because named Plaintiff failed to state a claim); *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 268 n.4 (4th Cir. 2002) (same).

Third, at a minimum the Court's rulings on Defendants' pending motions will inform the analysis of Plaintiffs' motion for class certification. For example, in moving for summary judgment on Plaintiff Davis's claim, Defendants have filed the certified administrative record. This record provides a factual context for understanding the nature of correction-board proceeding. Defendants accordingly request that the Court first decide Defendants' motion for voluntary remand and motion to dismiss and for summary judgment before addressing Plaintiffs' motion for class certification.

II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO GRANT PLAINTIFFS' REQUESTED INJUNCTION.

"Standing to sue is an essential threshold which must be crossed before any determination as to class representation under Rule 23 can be made." *Cassese v. Washington Mut.*, Inc., 262 F.R.D. 179, 183 (E.D.N.Y. 2009); *see also Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918, 928 (6th Cir. 2002); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000); *Lee v. Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997); *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981). If none of the proposed class representatives "establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea*, 414 U.S. at 494.

To establish standing to sue, Plaintiffs must show that they have (1) suffered injury in fact; (2) demonstrate that a causal connection exists between the injury and the conduct of Defendants; and (3) demonstrate the likelihood that their injury will be redressed by the requested judicial relief. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). "[A] plaintiff must demonstrate standing for each claim and form of relief sought." *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010). Here, Plaintiffs cannot establish the third standing element – redressability – because the Court lacks jurisdiction to grant the injunctive relief requested, whether on behalf of individuals or the class as a whole.

Plaintiffs specifically seek an injunction ordering the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force "to adopt suitable review procedures, including application of medically appropriate standards, to their consideration of all applications for a discharge status upgrade submitted by members of this class." ECF No. 24-1 at 6-7. Plaintiffs do not explain what they consider to be "suitable review procedures" or "medically

appropriate standards," although they suggest they are seeking an injunction from the Court ordering each Secretary "to hold in-person hearings"; to consider applications faster; to reconsider an application "based on evidence of service-related PTSD diagnosis"; and to review each application "by a person qualified to evaluate medical evidence." *See id.* at 4.

For multiple independent reasons, this Court lacks the authority to issue such a sweeping and intrusive injunction. First, Plaintiffs' requested injunction is not available in a case, like this one, seeking review of agency action under the Administrative Procedure Act. Instead, the proper remedy, upon a finding that the agency's actions violate the standards of the APA, 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' requested injunction 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 ask the Court to impose a host of additional administrative procedures on all three correction boards – "medically appropriate standards" (which Plaintiffs suggest includes evaluation of evidence by an individual with medical training), mandatory in-person hearings, expedited consideration of applications, and mandatory reconsideration of applications "based on evidence of service-related PTSD diagnosis." *See* ECF No. 24-1 at 4. However, the military record-correction statute, 10 U.S.C. § 1552, its implementing regulations, and the APA do not require these procedures. Plaintiffs' request for the Court to engraft additional procedural requirements, therefore, is foreclosed by *Vermont Yankee* and Second Circuit precedent.

Finally, Plaintiffs' requested injunction is flatly inconsistent with the increased judicial deference accorded to military correction decisions. *See Dibble v. Fenimore*, 545 F.3d 208, 216 (2d Cir. 2008) (In reviewing a correction board's decision, "a court may not assess the wisdom of an agency's choice; inquiry is limited instead to whether the Board has made a clear error of judgment."); *Falk v. Sec'y of the Army*, 870 F.2d 941, 945 (2d Cir. 1989) ("In addition to the requirements of A.P.A. § 706, we must give the Records Board's ruling increased deference because of the military context in which this appeal arises."). The increased deference shown to the military agencies does not mean that the decisions of military correction boards cannot be reviewed by federal courts, but rather that "only the most egregious decisions may be prevented under such a deferential standard of review." *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1515 (D.C. Cir. 1989); *see also Falk*, 870 F.2d at 945 (noting that judicial review of a "decision made by the Records board is tightly circumscribed by the confluence of A.P.A. § 706 and its military setting.").

Here, Plaintiffs ask the Court to completely overhaul the entire administrative system for correcting military records. They ask the Court to "[u]pdate board review standards" because, in

their view, the governing standards are "outdated and medically inappropriate" and not "suitable" for determining whether a particular record is in error or unjust. *See* ECF No. 24-1 at 2, 6. Plaintiffs' requested relief, however, ignores that Congress has specifically delegated authority to the Secretary of each military department not only to determine whether to correct a particular military record but also to establish the procedures governing the record correction process. *See* 10 U.S.C. § 1552(a)(1) & (a)(3).

Further, Plaintiffs' requested injunction is especially problematic given the equitable nature of their claims in this case. Plaintiffs contend that the misconduct leading to their undesirable discharge was caused by their combat-related PTSD, and thus their undesirable discharges are "unjust" under 10 U.S.C. §1552. When an applicant applies to correct a putative injustice, however, the correction boards "possess a greater level of discretion" to decide these inherently individualized cases, and judicial intervention is not authorized "except in manifest cases of abuse of discretion, and perhaps not always effectively even then, because they may not have jurisdiction to fashion a satisfactory mode of relief in all cases." *Reale v. United States*, 529 F.2d 533, 208 Ct. Cl. 1010, 1011-12 (1976) (unpublished); *see also Boyer v. United States*, 81 Fed. Cl. 188, 197 (Fed. Cl. 2008).

In short, the Court lacks the jurisdictional authority to grant Plaintiffs' requested injunctive relief, which would impose new and additional procedures on the military's administrative system for correcting military records. As such, Plaintiffs cannot establish a redressable injury and therefore lack standing. *See Newdow v. Roberts*, 603 F.3d 1002, 1010-11 (D.C. Cir. 2010) (plaintiffs could not establish redressability because "[i]t [was] impossible for th[e] court to grant [their requested] relief"); *Lozansky v. Obama*, 841 F. Supp. 2d 124, 132 (D.D.C.2012) ("Plaintiffs . . . lack standing because the Court cannot issue the requested writ of

mandamus, and thus cannot redress the [claimed] injury."). And without standing to seek their requested classwide relief, Plaintiffs motion for class certification should be denied. *See O'Shea*, 414 U.S. at 494.

III. PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS OF RULE 23.

Even if Plaintiffs could establish standing to seek a classwide injunction overhauling the United States military's administrative system for correcting military records (and they cannot), Plaintiffs' motion for certification still should be denied because they cannot meet the requirements of Rule 23.

A. Class Certification Standards Under Rule 23

Plaintiffs bear the burden of proving, by a preponderance of the evidence, each element of Federal Rule of Civil Procedure 23. *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Instead, Plaintiffs must "affirmatively demonstrate compliance with the Rule," and a district court may only certify a class if "satisfied, after a rigorous analysis," that the requirements of Rule 23 are met. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 237-38 (2d Cir. 2012) (citing *Walmart*, 131 S. Ct. at 2551) (internal quotation marks and alterations omitted). Frequently, this "rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* (citing *Wal–Mart Stores*, 131 S. Ct. at 2551).

To warrant class certification, Plaintiffs must first establish that their class is sufficiently precise and ascertainable such that the court can identify the members. Next, Plaintiffs must demonstrate that they have meet the requirements of Rule 23(a), requiring that Plaintiffs prove that (1) "the class is so numerous that joinder of all members is impracticable," (2) "there are questions of law or fact common to the class," (3) "the claims or defenses of the representative

parties are typical of the claims or defenses of the class," and (4) "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); *see also Wal-Mart*, 131 S. Ct. at 2548. Finally, Plaintiffs must prove the existence of at least one of the requirements in Rule 23(b). *Id.*; *see also Wal-Mart*, 131 S. Ct. at 2548. Plaintiffs cannot meet this burden.

B. Plaintiffs Cannot Establish Commonality or Typicality Under Rule 23(a)

The primary issue with regard to Rule 23(a) is whether Plaintiffs can meet the commonality and typicality elements. The "typicality" and "commonality" provisions of Rule 23(a) "tend to merge." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Both provisions of Rule 23(a) "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart*, 131 S. Ct. at 2551 n.5. "[I]t is insufficient to merely allege any common question." *Id.* Indeed, Rule 23(a)(2) is "easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'" *Id.* 131 S. Ct. at 2551. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* (quoting *Falcon*, 102 S. Ct. at 2364). This, in turn, means more than "merely that [the class members] have all suffered a violation of the same provision of law" and instead that the class's "claims must depend upon a common contention . . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Here, the purported class representatives seek to allege, on behalf of tens of thousands of Vietnam veterans, who received less than honorable discharges and were later diagnosed with

PTSD, that three separate departments of the United States military, acting through their respective correction boards, have issued individual record correction decisions under 10 U.S.C. § 1552 that are arbitrary, capricious, or otherwise contrary to law, in violation of the APA, the Fifth Amendment, and the Rehabilitation Act. *See* ECF No. 24-1, at 6 (proposed class definition).

There is no central, common issue, the resolution of which will be determinative of these putative class claims. Nor are the claims of the five individual Plaintiffs "typical" of every other Vietnam veteran who received a discharge under other-than-honorable conditions and who has been diagnosed with PTSD attributable to their military service. Instead, for numerous reasons, resolution of Plaintiffs' claims requires an individualized, fact-intensive inquiry that renders Plaintiffs' proposed class ineligible for certification.

First, and most fundamentally, the claims in this case are not capable of classwide resolution because the statutory and regulatory system for correcting military records is not a unitary and centralized system. Instead, Congress has delegated to each Secretary of a military department the authority to correct military records "of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Further, Congress specifically mandated that these record-correction determinations "shall be made under procedures established by the Secretary." 10 U.S.C. § 1552(a)(3). The Secretaries of the Army, Navy, and Air Force, moreover, have established separate regulations governing the correction of military records. *See* 32 C.F.R. §§ 581.3(a)-(i) (Army); 32 C.F.R. § 723.1-10 (Navy); 32 C.F.R. § 865 (Air Force). Thus, Congress has specifically *not* required uniformity in the procedures applicable to the correction of military records. Instead, a different Secretary appoints different board members to follow different

regulations in determining whether different applicants have demonstrated by a preponderance of different evidence that his or her military records are in error or unjust. Thus, this is not a case where Plaintiffs can establish commonality and typicality by showing their injuries "derive from a unitary course of conduct by a single system." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).[1]

Plaintiffs also cannot establish commonality or typicality because the military record-correction statute, 10 U.S.C. § 1552, and its implementing regulations require individualized consideration of each application, making classwide resolution of Plaintiffs' claims inappropriate.

As an initial matter, each individual claim presents a unique statute of limitations problem. Under 10 U.S.C. § 1552(b), a veteran must submit a request to their respective correction board within three years of discovering the alleged error or injustice, unless the board waives the three-year limitation in the "interest of justice." Here, the five named Plaintiffs, and the proposed class members, allege that their military records contain errors and injustices dating back to their service in the Vietnam War, and thus their claims are well outside the three-year limitation in Section 1552(b). For these five named Plaintiffs, the boards, after reviewing the facts presented in each application, determined that the interests of justice support waiving the limitations period. However, the board can only make that decision after considering the facts in

[1] The procedural facts of this very case demonstrate that each military department operates its own administrative system for correcting military records according to specific regulations, which can differ from one department to the next. For example, as explained in Defendants' motion for voluntary remand, the Army's regulation governing an applicant's request for reconsideration provides, in pertinent part, that the board's staff will consider whether an applicant has submitted new evidence with the request, while the board itself will determine whether the submitted evidence is material. *See* 32 C.F.R. § 581.3(g)(4)(i). In contrast, under the Navy's reconsideration regulation, the board's Executive Director – not the Board members themselves – determines whether evidence is both new and also whether it is material. *Id.* at § 723.9.

an individual's application. Because this threshold statute-of-limitations question requires individualized, fact-intensive, and applicant-by-applicant consideration, Plaintiffs cannot establish commonality or typicality. *See Novella v. Westchester Cnty.*, 661 F.3d 128, 148 (2d Cir. 2011) (noting that the method of calculating the statute of limitation "may in some cases require a resource-intensive, claimant-by-claimant inquiry" which "may in turn lessen the value, and indeed the availability, of [a] class action[]").

Even more fundamentally, Plaintiffs cannot establish commonality or typicality because the merits decision of each correction board is highly individualized and depends on the facts presented in a specific veteran's application, which can vary in numerous material respects. For example, in determining whether the "interests of justice" support an upgrade to an individual's discharge status, the boards consider the circumstances of a veteran's history of military service, which will vary in length and accomplishment; the nature of a veteran's misconduct, which will vary in severity and frequency; the causal relationship between the veteran's alleged combat-related mental illness and the instances of misconduct; the degree to which an individual's mental illness may have rendered him or her unfit for their specific duty, which will vary; the veteran's medical history; the type of discharge a veteran received when separated from service; and the procedural facts of the individual's separation proceeding and correction-board proceeding. For numerous reasons, therefore, consideration of each veteran's application requires a fact-intensive, applicant-by-applicant inquiry that renders Plaintiffs' proposed class ineligible for certification.

The administrative records filed in this case, along with the factual allegations in Plaintiffs' Complaint, demonstrates that each individual's application contains unique facts that must be decided on an individualized basis, making class treatment inappropriate. For example:

- The named Plaintiffs bring different claims. Plaintiff Monk and Plaintiff Davis allege that the Navy and the Army, respectively, discriminated against them on the basis of their race, a contention that no other Plaintiff makes and that has nothing to do with the issues of PTSD. *See* ECF No. 1, at ¶ 195; 26-1 at 17-18.
- The factual circumstances leading to each Plaintiff's separation from service are different. Plaintiff Monk alleges that he had an altercation with his commanding officer that played an integral role in the Navy's decision to discharge him under other than honorable conditions. *See* ECF No. 1, at ¶ 34. Plaintiff Siders alleges that his separation was prompted by consistent, recurring, and extensive unauthorized absences, one of which occurred after his "commanding officers refused his requests" for annual leave and he decided to leave "anyhow to be with [his] family." *Id.*, at ¶ 72; *see also* ECF No. 26-1 at 12-13. Plaintiff Marret, for his part, claims he received an undesirable discharge because, among other things, he "struggled with hypervigilance that interfered with his ability to carry out his assigned military tasks," and because he suffered from "anxiety attacks and abdominal cramps." ECF No. 1 at ¶ 51-53. Plaintiff Cottam attributes his undesirable discharge, at least in part, to the fact that he was assigned to a Division "primarily of seventeen-year-olds" and thus the "youthfulness of this Division meant that the military structure and control Mr. Cottam had expected were lacking." *Id.*, at ¶ 87. Mr. Davis, in turn, alleges that he received an undesirable discharge after he absented himself without leave and "found a job elsewhere in North Carolina before returning home to Memphis, TN.' *Id.*, at ¶ 104.

- The procedural facts are different for each Plaintiff. Plaintiff Monk, unlike the other four Plaintiffs, did not receive a decision on his application to change his military records before filing this lawsuit. *See* ECF No. 26-1 at 18-19. Plaintiff Marret and Siders filed motions for the BCNR to reconsider their previous requests, which the Executive Director screened pursuant to 32 C.F.R. § 723.9. Plaintiff Cottam received a substantive decision from the ABCMR denying his application, although the Army has recently located relevant separation documents and medical records that were not before the Board when it issued its decision, and thus a remand for consideration of this material is appropriate.

In their motion, Plaintiffs ignore all the aforementioned typicality and commonality problems plaguing their bid for certification. Instead, they list in formulaic fashion six "common questions" they contend make this three-defendant, multi-claim, multi-regulation, multi-issue litigation suitable for class treatment. *See* ECF No. 24-1 at 8-9. Four of the six are simply restatements of the causes of action and thus cannot establish commonality. *See Wal-Mart*, 131 S. Ct. at 2551 (noting that it is insufficient under Rule 23(a) to merely allege that plaintiffs have "suffered a violation of the same provision of law"); ECF No. 24-1 at 8-9, ¶ (b) (restating APA claim), ¶ (c) (restating Fifth Amendment claim), ¶ (d) (restating Rehabilitation Act claim), ¶ (e) (also restating Rehabilitation Act claim). The other two "common questions" Plaintiffs identify, while perhaps more than restatements of their claims, are not capable of classwide resolution and thus do not meet the commonality and typicality requirements of Rule 23(a).

Plaintiffs contend that a common issue in this case is whether Defendants "have failed to utilize consistent and medically appropriate standards when assessing how PTSD affected proposed class members' abilities to perform their duties when considering whether to upgrade

their discharge statuses . . . ." *Id.*, at 8. This issue is not capable of classwide resolution for numerous reasons. First, and as noted in Section I, this Court lacks jurisdiction to impose additional procedural requirements – like Plaintiffs' conception of "medically appropriate standards" – on the three correction boards, and thus classwide resolution of this issue is not possible. Second, even if the Court had the jurisdictional authority to grant Plaintiffs' injunction, classwide resolution still is not appropriate because the system for correcting military records is not centralized and unitary. To the contrary, as noted above, Congress has specifically decided not to create one administrative system and instead has delegated to each Secretary the authority to create department-specific regulatory procedures. *See* 10 U.S.C. § 1552(a)(3). Thus, even if Plaintiffs' could identity a particular administrative error in one board's processes, such an error would not necessarily be present in another department's processes. Fourth, each board's assessment of "how PTSD affected proposed class members' abilities to perform their duties," ECF No. 24-1 at9, depends on numerous individualized factors, as explained above, making classwide treatment inappropriate. For numerous reasons, therefore, Plaintiffs' contention that each separate correction board should use "medically appropriate standards" is not a common or typical issue that can be resolved on a classwide basis.

Plaintiffs also identify, as a purportedly common and typical issue, that the proposed class members "have suffered impermissibly the stigmatizing effects of other-than-honorable discharges related to untreated PTSD." ECF No. 24-1 at 9. This contention, too, fails to establish the commonality and typicality requirements. First, "effects of other-than-honorable discharges related to untreated PTSD," *id.* – is not "central to the validity of each one of the claims" in this case. *Wal-Mart Stores*, 131 S. Ct. at 2551. Plaintiffs' claims challenge, under several different statutory and constitutional provisions, the procedures used by three different

military correction boards to evaluate whether an individual's discharge status is "unjust" under 10 U.S.C. § 1552. The "effects" that an individual endures *after* being discharged are not central to the issue of whether an individual's discharge decision was in error or unjust under 10 U.S.C. § 1552. Second, even if the post-discharge consequences are somehow central to the claims in this case (and they are not), those effects certainly will vary from one individual to the next.

Plaintiffs also cannot establish commonality or typicality with their "medical impossibility" argument. Plaintiffs' central factual contention in this lawsuit is that all three correction boards are denying the applications of all Vietnam veterans "because their records did not show that they were diagnosed with PTSD before discharge, which was a medical impossibility before 1980." ECF No. 24-1, at 3; *See also* ECF No. 27, at 1 (alleging that the correction boards are using "Kafkaesque logic" to deny claims on the basis of a medical impossibility). Plaintiffs' contention mischaracterizes the facts and law in this case.

Plaintiffs' medical-impossibility argument mischaracterizes the facts in the administrative records. For example, for Plaintiff Davis, the ABCMR made the following statement in denying his application:

> Counsel contends the events leading to the applicant's undesirable discharge were caused by PTSD. However, there is no evidence which shows the applicant was diagnosed with PTSD *or any other mental condition* prior to discharge on 12 February 1974. There is also no evidence that shows he was having mental problems in 1972/1973 that interfered with his ability to perform his military duties or that this was the underlying cause of the misconduct that led to his discharge.

ECF No. 25-1 at 9, ¶ 1 (000007) (emphasis added). Thus, the ABCMR in this case did not deny Mr. Davis's application because he was not diagnosed with PTSD in 1974 – *i.e.* on the basis of a "medical impossibility" as Plaintiffs allege. Instead, the ABCMR found that the applicant has not produced pre-discharge evidence of *any mental condition* that may substantiate his claim that

PTSD was the root of the misconduct committed during the Vietnam era. This demonstrates that Plaintiffs' "medical impossibility" basis for class certification is unfounded factually and cannot justify certification.

Plaintiffs' medical-impossibility argument also mischaracterizes and misconceives the nature of a board's review under 10 U.S.C. § 1552 and its implementing regulations. Under Section 1552, each board evaluates a particular application to determine whether the applicant has demonstrated the existence of probable error or injustice in their military records. 10 U.S.C. § 1552(a)(1); 32 C.F.R. § 581.3(b)(4)(i) (Army); 32 C.F.R. § 723.2(b) (Navy); 32 C.F.R. § 865.2(a) (Air Force). When applicants contend that their PTSD caused them to commit misconduct that led to their undesirable discharge, they are not identifying a discrete administrative "error" in their records but instead are claiming that "the interests of justice" support a discharge upgrade. 10 U.S.C. § 1552(a)(1); *see also Reale*, 208 Ct. Cl. at 1011-12 (1976) (noting that correcting an "error" and an "injustice" "are not the same"). Under these circumstances, the boards must "exercise high discretionary functions in the management of the military establishment," *Reale*, 208 Ct. Cl. at 1012, and consider numerous individualized factors, only one of which is the presence or absence of pre-discharge medical documentation of a mental illness. Thus, even if Plaintiffs contend that certain board decisions did not adequately address pre-discharge medical evidence in a given case, including whether PTSD caused the misconduct on which a discharge was based, this contention would not be "central to the validity of each one of the claims" and will not "drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551. To the contrary, pre-discharge medical evidence – however described – is simply one factor among other individualized considerations that the board considers to determine whether justice supports a discharge upgrade. Again, the applicable service board's

individualized examination of applications to correct military records demonstrates that Plaintiffs' "medical impossibility" basis for certification is unfounded.

In sum, there is nothing common or typical about the claims in this case that would make class certification appropriate. Plaintiffs accordingly cannot meet the requirements of Rule 23(a) and thus their motion for class certification should be denied.

C. Plaintiffs Cannot Meet the Requirements of Rule 23(b)(2)

Plaintiffs' motion for class certification also fails because they cannot meet the requirements of Rule 23(b)(2). The fundamental characteristic of a class properly certified under Rule 23(b)(2) is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* at 2557 (citation omitted). Rule 23(b)(2) thus applies "when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* Rule 23(b)(2) does not authorize certification "when each individual class member would be entitled to a *different* injunction or declaratory judgment." *Id.* (emphasis in original).

For several reasons, Plaintiffs cannot demonstrate that a single, indivisible injunction is appropriate for the entire proposed class. First, as explained in Section I, this Court lacks jurisdiction to grant Plaintiffs' requested injunction, and thus injunctive relief under Rule 23(b)(2) is completely unavailable. In this APA case, judicial review is limited to the individual administrative record for each individual claim, and the only available remedy under the APA, upon a finding of administrative error, is to remand to the agency for further proceedings consistent with the court's decision. The individualized nature of the remedy makes certification under Rule 23(b)(2) inappropriate.

Second, even if jurisdictionally possible, a single injunction cannot provide relief to

every member of the class in this case. Plaintiffs challenge the conduct of three separate departments of the United States military, and each department has a separate regulatory system for correcting military records. A uniform injunction applying to the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force is not possible.

Third, even if Plaintiffs could surmount all these hurdles (and they cannot), a "one-size-fits-all" injunction imposing "medically appropriate standards" cannot apply across the board in all cases to each member of the class because what is "medically appropriate" will vary from one case to the next. All three correction boards place the burden on the applicant to demonstrate error or injustice in a particular military record, and thus the evidentiary record will vary from applicant-to-applicant. Some applicants might submit medical evidence, but others may not, and thus determining what is "medically appropriate" will necessarily depend on the specific medical facts before the boards. A single classwide injunction under 23(b)(2) is not appropriate under these circumstances.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification should be denied.

Dated: August 7, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on August 7, 2014, a copy of the foregoing DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION 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