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' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

ARGUMENT[1]

I. THE ABCMR'S DENIAL OF PLAINTIFF DAVIS'S APPLICATION DID NOT VIOLATE THE APA OR THE FIFTH AMENDMENT.

A. The ABCMR's Decision Did Not Violate the APA.

Plaintiff Davis first argues that the ABCMR acted arbitrarily, in violation of the APA, because it "nowhere addressed Mr. Davis' argument that his PTSD diagnosis explains his misconduct and justifies a record correction." ECF No. 34 at 26. This claim is factually incorrect and inconsistent with the administrative record. The ABCMR considered Davis's PTSD argument, along with documentation showing that a physician at the Department of Veterans Affairs diagnosed Davis with PTSD in August 2011, but ultimately concluded that Davis had not met his burden of demonstrating that his other than honorable discharge status was unjust. *See* ECF No. 26-1, at 24; AR 7, ¶ 1; AR 5, ¶ 3. Plaintiffs' failure-to-consider contention, therefore, lacks merit.

Davis next argues that the ABCMR acted arbitrarily by requiring him to produce evidence that a physician diagnosed him with PTSD prior to his discharge, even though PTSD was not recognized as a medical condition until after his discharge. ECF No. 34 at 27-28. Plaintiff's argument mischaracterizes the facts in the administrative record. In denying Davis's application, the ABCMR found that Davis did not produce evidence showing that he "was diagnosed with PTSD *or any other mental condition* prior to discharge on 12 February 1974." AR 7, ¶ 1 (emphasis added). Thus, the ABCMR did not deny Davis's application because he was not diagnosed with PTSD in 1974. Instead, the ABCMR found that he failed to produce

[1] On September 3, 2014, the Secretary of Defense issued a policy memorandum addressing many on the issues at the center of this litigation. As a result, Defendants intend to move for a voluntary remand of all claims in this case for administrative consideration under the new policy memorandum.

pre-discharge evidence of *any* mental condition that interfered with his performance of his military duties and that caused the misconduct leading to his discharge. *See id.*

Davis next argues, in sum, that the Court should reweigh certain evidence and find that his combat trauma caused him to develop PTSD, led to his other than honorable discharge, and constitutes an "injustice" warranting an upgrade in his discharge status. ECF No. 34, at 27-28. This argument fails, however, because it misapprehends the nature of judicial review of a board decision under the APA. Courts do not review a board's decision *de novo*, but only under the deferential standard of whether the decision was arbitrary, capricious, or unsupported by substantial evidence. *See, e.g.*, *Dibble v. Fenimore*, 545 F.3d 208, 216 (2d Cir. 2008). Here, consistent with the APA, the ABCMR articulated a reasonable explanation for its conclusion that Davis had not met his burden of demonstrating that his other than honorable discharge status was the result of material error or injustice. *See* ECF No. 26-1, at 21-26.

Plaintiff Davis also argues that the ABCMR acted arbitrarily by rejecting his access-to-counsel claim. ECF No. 34 at 29-30. He claims that his discharge status should be upgraded because the document informing him of the consequences of his discharge is unsigned, which Davis suggests is evidence that the Army "improperly denied his rights to notice and access to counsel" *Id.* at 29. This argument fails: The "absence of documents . . . reasonably unavailable is not a basis for a court to set aside a Board decision because under the APA, the court should assess the lawfulness of the Board decision in light of the factual record at the time of the decision." *Blassingame v. Sec'y of Navy*, 811 F.2d 65, 72 (2d Cir. 1987).

B. The ABCMR's Decision Did Not Violate the Fifth Amendment.

The ABCMR did not violate Plaintiff Davis's procedural due process rights under the Fifth Amendment. The administrative record demonstrates that Plaintiff Davis received

adequate procedural protections: Plaintiff had the opportunity to submit evidence and argument to the ABCMR with the assistance of counsel, AR 12-94, 3, 14; the ABCMR considered Plaintiff's evidence and addressed Plaintiff's contentions of error in a reasoned, written opinion, AR 3-8; and the ABCMR notified Plaintiff of its decision and afforded him the opportunity to seek timely reconsideration of that decision, AR 1-2. In his opposition, Plaintiff does not dispute any of the foregoing facts, or point to any specific, constitutionally-deficient procedure evident in the administrative record. Nor does Plaintiff identity the additional procedure that he contends is constitutionally required. Plaintiff, accordingly, has failed to create any genuine issue of material fact with regard to his procedural due process claim, and thus the Secretary is entitled to summary judgment on this claim.[2]

The ABCMR also did not violate Davis's equal protection rights under the Fifth Amendment. The ABCMR correctly determined that Plaintiff Davis failed to submit evidence showing that he was discriminated against on the basis of his race while stationed at Fort Bragg after he returned from Vietnam, and thus reasonably decided that Davis had not met his burden of showing that his discharge under other than honorable conditions was unjust. *See* ECF No. 26-1 at 27-28. In his opposition, Plaintiff argues that the Board should have provided its own evidence to affirmatively disprove Davis's allegations of discrimination in the Vietnam Era. ECF No. 34 at 32. This argument fails. The ABCMR is required, by regulation, to decide each case with the "presumption of administrative regularity" and thus *the applicant* has the burden of

[2] In a footnote, Davis contends that the ABCMR violated procedural due process by declining to conduct an in-person hearing. ECF No. 34 at 31 n.17. The law is well-settled, however, that an in-person evidentiary hearing is not constitutionally required in all circumstances. *See, e.g., Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 653-54 (2d Cir. 1999). Here, the ABCMR determined, consistent with its regulation, 32 C.F.R. § 581.3(e)(3)(ii), that justice did not require a live hearing for reviewing Davis's paper application. This decision was reasonable and in no way constitutionally deficient.

proving an error or injustice by a preponderance of the evidence. 32 C.F.R. § 581.3(e)(2). The ABCMR reasonably determined that Mr. Davis's conclusory allegations of discrimination did not demonstrate purposeful discrimination by a preponderance of the evidence.

II. PLAINTIFF MONK'S APA AND FIFTH AMENDMENT CLAIMS ARE NOW MOOT BECAUSE THE BCNR HAS ISSUED A FINAL DECISION ON HIS APPLICATION.

In his opposition, Plaintiff Monk argues that his application has been "constructively denied" because the BCNR has not issued a decision within 18 months of receipt, as required by 10 U.S.C. § 1557(b), and thus the Court can judicially review this "constructive denial." ECF No. 34 at 24-25.

Plaintiff's understanding of Section 1557(b) and judicial review under the APA is incorrect. Nonetheless, the issue of whether the Court can judicially review Plaintiff's purported "constructive denial" is now moot because the BCNR has recently issued an actual decision denying Plaintiff Monk's application. *See* Ex. 1, BCNR Decision Denying Conley Monk's Application (July 28, 2014). *See also, e.g.*, *Van Wie v. Pataki*, 267 F.3d 109, 113 (2d Cir. 2001) ("[a] case becomes moot when interim relief or events have eradicated the effects of the defendant's act...."); *Holmes v. v. Dep't of Army*, 4:13-CV-159 CDL, 2014 WL 1029946, at *3 n.1 (M.D. Ga. Mar. 17, 2014) (finding challenge to ABCMR's reconsideration denial moot given Court's decision upholding ABCMR's underlying decision). Plaintiff Monk's constructive-denial claim, accordingly, should be denied as moot.

III. THE INDIVIDUAL AND ORGANIZATIONAL PLAINTIFFS' APA AND FIFTH AMENDMENT CLAIMS CHALLENGING THE "GENERAL POLICIES AND SYSTEMIC PRACTICES" OF THE CORRECTION BOARDS (COUNTS ONE AND TWO) SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

In Counts One (APA) and Two (Fifth Amendment), Plaintiffs seek to "challenge the boards' general policies and systemic practices," and, for relief, request that the Court impose "injunctions directing the boards to modify their policies and practices." ECF No. 37 at 29 n.28; *see also* Compl., Second Prayer for Relief.

Plaintiffs' "system-wide" APA and Fifth Amendment claims should be dismissed because this Court lacks the jurisdictional authority to grant the injunctive relief Plaintiffs have requested. *See* ECF No. 33 at 9-13 (explaining bases for dismissal of Plaintiffs' "system-wide" challenge in context of opposing motion for class certification). In summary:

(1) Plaintiffs' requested injunction, which seeks an order requiring each Secretary to adopt unexplained and undefined "suitable review procedures," is not available in a case, like this one, seeking review of agency action under the APA; 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);

(2) The procedures Plaintiffs seek to impose on all three correction boards are not required by the military record-correction statute, 10 U.S.C. § 1552, its implementing regulations, and the APA; Plaintiffs' request to engraft additional procedural requirements is therefore foreclosed by *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523–25 (1978), and Second Circuit precedent;

(3) Plaintiffs' requested injunction, which seeks to completely overhaul the administrative system for correcting military records, 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), as well as Congress's express delegation of authority to the Secretary of each military department to establish the appropriate procedures governing the record correction process, *see* 10 U.S.C. § 1552(a)(1) & (a)(3).

Plaintiffs' APA and Fifth Amendment claims also fail for an additional reason, which has become clear in their opposition memorandum. Plaintiffs make clear that Counts One and Two do not challenge any specific board regulation, rule, decision, or other discrete agency action of a particular correction board. Instead, Plaintiffs seek to challenge the "general policies and practices" of the correction boards. *See* ECF No. 34 at 37 & n.28. This type of broad programmatic challenge is not actionable under the APA. The APA was designed to ensure deferential review of agency action and to avoid "pervasive oversight by federal courts over the manner and pace of agency compliance with . . . congressional directives." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004). Thus, the APA permits review only of "discrete" agency actions, which means that Plaintffs cannot seek "general orders compelling compliance with broad statutory mandates." *Id.* at 67. Here, Plaintiffs' challenge to the "general policies and systemic practices" of the correction boards is precisely the type of programmatic challenge that is not actionable under the Administrative Procedure Act.[3]

[3] Because this Court lacks the jurisdictional authority to grant the injunctive relief Plaintiffs have requested in Counts One and Two, those claims should be dismissed in their entirety, and thus the Court need not address whether the organizational Plaintiffs have organizational and representational standing to assert these claims alongside the individual Plaintiffs. Nonetheless, for the reasons discussed in Defendants' opening brief, the organizational Plaintiffs should be dismissed from this case for lack standing. *See* ECF No. 26-1 at 38-46. In addition, the

IV. ALL CLAIMS ASSERTED UNDER SECTION 504 OF THE REHABILITATION ACT (COUNTS THREE AND SIX) SHOULD BE DISMISSED.

A. The Rehabilitation Act Claim is Foreclosed by the Comprehensive and Exclusive Congressional Scheme for the Correction of Military Records.

In their opposition, Plaintiffs do not identify a single case where a federal court has permitted a member of the military to challenge a decision made under 10 U.S.C. § 1552 by filing a claim under Section 504 of the Rehabilitation Act. Nonetheless, Plaintiffs maintain that their Section 504 claim is not precluded because it challenges the standards or procedures of the correction boards as opposed to the individual decisions made pursuant to those procedures. ECF No. 34 at 22-24. Relying on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994), Plaintiffs contend that their Section 504 claim is not precluded because a finding of preclusion would "foreclose meaningful judicial review"; their Section 504 claim is wholly "collateral to" the review provisions of 10 U.S.C. § 1552; and their Section 504 claim is "outside the agency's expertise." *Id.* Plaintiffs' contention fails because none of those circumstances are present in this case.

Plaintiffs' challenge to the procedures used by the correction boards can be meaningfully reviewed under 10 U.S.C. § 1552 and its implementing regulations. Under these provisions, Plaintiffs can submit, either in their original application or in a timely-filed motion for reconsideration, any evidence or argument in support of their contention that their military records are in error or unjust, including a challenge to the procedures used by the boards in adjudicating their claims. *See* 32 C.F.R. §§ 581.3(c)(2)(iii), 723.3(e)(1), 865.2(c) (noting that boards decide cases on the "evidence of record" submitted by the applicant). Further, even if

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Secretary of the Air Force should be dismissed as a Defendant because there are no allegations or claims asserted against the Air Force by an actual individual veteran. *See* ECF No. 26-1 at 46.

Plaintiffs are correct that they could not present their procedural challenge at the administrative level (and they are not), their procedural challenge still can receive meaningful review from this Article III court under the APA. Once Plaintiffs obtain a final decision from the correction boards, they may appeal that decision under 10 U.S.C. § 1552 and the APA. *See, e.g.*, *Blassingame*, 866 F.2d at 560 (reviewing claim of procedural error under APA); *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132 (2012) (finding that plaintiff's constitutional claims could receive meaningful review under Civil Service Reform Act even if claim could not be addressed at administrative level, in light of later review by an Article III court). Plaintiffs do not need to bring an individual action under Section 504 of the Rehabilitation Act to obtain meaningful judicial review of the board's implementation of its procedures.

Plaintiffs' Section 504 claim also is not "wholly collateral" to the provisions of 10 U.S.C. § 1552. Plaintiffs seek, through Section 504, to challenge the procedures used by each Secretary to correct military records. Section 1552(a)(3), however, specifically mandates that all corrections of military records "*shall* be made under the procedures established by the Secretary concerned." 10 U.S.C. § 1552(a)(3)(emphasis added). Plaintiffs' procedural challenge, which contests each Secretary's implementation of the military correction statute, is thus precisely the type of challenge that Congress intended to channel through Section 1552's review process. *Cf. Connecticut v. Spellings*, 453 F. Supp. 2d 459, 493 (D. Conn. 2006) (noting that because plaintiffs' "claim requires a particularized analysis of the language and implementation of the Act, the claim is not wholly collateral to the enforcement scheme provided by Congress."); *see also Elgin*, 132 S. Ct. at 2133 (similar).

Plaintiffs' procedural challenge also falls squarely within the expertise of the correction boards. Plaintiffs contend that the correction boards are not using what they consider to be

"medically appropriate standards" (which Plaintiffs do not explain or define). Determining what is "medically appropriate," however, will necessarily depend on the specific medical facts before the boards, which will vary depending on the evidence that a particular applicant submits. The boards, having processed thousands of applications raising a host of medical claims, are in the best position to know what procedures would be most appropriate. The expertise of the correction boards can be "brought to bear" on applications seeking a discharge upgrade due to combat-related PTSD. *See Elgin*, 132 S. Ct. at 2140. Accordingly, Plaintiffs' procedural challenge should be exclusively reviewed by the correction boards under 10 U.S.C. § 1552 and, if necessary, by a federal district court under the APA. The board's procedures should not be reviewed as part of an independent action under Section 504 of the Rehabilitation Act.

B. Section 504 of the Rehabilitation Act Does Not Provide for a Private Cause of Action Against a Federal Agency Conducting a Federal Program.

Plaintiffs argue that Section 505(a)(2) of the Rehabilitation Act provides for a private cause of action because that provision incorporates the remedies of Title VI of the Civil Rights Act of 1964, and, according to Plaintiffs, Section 601 of Title VI (42 U.S.C. § 2000d) implicitly authorizes a private right of action against a federal agency conducting a federal program. *See* ECF No. 34 at 19-20. Plaintiffs are mistaken. It is true that Section 505(a)(2) of the Rehabilitation Act incorporates the remedies of Title VI; however, Title VI only provides for an implicit private cause of action *against nonfederal recipients of federal funds*. *See Cannon v. University of Chicago*, 441 U.S. 677, 696–97 nn. 20 & 21 (1979); *see also Lau v. Nichols*, 414 U.S. 563 (1974) (assuming a private right to enforce Title VI against non-federal entities); *see also* ECF No. 34 at 20 (relying on cases asserting claims against nonfederal entities that receive federal financial assistance). Title VI does not, however, confer a private cause of action against programs administrated directly by a federal agency, such as the military's record-correction

program at issue here. *See, e.g.*, *Soberal-Perez*, 717 F.2d 36 (2d Cir. 1983) (holding that Title VI does not apply to programs directly administered by United States); *Sherman v. Black*, 510 F. Supp. 2d 193, 198 (E.D.N.Y. 2007) (same); *Wise v. Glickman*, 257 F. Supp. 2d 123, 132 (D.D.C 2003) (same); *Marsaw v. Trailblazer Health Enters*, L.L.C., 192 F. Supp. 2d 737, 737 (S.D. Tex. 2002) (same); *Williams v. Glickman*, 936 F. Supp. 1 (D.D.C. 1996) (same). Plaintiffs, therefore, are incorrect in claiming that Section 504 contains a private right of action against federal agencies administering federal programs (like Defendants here) by incorporating the remedies of Title VI.[4]

CONCLUSION

For these reasons, and for those reasons previously discussed, Defendants' motion to dismiss and for summary judgment should be granted.

Respectfully submitted this 5th day of September, 2014,

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[4] Plaintiffs also err by citing cases addressing claims of disability discrimination in federal employment. *See* ECF No. 34 at 20-21. This case does not concern any employment discrimination claim. Further, a claim of disability discrimination in federal employment is governed by Section 501 of the Rehabilitation Act, not Section 504, and incorporates remedies borrowed from Title VII. *See* 29 U.S.C. §§ 794a(a)(1); 791(g); *see also Rivera v. Heyman*, 157 F.3d 101, 104 (2d Cir. 1998).

It is true that several cases from the Ninth Circuit have concluded that a private right of action against federal agencies conducting federal programs is available under Section 504. *See J.L. v. Soc. Sec. Admin.*, 971 F.2d 260, 264 (9th Cir. 1992); *Doe v. Attorney Gen.*, 941 F.2d 780, 794–95 (9th Cir. 1991); *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 503 (N.D. Cal. 2011). These cases, however, are wrongly decided, for all of the reasons set forth in Defendants' opening brief.

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CERTIFICATION OF SERVICE

I hereby certify that on September 5, 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
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