

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

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)	
WILLIAM B. COWLES,)	
)	
	Plaintiff,)	Civil No.: _____
)	
	v.)	
)	
JOHN MCHUGH, Secretary of the Army,)	
)	November 21, 2013
	Defendant.)	
)	
_____)	

Plaintiff William B. Cowles, through counsel, alleges the following facts upon information and belief:

COMPLAINT

The United States Army wrongfully stigmatized and denied benefits to William B. Cowles by misdiagnosing him with Adjustment Disorder (“AD”) during the process of separation. The Army then compounded its error by refusing to correct the record to medical retirement for Post-Traumatic Stress Disorder (“PTSD”), as requested in Mr. Cowles’s application to the Army Board for the Correction of Military Records (“ABCMR”). In this action, Mr. Cowles seeks an order reversing the ABCMR’s denial of his record correction application and directing payment of retirement pay that his service earned but which the Army has unlawfully withheld. In the alternative, Mr. Cowles seeks a remand with instructions to the ABCMR to respond adequately to all contentions.

Mr. Cowles served honorably in the Army National Guard for over twenty years. While deployed for Operation Iraqi Freedom in 2003, he experienced trauma that led to his medical

evacuation. The Army diagnosed him with Adjustment Disorder and separated him with an honorable discharge for “other designated physical or mental conditions,” never testing him for PTSD and affording him less than four months to recover from his alleged AD.

Less than two months after Mr. Cowles’s discharge, a U.S. Department of Veterans Affairs (“VA”) physician diagnosed him with service-connected PTSD at a 30% disability rating. The VA now rates Mr. Cowles 100% disabled. His severe PTSD and service-connected knee injuries forced Mr. Cowles to retire from his job in environmental waste removal. He wants to go back to school so he can change careers, but his AD discharge prevents him from receiving the full education benefits from the Post-9/11 Veterans Educational Assistance Act available to service members who are medically retired.

Mr. Cowles applied to the ABCMR to change his discharge to medical retirement. The Board denied him, insisting that because there was no PTSD diagnosis prior to separation, the Army’s diagnosis of Adjustment Disorder must have been correct. In violation of the Administrative Procedure Act, the Due Process Clause, and the Rehabilitation Act, the Board ignored the VA’s contemporaneous PTSD diagnosis, failed to use medically appropriate standards for considering the evidence of PTSD, and failed to respond to multiple additional arguments raised by Mr. Cowles.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 1346, and 2201. This action arises under the Fifth Amendment of the U.S. Constitution; the Administrative Procedure Act, 5 U.S.C. § 706; the Rehabilitation Act of 1973, 29 U.S.C. § 794; and 10 U.S.C. § 1201.

2. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) as Plaintiff William Cowles resides in the District of Connecticut, no real property is involved in the action, and Defendant John McHugh is sued in his official capacity as an Officer of the United States.

PARTIES

3. Plaintiff William B. Cowles is a veteran of the United States Army National Guard. He is a citizen of the United States and currently resides in Connecticut.

4. Defendant John McHugh, Secretary of the Army, is sued in his official capacity. Defendant is empowered to act through a board of civilians to change any military record of a former member of the Army whenever necessary to correct an error or to remove an injustice.

FACTS AND PROCEEDINGS

Mr. Cowles's Military Service

5. William B. Cowles volunteered to serve in the Army National Guard in 1974 as a combat engineer.

6. Mr. Cowles completed training as a construction equipment operator and a nuclear biological chemical specialist. He served honorably for more than twenty years, consistently receiving positive performance reviews and the Army Commendation Medal, the Army Achievement Medal, Army Reserve Components Medal (5th award), National Defense Service Medal (2nd award), and the Armed Forces Reserve Medal with M Device.

7. In February 2003, he was activated for deployment with the 248th Engineering Combat Team to Kuwait in support of Operation Iraqi Freedom ("OIF").

8. Mr. Cowles arrived at Camp Virginia, Kuwait, on May 3, 2003. His unit then moved to Iraq.

9. As soon as he arrived, insurgents ambushed a humvee, and three people from the National Guard unit serving alongside him were killed. Mr. Cowles saw the bloodstained, mangled humvee when it came back to base, and he saw grown men cry for the first time in over twenty years of service.

10. A few days after the ambush, insurgents blew up an ammunition storage unit not far from his position. The explosion sent the soldiers running for their lives, and Mr. Cowles saw men urinate in their uniforms from fear as they screamed for their Personal Protective Equipment – helmets and apparel designed to shield bodies from impact.

11. Mr. Cowles then witnessed a brutal death firsthand. Despite security rules prohibiting the use of cell phones in the camp (because they were often used to detonate Improvised Explosive Devices), one day a civilian Pakistani truck driver pulled a cell phone out of his boot inside the base. When the driver would not relinquish the cell phone, a soldier repeatedly beat the man in the head with the stock of his M-16 until the man stopped moving. Plain-clothed special operations personnel soon drove up, took the driver's pulse, removed his corpse, and instructed the witnesses never to speak of the event.

12. Mr. Cowles then began having nightmares. Seeing the driver killed triggered intrusive thoughts about the death of Mr. Cowles's own brother from cancer ten years earlier, and Mr. Cowles began to think he would die as well. The combination of nightmares, lack of sleep, and emotional stress prevented Mr. Cowles from having a bowel movement for five days. Eventually the pain from this became unbearable, and Mr. Cowles passed out.

13. Mr. Cowles was medically evacuated to the Naval Fleet Hospital in Rota, Spain, on or about May 27, 2003, and was then transferred to Walter Reed Army Medical Center

(“Walter Reed”) in Washington, D.C., on or about May 31, 2003. There, physicians assigned him to the locked-down psychiatric ward.

Mr. Cowles’s Separation

14. After meeting with Mr. Cowles once, a physician at Walter Reed diagnosed Mr. Cowles with Adjustment Disorder with mixed anxiety and depressive mood. Mr. Cowles was then discharged from Walter Reed with nearly a month of authorized leave to his home in Connecticut, where he received no treatment or monitoring.

15. As directed, Mr. Cowles reported to Behavioral Health at Fort Drum on or about July 14, 2003. He was assigned to a treating psychologist, Captain Demer. After a single meeting of approximately fifteen minutes, Captain Demer recommended that Mr. Cowles be allowed to retire due to his many years of service. Mr. Cowles asked Captain Demer for medication to address his symptoms, but Captain Demer refused. Mr. Cowles met with Captain Demer only once more.

16. Mr. Cowles attended group therapy sessions but found them ineffective. His hands shook uncontrollably, he had great difficulty sleeping, he experienced severe nightmares, and he turned to alcohol to cope with his symptoms. Subsequently, a psychiatrist at the Army Medical Center at Ft. Drum gave Mr. Cowles medication to help with sleep and tremors.

17. Captain Demer met with Mr. Cowles for the second and last time and yelled at him for obtaining this medication. The meeting lasted no longer than fifteen minutes.

18. Captain Demer maintained that Mr. Cowles had Adjustment Disorder, and recommended him for separation on August 27, 2003. That day, Mr. Cowles’s commander, Captain Walling, counseled him about this diagnosis and the possibility of administrative separation if he did not recover. In the formal counseling record, Captain Walling indicated that

Mr. Cowles had been verbally counseled once previously, but this previous counseling does not appear in Mr. Cowles's record as required by Army Regulations.

19. Shortly thereafter, Mr. Cowles was advised that he would be sent back to Connecticut so that he could retire due to his medical condition. Based on Captain Demer's recommendation, Captain Walling instituted an administrative discharge per Army Regulation 635-200, ¶ 5-17, on or about September 2, 2003.

20. Mr. Cowles was separated with an honorable discharge on September 25, 2003. The Army recorded the narrative reason for separation as "other designated physical or mental conditions."

PTSD Diagnosis

21. After his discharge, Mr. Cowles continued to experience severe psychological symptoms, so he went to the VA Medical Center in West Haven, CT, not far from his home. Less than two months after his discharge, VA doctors diagnosed Mr. Cowles with "[c]ombat-related PTSD, now chronic." VA rated Mr. Cowles as 30% disabled for service-connected PTSD, dating back to Sept. 26, 2003. Subsequently, VA increased his disability rating to 50%, 70%, and finally 100%.

Post-Discharge Struggles

22. Today Mr. Cowles relies upon medication to treat a number of symptoms, including anxiety, anger, and depression. He struggles to sleep, often has little appetite, and isolates himself from the rest of his family because of his severe levels of fear and anger. VA increased his disability rating because his PTSD symptoms steadily worsened.

23. Mr. Cowles was forced to retire from his civilian job in waste management, where he had worked as a senior supervisor. His PTSD and service-connected knee injury created a

safety hazard when he supervised waste management sites. Additionally, the job was extremely stressful, as one small mistake in a quote could lose the company a bid or a large sum of money. His PTSD often made it difficult to concentrate and to remember details, so Mr. Cowles constantly worried that he would slip up on a contract or cause another explosion at a job site. As a result, he became a liability to the company.

24. Because of his inability to work in environmental waste removal, Mr. Cowles wants to go back to school and change careers. However, he cannot afford to pay tuition and living expenses if he is not working.

25. Because he was separated under ¶ 5-17 for Adjustment Disorder rather than medically retired for the condition he actually had, PTSD, Mr. Cowles is eligible for only half of the GI Bill benefits that his service has otherwise earned. Mr. Cowles did not realize he had not been medically retired until 2009, when he applied for education benefits. If his record were changed to reflect the proper diagnosis at discharge, he would be entitled to his full GI Bill benefits.

26. Mr. Cowles's separation for Adjustment Disorder also deprived him of Army retirement pay. Between September 2003 and January 2008, Mr. Cowles received VA disability payments based on a 30% disability rating. If he had instead received Army retirement payments based on a 30% disability rating, he would have collected approximately \$18,000 more than he did from the VA payments.

Application for Upgrade

27. Congress has authorized the Secretary of the Army, acting through the Army Board for Correction of Military Records ("ABCMR"), to correct any military record when it is "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). The Secretary

regularly exercises this power to upgrade the discharge status of a former service member. The ABCMR has “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.” *Yee v. United States*, 512 F.2d 1383, 1387-88 (Ct. Cl. 1975) (citations omitted).

28. In June 2012, Mr. Cowles applied to the ABCMR for review of his discharge status.

29. In his application, Mr. Cowles explained that he does not have Adjustment Disorder, as incorrectly diagnosed by the military. In fact, he has PTSD, as VA doctors and a psychiatric expert agree. Moreover, his discharge was in violation of current Army regulations and those in effect at the time of his separation.

30. Mr. Cowles submitted a detailed brief supported by five declarations, an expert psychiatric evaluation by Dr. Sarah Mourra of the Yale School of Medicine Department of Law and Psychiatry, and hundreds of pages of other documentation of his medical history.

31. On November 8, 2012, the ABCMR denied Mr. Cowles’s application.

32. The ABCMR rejected Mr. Cowles’s claim to a record correction on the grounds that he had not presented any evidence of a diagnosis of PTSD prior to his separation. The Board concluded, therefore, that the Army’s diagnosis of Adjustment Disorder was correct.

33. The ABCMR decision did not address Mr. Cowles’s contention that the Army violated its own separation procedures by failing to give him ample opportunity to recover from the alleged Adjustment Disorder before separating him.

34. The Board’s decision included boilerplate language about the disability evaluation and separation process. It did not mention the Army regulations requiring that a soldier be

offered “ample opportunity” to improve his performance and to recover. It did not discuss which procedures the Army did or did not follow in Mr. Cowles’s case.

35. The Board did not respond to Mr. Cowles’s contention that Army doctors’ failure to consider PTSD was inconsistent with good medical practice.

36. Furthermore, the Board failed to address Mr. Cowles’s separate argument that a correction is warranted to remove an error or injustice because if current Army regulations for separation had been in place at the time of his discharge, the misdiagnosis and erroneous administrative discharge would likely not have occurred.

37. In addition, the decision did not address Mr. Cowles’s argument that military retirement with a PTSD diagnosis should be granted to remove an injustice based on the totality of Mr. Cowles’s life and circumstances.

38. The Board’s decision to deny Mr. Cowles a correction to medical retirement for PTSD discriminated against him based upon the Army’s record of his disability, Adjustment Disorder.

39. The Government Accountability Office has identified hundreds of illegal Personality Disorder discharges from the Army. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-31, DEFENSE HEALTH CARE: ADDITIONAL EFFORTS NEEDED TO ENSURE COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (2008). Other reports indicate the Army processed a substantial number of Adjustment Disorder discharges in recent years. Melissa Ader et al., *Casting Troops Aside: The United States Military’s Illegal Personality Disorder Discharge Problem*, VIETNAM VETERANS OF AMERICA (Mar. 2012), <http://www.vva.org/PPD-Documents/WhitePaper.pdf>.

40. Since at least 1998, in considering corrections to medical retirement for PTSD, the ABCMR has denied all applications from veterans separated for AD.

41. The ABCMR also discriminated against Mr. Cowles on the basis of his PTSD. The Board failed to adequately consider Mr. Cowles' PTSD diagnosis, as it frequently does with veterans with PTSD seeking changes to their discharge statuses.

42. The military has systematically denied applications for discharge upgrades and other corrections for veterans whose claims are based in whole or in part on PTSD.

43. For example, since 2003, the ABCMR has only approved two of approximately 145 applications for upgrades of other-than-honorable discharges submitted by Vietnam veterans claiming PTSD—a 1.4% approval rate. In contrast, the ABCMR's overall grant rate for cases heard by the board was approximately 40% for the years 2005-2008, the most recent years for which the ABCMR has made data available.

44. Mr. Cowles has exhausted all administrative remedies available to him.

LEGAL CLAIMS

Count I

Administrative Procedure Act, 5 U.S.C. § 706(2)(A) Refusal to Correct Discharge Status

45. Plaintiff alleges and incorporates herein by reference as though fully set forth each and every allegation contained in Paragraphs 1 through 44 of this Complaint.

46. The ABCMR's decision on the merits in Mr. Cowles's case was arbitrary, capricious, unsupported by substantial evidence, contrary to law, and an abuse of discretion for reasons including but not limited to those discussed below.

47. The ABCMR failed to engage in reasoned decisionmaking when it concluded that because there was no diagnosis of PTSD before separation, the Army's diagnosis of Adjustment

Disorder was correct. It also failed to engage in reasoned decisionmaking when it rejected Mr. Cowles's argument that the Army had violated its own separation procedures but only provided boilerplate language about the disability evaluation and separation process.

48. The Board's decision was also arbitrary and capricious in failing to distinguish other ABCMR decisions that have invalidated diagnoses upon separation based on medical evidence from after separation.

49. The decision was also arbitrary and capricious because it failed to address each of Mr. Cowles's legal arguments.

Count II Violation of Procedural Due Process

50. Plaintiff alleges and incorporates herein by reference as though fully set forth each and every allegation contained in Paragraphs 1 through 49 of this Complaint.

51. The Due Process protections of the Fifth Amendment of the U.S. Constitution require that an administrative agency conduct adjudications in a fair and orderly manner.

52. The ABCMR failed to respond to each of Mr. Cowles's contentions. It did not address the arguments that the Army committed a procedural error in the separation process by failing to allow ample opportunity for Mr. Cowles to recover, that Army doctors' failure to consider PTSD was a violation of good medical practice, that current regulations would have prevented the misdiagnosis, or that justice requires a correction to mitigate the impact of disability on Mr. Cowles's life.

53. The ABCMR also failed to use consistent and medically appropriate standards to evaluate the accuracy of Mr. Cowles's diagnosis upon separation, given the medical evidence from immediately after separation.

54. The decision also failed to distinguish Mr. Cowles's case from previous decisions where post-separation medical evidence has invalidated diagnoses upon separation.

55. The Army's perversion of the normal adjudication process has unconstitutionally infringed upon Mr. Cowles's property and liberty rights protected by the Due Process Clause of the Fifth Amendment.

Count III
Violation of Section 504 of the Rehabilitation Act

56. Mr. Cowles alleges and incorporates herein by reference as though fully set forth each and every allegation contained in Paragraphs 1 through 55 of this Complaint.

57. Section 504 of the Rehabilitation Act of 1973 ("Section 504") provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a).

58. Disability is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102.

59. Mr. Cowles has "a record of" Adjustment Disorder. By separating him on this basis, the Army indicated its view that Adjustment Disorder prevented Mr. Cowles from "working," a major life activity. 42 U.S.C. § 12102(2)(A).

60. Mr. Cowles is also "regarded as having such an impairment." Since the Army removed him from the service on this basis, it must have regarded Mr. Cowles's Adjustment Disorder as recurrent and not minor. According to the Medical Standards for Fitness, Adjustment Disorders "may be the basis for administrative separation if recurrent and causing interference with military duty." AR 40-501 ¶ 3-36 (2003).

61. Mr. Cowles is “otherwise qualified” to receive medical retirement. He meets all of the program requirements to be considered for medical retirement. If he had not been separated for AD, he would be qualified to receive medical retirement based on evidence that he actually had PTSD before separation. That he was separated for AD should not deprive him of that entitlement. If he had a different disability instead of PTSD, he would be qualified to receive medical retirement. The fact that he has PTSD should not deprive him of that entitlement.

62. The ABCMR’s program or activity of reviewing military records has received substantial federal financial assistance.

63. The regulations implementing Section 504 prohibit entities receiving federal financial assistance from utilizing “criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the recipient’s program or activity with respect to handicapped persons.” 34 C.F.R. § 104.4(b)(4).

64. In denying his application to correct his discharge status to medical retirement for PTSD, the ABCMR discriminated against Mr. Cowles on the basis of his separation for Adjustment Disorder. The method for considering claims by service members separated for AD discriminates on the basis of that AD by failing to use medically appropriate standards to evaluate whether it was a misdiagnosis. The Board has rejected every claim for medical retirement for PTSD from veterans who were separated for Adjustment Disorder since at least 1998.

65. The Board also discriminated against Mr. Cowles on the basis of PTSD. The ABCMR's method for considering claims for medical retirement for PTSD discriminates on the basis of that PTSD by failing to use medically appropriate standards to evaluate whether the service member had PTSD before separation.

66. As a result of this discrimination, Mr. Cowles cannot receive the benefits of Defendant's review processes, including a change in his discharge status and the benefits associated with it.

Count IV
Little Tucker Act, 28 U.S.C. § 1346, and Regulars and Members on Active Duty
for More than 30 Days: Retirement, 10 U.S.C. § 1201

67. Mr. Cowles alleges and incorporates herein by reference as though fully set forth each and every allegation contained in Paragraphs 1 through 66 of this Complaint.

68. Under 10 U.S.C. § 1201, the Secretary may retire a service member with retired pay when he is "unfit to perform the duties of [his] office . . . because of physical disability."

69. The Army has violated § 1201 by failing to medically retire Mr. Cowles.

70. If the Army had properly awarded Mr. Cowles medical retirement for his PTSD or if the ABCMR had properly corrected his record to medical retirement with at least a 30% rating, he would have been eligible for retired pay.

71. Army medical retirement payments to Mr. Cowles for the months of September 2003 to January 2008 would have been worth approximately \$18,000 more than the VA disability payments that Mr. Cowles received during that period.

72. The Little Tucker Act, 28 U.S.C. § 1346, gives this court jurisdiction over a claim for damages against the United States, not exceeding \$10,000, founded upon the violation of a federal statute.

73. Mr. Cowles waives any claim to damages over \$10,000, so this court has jurisdiction over his claim for back retirement pay.

DEMAND FOR JURY

74. Pursuant to Federal Rule of Civil Procedure 38(b), Mr. Cowles demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

(1) Direct, by issuance of an injunction, that the Board correct Mr. Cowles's record to reflect medical retirement by reason of permanent disability for PTSD, with a physical disability rating of at least 30%, for all purposes, including education benefits and back retirement pay.

(2) In the alternative, vacate the decision of the ABCMR and remand with instructions that the Board: (a) address Mr. Cowles's contention that lack of a PTSD diagnosis upon separation when he was not tested for it does not mean the Army's diagnosis was correct; (b) address, and distinguish if appropriate, Board authority in which relief was granted based on an applicant's post-separation medical evidence; (c) address Mr. Cowles's contention that the Army committed a procedural error by failing to give him ample opportunity to recover before separation; (d) address Mr. Cowles's argument that his discharge status is unjust because under current Army PTSD regulations, he would likely not have been administratively separated for Adjustment Disorder; and (e) address Mr. Cowles's contention that the totality of his meritorious service and life circumstances warrant a change in discharge status in the interest of justice.

(3) Grant any other relief that the Court deems just and proper.

Dated: November 21, 2013
New Haven, Connecticut

Respectfully Submitted,

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