UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sean Nealy
3300 Sky Country Lane
Apartment 203
Las Vegas, NV 89117

Plaintiff

v.

Kenneth J. Braithwaite
Secretary of the Navy
720 Kennan St., SE
Washington Navy Yard, DC 20374-5013

Defendant

Case No.: 1:20-cv-03820 (CKK)

Oral Argument Requested.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Petty Officer First Class Sean Nealy ("Plaintiff"), by and through his attorney, who respectfully moves this Court to grant summary judgment in this matter, for the reasons set out in the accompanying Memorandum in Support of Plaintiff's Motion. Plaintiff requests that this Court issue an order:

(1) Finding that the evidentiary record compelled a reasonable mind to find that Plaintiff had suffered from a highly stressful event;

(2) Finding that the evidentiary record compelled a reasonable mind to find that Plaintiff's PTSD was combat related;

(3) Holding that the PDBR's refusal to apply VASRD § 4.129 to Plaintiff's case was contrary to the law;

(4) Holding that the PDBR acted arbitrarily by failing to properly consider the VA's disability rating for Plaintiff;

(5) Holding that the PDBR's acted arbitrarily by failing to address Plaintiff's arguments concerning the impact of the stigma placed by the military on PTSD at the time;

(6) Holding that the Plaintiff did not waive consideration of the impact of the stigma placed on PTSD within the military on his own internal suppression of how he reported his own condition;

(7) Setting aside the PDBR's decision, PD 2016-00401, dated November 21, 2017, as unlawful under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (F), as arbitrary, capricious, and not supported by substantial evidence; and

(8) Remanding this matter to the PDBR for further proceedings in accordance with the Court's order.

In addition, he maintains his request that he be granted attorney's fees and expenses, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), should he prevail on remand.

Dated: December 29, 2021.

Respectfully submitted,

/s/DavidP.Sheldon

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INTRODUCTION

For the ease of all the parties, all citations will be to the certified administrative record ("AR") and will use the pagination of the record.

Plaintiff was a Petty Officer First Class in the Navy. He served as an in-flight technician and sensor operator on a Lockheed EP-3, a signals reconnaissance aircraft. From 2004 to 2007 he was assigned to VPU-2 squadron, which was one of two Navy covert Special Projects Squadrons, which were tasked by the Joint Chiefs of Staff, the U.S. Pacific Fleet, and the Joint Special Operations Command to conduct global high priority missions for reconnaissance, surveillance, and target acquisition.

From 2004 to 2007 Plaintiff would serve as a sensor operator in over 120 combat missions. Over the course of these missions, he helped participate in the coordination of many airstrikes and then had to assess the casualties which resulted from the strikes. One particular mission, dated May 26, 2006, would cause him lasting mental wounds. On May 26, 2006, Plaintiff coordinated a strike in Afghanistan which killed 180 enemy combatants. He assessed the battlefield through his sensor tools, called in A-10 Warthogs to engage in the strike, directed and coordinated the A-10's against the enemy combatants, and watched the strike unfold as the A-10's made their passes. Not only did he witness the strike as it happened, but he also reviewed the footage and had to count the dead, one by one, while assessing the aftermath. This was but the first day of a week where he would participate in the killing of 360 enemy combatants.

When he returned from deployment in July of 2006, he could clearly tell that something was wrong. His personality shifted and he began experiencing significant problems with anger. Intrusive thoughts and nightmares related to the May 26, 2006, airstrike would force their way into his head. He reported some of these issues during his post-deployment interview, dated

September 11, 2006. At the urging of his then girlfriend, later wife, he reported his condition to his flight surgeon, who referred him to a Navy medical facility for a diagnosis on September 22, 2006. He was diagnosed with acute PTSD and began undergoing intensive therapy and treatment. He would be grounded as unfit for flight duties in January of 2007, and finally was separated from the Navy on the grounds of disability in August of 2008.

Yet, his long and honorable service, and the mental wounds he suffered as a result of it, would be denigrated by the personnel of the very armed forces he had so honorably served. During his physical examination board, the board determined that he was disabled due to depression, with his PTSD only being an unclassified related injury. They determined that his depression was due to a moral failing and his growing difficulties rationalizing his actions during his service, not the severe mental trauma he experienced. One particularly reprehensible line officer, in his minority opinion, derided what Plaintiff had experienced as being unrelated to "real combat" and stated that Plaintiff wasn't truly disabled. He was thus separated, with an honorable characterization, with a 10% disability rating, insufficient for a disability retirement.

When Plaintiff appealed this decision in 2016 to the Physical Disability Board of Review ("PDBR") the PDBR adopted the PEB's denigration of Plaintiff's injuries, in their November 21, 2017, decision, PD 2016-00401.They refused to give his PTSD an independent disability rating on the grounds that he lacked a documented highly stressful event. In addition, they also implicitly stated that they did not believe he even had PTSD, using the then long out of date criteria of the DSM-4. Finally, the PDBR also completely refused to address the issue raised to them by the Plaintiff of the impact of the stigmatization of PTSD by the armed services at the time on Plaintiff's self-reporting of his own condition.

Plaintiff filed his complaint to set aside PD 2016-00401 as unlawful under the Administrative Procedure Act ("A.P.A.") in 2020. He filed his amended complaint on March 8, 2021. The Court requested a briefing schedule from the parties, and, pursuant to this schedule, he now moves this Court for summary judgment on his behalf. He requests that the Court find that the PDBR's finding that his condition was not related to a highly stressful event be set aside as unsupported by substantial evidence. A reasonable mind would be clearly compelled by the record to find that participating in, witnessing, and then later reviewing the aftermath of, in minute detail, an air strike which ended 180 human lives was a highly stressful event ("HSE"). On these grounds, he also requests that the Court find that the PDBR's refusal to apply the V.A. Standard Rating of Disabilities § 4.129 ("VASRD § 4.129" or "38 C.F.R. § 4.129") to him was contrary to the law, as it is uncontested that his mental condition was severe enough to result in his separation from the military, and the record compels a finding that it resulted from a highly stressful event. This would require assessing his disability on separation at a minimum of 50%, qualifying him for a disability retirement.

In addition, he also requests that PD 2016-00401 be set aside as unlawful under the A.P.A. as arbitrary due to the PDBR's failure to give proper consideration to his January 2009, VA rating, as required by binding Department of Defense Instruction. In addition, he also requests that it be set aside as arbitrary due to the PDBR's failure to address his substantive argument as to the impact of the stigmatization of PTSD in the military at the time on how his disability was assessed. He also requests that this Court find that he has not waived consideration of the issue of how this stigmatization impacted his own self-reporting of his condition. Finally, he notes to this Court that he maintains his request that he be awarded attorney's fees and expenses and will file a request should he prevail on remand.

STATEMENT OF THE FACTS

Plaintiff was a petty officer, first class, in Squadron VPU-2. AR at 659 (Evaluation Report and Counseling Record for period November 16, 2005, to November 15, 2006). He served as an in-flight technician and sensor operator on a Lockheed Ep-3, surveilling battle zones, coordinating and directing airstrikes, and then assessing the aftermath of the strikes. *Id.* at 659-60. By January of 2006 he had already earned three Air Medals and flown 57 combat missions between February of 2005 and January of 2006. AR 1292, 1360-1 (First, Second, and Third Air Medals and Descriptions). By the end of 2006, he would have flown 119 combat missions. Answer to the Amended Complaint at ¶7. On May 26, 2006, he helped coordinate a series of airstrikes which killed 180 enemy combatants. *See, e.g.* AR at 96 (Health Record dated September 22, 2006); *see also* AR at 588 (Compensation and Pension Exam Report dated November 12, 2008). This involved directing the strike aircraft on their repeated passes over the target zone. When the strikes were done, he also had to review the battlefield through the powerful optics of the aircraft in order to assess the aftermath and count the casualties. When he returned from deployment, he began reporting that he was suffering from changes in mood and personality, was becoming significantly more aggressive, was hypervigilant, and was having difficulty concentrating and dealing with intrusive nightmares. *Id.* These had also been reported on his September 11, 2006, post-deployment health evaluation. AR at 516-19. On September 22, 2006, on the prompting of his then girlfriend, later wife, he reported to a Navy medical facility after discussing his difficulties with his flight surgeon. AR at 96. He stated that he did not want to become a liability for his unit, but he was also trying to make sense of what has happening to him. *Id.* During this initial visit, and at all times afterward, he specifically linked his condition to what he had participated in and witnessed on May 26, 2006. *See id.*; *see also* AR at 81 (Health

Record dated December 1, 2006). He was diagnosed with acute PTSD and began intensive treatment and counseling. *Id.* This included exposure therapy to "kill-cam" footage. AR at 77 (Health Record dated December 15, 2006). In January of 2007, he was determined to no longer physically qualified for flight duty due to prolonged PTSD which was now considered permanent. AR at 76 (Direction of Commanding Officer, Naval Operational Medicine Institute, dated January 16, 2007). He was reassigned to the Calibration and Precision Measuring Equipment Laboratory, where he worked as a supervisor overseeing teams maintaining high precision avionics sensors, earning high reviews for his service. AR at 1350-1 (Evaluation Report for the period dated March 24, 2007, to November 15, 2007). He underwent a Medical Evaluation Board on April 8, 2008, which diagnosed him with the independent conditions of severe PTSD and a single episode of major depressive disorder. AR at 731-6 (MEB Report dated April 8, 2008). He then underwent a Physical Evaluation Board on May 12, 2008. AR at 39-40 (PEB Report dated May 12, 2008).

The PEB determined that he was suffering from major depressive disorder, granting him a 10% disability rating for it, but decided to subsume his PTSD into the major depressive disorder as only a related disorder, which resulted in no disability rating for it. *Id*. The PEB recommended his separation from active duty with severance, and he received an honorable characterization of his service. *Id.* However, the PEB found that he did not qualify for a medical retirement, as his disabilities were not rated above the 30% threshold. *Id.* Of the three officers on his PEB, the third would issue a derisive minority opinion, stating that Plaintiff had not seen any real combat, had never been directly involved in combat or directly threatened, and that he should not be separated because he was not suffering from PTSD, but was instead merely a conscientious objector. *Id.* at 40.

He was separated from the Navy for a non-combat related disability, with severance pay and an honorable characterization, on August 17, 2008. AR at 1322 (DD 214 of Sean Nealy). He filed an application with the VA, resulting in a determination of 40% service-connected disability, with 30% for PTSD, 10% for lumbar spine strain, and 10% for tinnitus. AR at 550 (VA Rating Decision dated January 14, 2009). In November of 2008 he would report experiencing intense fear and horror, and also being subject to RPG attacks. AR at 588.

In March of 2016 he filed an appeal to the Physical Disability Board for Review ("PDBR") in order to request that his PTSD be an independently rated disability, instead of an unrated related condition to his major depressive disorder and that his separation reason be changed AR at 1, 12 (2016 Application of Sean Nealy to the PDBR). On November 21, 2017, the PDBR issued their decision, PD 2016-00401. AR 1368-70. In the decision the PDBR first held that Plaintiff was not eligible for VASRD § 4.129, which mandated a minimum rating of 50% for mental disorders which were severe enough to result in separation for the military and which were related to highly stressful events. *Id.* at 1369. The PDBR based this holding on their finding that Plaintiff lacked a documented highly stressful event, had not stated that he had felt intense fear or horror, had not engaged in direct combat, and had not felt that his life was in danger. *Id.* In addition, the PDBR found that Plaintiff's symptoms were consistent with a rating of 10% for mental disorders under VASRD § 4.130. *Id.* at 1370. For these reasons, the PDBR denied Plaintiff's application. *Id.*

Plaintiff filed his complaint on December 27, 2020. He filed his amended complaint on March 8, 2021. In his complaint he requested that PD 2016-00401 be set aside under the Administrative Procedure Act, that the matter be remanded for further consideration by the

PDBR, pursuant to the Court's order, and that he be awarded attorney's fees and expenses. On September 27, 2021, the Court set the briefing schedule for this matter.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and evidence show "there is no genuine dispute as to any material fact and [the] movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). As judicial review for agency actions is based solely on the administrative record, the issue of undisputed/disputed material fact is not relevant to summary judgment motions in such matters. D.C. LCvR 7(h)(2). When a court reviewing an agency action determines that the agency action was unlawful, the matter must be remanded for further proceedings in line with the court's holding. *See N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012); *see also County of Los Angeles v. Shalala*, 192 F.3d 1005 at 1011 (D.C. Cir. 1999). Decisions by the PDBR reviewed under the heightened "substantial evidence" standard under 5 U.S.C. § 706(2)(E), along with the arbitrary and capricious, or otherwise not in accordance with law, standard under § 706(2)(A). This is because PDBR decisions, as established by its governing statute, 10 U.S.C. § 1553a, are reviewed on the record of an agency hearing provided by statute, meaning they qualify for § 706(2)(A). *See Sissel v. McCarthy*, 2021 U.S. Dist. LEXIS 244406 at *21-2 (D.D.C. December 22, 2021) (reviewing PDBR decision under the substantial evidence standard, given that it was an agency action based on a record-based factual conclusion); *see also Hatmaker v. United States*, 138 Fed. Cl. 471, 478 (Fed. Cl. 2018) ("The court's role here is to review the PDBR's decision under the 'substantial evidence' standard.") The "substantial evidence" standard of review requires that a reasonable mind could find adequate evidence within the evidentiary record to support the particular conclusion reached by the agency. *See Dickenson v. Zurko*, 527 U.S. 150, 162 (U.S. 1999). Or, to place it from the

opposite perspective, an administrative decision must be set aside when the evidentiary record would compel a reasonable mind to arrive at a contrary conclusion. *See, e.g., Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005).

ARGUMENT

I. The PDBR's failure to apply VASRD § 4.129 was a legal error because its finding that Plaintiff's PTSD because a reasonable mind would be compelled by the record to find that coordinating, and then witnessing, in minute detail, airstrikes that killed 180 enemy combatants, was a highly stressful event.

A decision must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) when it is contrary to the law. VASRD § 4.129 requires that a mental disorder, which results from a highly stressful event ("HSE"), and is severe enough to result in a service member's separation from the military, mandates a finding by a rating agency (including the PDBR) as at least 50% disabling. 38 C.F.R. § 4.129. This is determinative because the criteria for a disability retirement are that the service member must be found unfit for duty and have disabilities rated at least 30% disabling pursuant to the VASRD. The PDBR, in PD 2016-00401, refused to apply VASRD § 4.129 for several reasons. AR at 1369. The first is that the PDBR found that Plaintiff lacked a documented highly stressful event. *Id.* The second is that, though not explicitly stated, the PDBR found that Plaintiff did not merit a separate rating for his PTSD on the grounds that he did not meet the criteria PTSD, as he had not stated that he had felt intense fear or horror, and also had not stated ever having felt that his life was in danger. *See id.*

The PDBR's finding that Plaintiff lacked a documented HSE must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) as unsupported by substantial evidence. A reasonable mind would be clearly compelled by the record to find that participating in the coordination of, witnessing, and then assessing the aftermath of, all in minute detail, air strikes

which ended 180 human lives, even if enemy combatants, was a highly stressful event. *See* AR at 96, 588. In addition, the PDBR's other findings must be set aside as material errors of fact.

First, the PDBR made a blatant error in finding that Plaintiff had never expressed feeling intense fear or horror. *See* AR at 1369; *compare* AR at 588. Second, the PDBR tacitly judged Plaintiff's PTSD under the criteria of the DSM-4, which was not only 23 years old at the time of their judgment, but also four years out of date. *See* AR at 1369; *compare* SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (SAMHSA), *Substance Abuse Treatment: Addressing the Specific Needs of Women* (2009) at Appendix E: DSM-IV-TR Criteria for Posttraumatic Stress Disorder (A)(2). The requirement of stating intense fear or horror was dropped in the DSM-5, published in 2013, in large part thanks to the military's growing understanding of the impact of PTSD and the need to modernize the conception of those mental wounds. AMERICAN PSYCHIATRIC ASSOCIATION, *Diagnostic and Statistical Manual of Mental Disorders* (2013) at 271-272.

Third, the PDBR not only applied a long out of date criteria, it applied the criteria incorrectly, by finding that Plaintiff had to express that he had felt that his own life was in danger. *See* AR at 1369. The DSM-4's criteria for PTSD including witnessing the killing or serious injuring of others. *Substance Abuse Treatment* at Exhibit E. Fourth, the PDBR also made a material error in adopting the reprehensible reasoning of the PEB's minority opinion, which found that Plaintiff's condition was not directly related to combat and that Plaintiff had never stated that he had felt his life was in danger. *See* AR at 1369; *compare* AR at 40 (PEB Minority Opinion). Plaintiff's PTSD was directly related to his actions coordinating airstrikes and reviewing the aftermath of the mass death he had helped cause. *See* AR at 96, 588. This was clearly directly related to combat. Fifth, during his diagnosis by the VA, Plaintiff had also clearly

mentioned coming under rocket-propelled grenade ("RPG") fire, which clearly showed that he had felt his life was in danger. *See* AR at 588.

Given that the record compelled a reasonable mind to find that Plaintiff suffered from an HSE, and that it is uncontested that Plaintiff's condition clearly resulted from this HSE, and that his condition was severe enough to result in his separation from the military, the PDBR's decision to refuse to apply VASRD § 4.129 to his matter was thus contrary to law. *See* 5 U.S.C. § 706(2)(A), (F); *see* 38 C.F.R. § 4.129. As such, the PD 2016-00401 must be set aside under the A.P.A. as unlawful, not only as not supported by substantial evidence, but also as contrary to law. *Id.*

A. The PDBR's finding that Plaintiff's PTSD was not linked to a highly stressful event was unsupported by substantial evidence because the evidentiary record would compel a reasonable mind to find that the witnessing of, and participation in, the killing of 180 enemy combatants was a highly stressful event.

The PDBR's decision to refuse to apply VASRD § 4.129 was primarily founded on its finding that Plaintiff's PTSD was not linked to a documented HSE. AR at 1369 ("After prolonged deliberations, the panel concluded in the absence of a documented highly stressful event there is insufficient evidence to support the application of § 4.129"). The PDBR's decision to not apply VASRD § 4.129 was supported by their material factual error of applying the criteria of the DSM-4 for PTSD, instead of the DS-5. *See id.* Not only that, but they also managed to incorrectly apply the DSM-4. *See id.* In addition, their adoption of the derisive PEB minority opinion finding that Plaintiff's condition was unrelated to combat was unsupported by substantial evidence, and their finding that Plaintiff had never stated that he felt his life had been threatened was a material error of fact. *See id.*

i. A reasonable mind would be compelled to find that participating in the coordination of, witnessing, and counting the aftermath of, the killing of 180 human beings, even if enemy combatants, would be a highly stressful event.

It is an undisputed material fact that, from the start, Plaintiff reported to his treating physicians that his conditions were linked to the incident dated May 26, 2006, where he participated in and witnessed the killing of 180 enemy combatants. AR 81, 96, 588. He had already highlighted his mental struggles during his post-deployment interview on September 11, 2006. AR at 516-9. Upon the request of his then girlfriend, now wife, he fully reported his symptoms to his flight surgeon, who referred him to military medical personnel, with the first visit occurring on September 22, 2006. AR at 96. During this initial visit, he specifically stated that his mental condition derived from the May 26, 2006, incident. *Id.* However, he also noted that he did not want to become a burden on his unit, and was just seeking to understand what was happening to him. *Id.* He was diagnosed with acute PTSD during that visit, with treatment beginning immediately. *Id.* On October 20, 2006, during a medical visit, he reported that "he had seen more than he could handle." AR 93. Part of his PTSD therapy involved exposure therapy on December 15, 2006, to "kill cam" footage of airstrikes in order to address the source of his PTSD. AR 77. It is important to stress to the Court that this is *but one* of the many airstrikes that Plaintiff helped both to coordinate, and then witnessed in minute detail, as an in-flight technician. AR at 1360-1. From October 2005 to January 2006, he would be awarded his 2nd and 3rd Air Medal for participating in no less than 57 combat missions. *Id.* By the end of his tenure as an in-flight technician, he had flown 119 combat missions. Answer to the Amended Complaint at ¶7. Needless to say, Plaintiff's clear and consistent highlighting of the May 26, 2006, airstrikes in all of his medical visits is clear documentation of an event, especially given that the PDBR never showed any doubt that this incident occurred. AR at 1369.

The Court must consider what Plaintiff's role in this event meant. As an in-flight technician and sensor operator, Plaintiff was viewing the battlefield in minute detail in order to both coordinate airstrikes and then review and count the dead afterward. AR at 588. He could see the personal details of each combatant he was targeting, their faces, their beards, whether they wore glasses. AR 1241-2 (Complaint at ¶5). He could see their bodies as they were torn apart by the storm of steel and high explosives that rained down on them. *Id.* A storm that Plaintiff was *personally guiding and coordinating*. AR at 96, 588. He then had to review the corpses, mangled by fire that he had directed upon them, in order to assess and report the results of the air strike. *Id.*; *see e.g.* AR at 1439-40 (Health Record dated January 7, 2008) (noting combat exposure as a major vulnerability for Plaintiff and Plaintiff's major fears that return to flight duty would cause resurgence of PTSD symptoms due to imagery analysis required by his position).

Consider what even a single killing would entail. The process of studying a living human being through incredibly powerful optics, even one who was an enemy combatant. He breathes, he moves, he talks to his comrades, he laughs. Plaintiff observed this. Plaintiff then called in strikes upon that human being. The enemy combatant is torn apart by the bombs, rockets, and high caliber gunfire of the A-10 Warthogs. He screams out in pain, he watches his comrades die alongside him, and his life ends, all seen through an incredibly powerful camera. And then Plaintiff must review the results of his actions, as he scrolls through and counts the mangled corpse. Or worse, he counts the still screaming man, wounded from his injuries, and writhing in incredible pain. Now multiply this by 180, all in a single day.

This is obviously an incident which a reasonable mind would be compelled to find was highly stressful. In fact, it is incredibly hard to find how a reasonable mind would not find this to be incredibly stressful. In the space of a mere few hours, Plaintiff helped coordinate,

witnessed, and then counted the ending of 180 lives. *Id.* Such a massive weight, especially in such a heavy concentration, would place an incredible stress on any human being. The fact that Plaintiff, before his deployment to Afghanistan had even begun, had already completed 57 combat missions further increases the burden of his mental wound. AR at 1360-1. And yet, despite the record clearly compelling a finding that this was a highly stressful event, the PDBR instead followed in the disgraceful footsteps of the minority opinion of the PEB by finding that Plaintiff lacked a documented HSE. *See* AR at 1369; *compare* AR at 40. This renders their finding clearly unsupported by substantial evidence under the A.P.A. *See* 5 U.S.C. 706(2)(E); *see Palace Sports*, 411 F.3d at 220.

ii. The PDBR made a material error of fact by finding that Plaintiff had never expressed having felt intense fear or horror, using the criteria for PTSD under the out-of-date DSM IV, instead of the DSM V. In addition, they also incorrectly applied the DSM IV.

A key finding underlying the PDBR's decision to refuse to apply VASRD § 4.129 was their finding that there was no evidence in the record of Plaintiff stating that he had ever felt that his life was in danger, or that he had felt intense fear or horror, which was an implicit doubting by the PDBR that Plaintiff had suffered from PTSD. *See* AR at 1369 ("there was no mention of the CI having felt his life was threatened or that he experienced intense fear or horror after witnessing a specific traumatic event"). First and foremost, this was a material error of fact given that Plaintiff, in his November 12, 2008, Compensation and Pension examination, clearly stated that he had felt intense fear or horror. AR at 588.

Secondly, this was a tacit application of the criteria of the out-of-date 1994 Diagnostic and Statistical Manual of Mental Disorder IV ("DSM-4"), and an equally tacit refusal to apply VASRD § 4.129 on the basis that Plaintiff did not meet the DSM-4's criteria for PTSD. The DSM-4 required for a finding of PTSD that a person who had been exposed to a traumatic event

showed a response involving intense fear, helplessness, or horror. *See Substance Abuse Treatment* at Appendix E: DSM-IV-TR Criteria for Posttraumatic Stress Disorder (A)(2). This was the version of the DSM at the time that Plaintiff had been assessed in 2006, 2007, and 2008.

Of particular note is that, not only was it an application of an out-of-date version of the DSM, but it was also an *incorrect* one. The PDBR was refusing to apply VASRD § 4.129 on the implicit basis that Plaintiff did not satisfy the criteria of the DSM-4 for PTSD because he had not stated that he had ever felt that his life was in danger. *See* AR at 1369. However, the DSM-4 criteria for PTSD did not just include the person themselves ever having felt that their life was in danger, as the person could also experience, witness, or be confronted by actual or threatened death, or serious injury to others. *Substance Abuse Treatment* at Appendix E: DSM-IV-TR Criteria for Posttraumatic Stress Disorder (A)(1).

However, even if correctly applied, the PDBR was still applying a long since out of date version of the DSM. Published in 2013, and easily available to the PDBR in 2017, the DSM-5, reflecting the rapid societal advances in the understanding of PTSD caused by the intense trauma of veterans of the Global War of Terror, dropped the requirement of intense fear or horror completely. AMERICAN PSYCHIATRIC ASSOCIATION, *Diagnostic and Statistical Manual of Mental Disorders* (2013) at 271-272. The new requirement was that the patient had been exposed to actual or threatened death, serious injury, or sexual violence, through:

(1) Direct experience;
(2) Witnessing it in person occurring to others;
(3) Learning that it had occurred to a close family member or friend; or
(4) Experiencing repeated or extreme exposure to aversive details of the traumatic event.

Id. It is telling that the Army, even before the DSM-5 was released, had already dropped in 2012 consideration of the criteria of (A)(2) in Army Medical Command Policy Memo 12-035, *Policy*

Guidance on the Assessment and Treatment of Post-Traumatic Stress Disorder (April 10, 2012) at paragraphs 6(c).

It is clear that Plaintiff met the conditions for PTSD under the DSM-5, which was in force in 2017. The PDBR was thus making a material error of fact by implicitly judging Plaintiff's qualifications for VASRD § 4.129 under the standards of a then 23 years old, and four years out of date, manual. *See* AR at 1369. In addition, it is incredibly troubling that the board charged with the reviewing of disability decisions is unaware of the shift in diagnosis of what is likely the most common untreated wound our service members have suffered from.

iii. A reasonable mind would be compelled to find that Plaintiff's PTSD was combat related.

The PDBR made a material error by adopting the deplorable minority opinion from the PEB of the USMC Line Officer, who derided Plaintiff's experiences as being unrelated to real combat, as part of their justification of their refusal to apply VASRD § 4.129 to Plaintiff. AR at 1369; *compare* AR at 40. This error is now reflected on Plaintiff's DD 214, which states that his disability was not combat related. AR at 1322. Plaintiff's PTSD was directly linked to his participation in coordinating, and then his reviewing of the aftermath, of the killing of 180 enemy combatants. *See, e.g.* AR at 96, 588. In effect, the PDBR was declaring that only the soldier who pulled the trigger could feel the stress of having killed another human being. *See* AR at 1369. And yet, to the A-10 Warthog pilots, the 180 men they killed were small specks on the ground that they zoomed past at high speed as they dropped their ordinance. To Plaintiff, they were living, breathing, human beings who he observed, helped kill, and then counted their corpses. Plaintiff was clearly participating in combat through directing these airstrikes. To find otherwise would be to hold that forward air or artillery observers, which Plaintiff was one, do not

engage in combat as they coordinate and direct fires onto the enemy. Given that the defining facet of warfare in the 20th and 21st centuries is the direction of fires by forward observers, such a finding is not only patently ridiculous, but also a denigration of the intense stress such service members face. Those observers are as much, if not more, the trigger pullers for artillery and air strikes as the pilot who follows their direction and drops the ordinance on the small, blurred, dots below them. A reasonable mind would thus be compelled to find that Plaintiff's disability from his mental wounds were combat related. This renders the PDBR's finding that his disability was not combat related unsupported by substantial evidence. *See* 5 U.S.C. 706(2)(E); *see Palace Sports*, 411 F.3d at 220.

iv. The PDBR made a material error in finding that Plaintiff had never stated that his life was in danger.

In addition, the PDBR's finding that Plaintiff had never stated that his life was in danger was a clear material error, given that, in his Compensation and Pension Examination report dated November 12, 2008, he specifically discussed having been the subject of rocket-propelled grenade ("RPG") attacks. AR at 30-1; *see* AR at 1369.

To summarize: the PDBR's finding that Plaintiff's condition was not linked to an HSE was clearly unsupported by substantial evidence. A reasonable mind would be compelled to find that the participation in the coordination of, the witnessing, and the assessment of the aftermath of, airstrikes which killed 180 human beings was an obviously highly stressful event. In addition, the PDBR made many material errors of fact in their implicit finding that Plaintiff did not meet the criteria of the DSM-4 for PTSD, and thus did not warrant application of VASRD § 4.129. First, the PDBR blatantly ignored that the Plaintiff had expressed feeling intense fear or horror. Second, they applied a badly out of date criteria for PTSD by imposing the 1994 DSM-4's requirement of intense fear or horror, instead of the 2013 DSM-5's lack of said criteria. Third, in

their (also mistaken) finding that Plaintiff had not stated personally feeling in danger, they were making a material error even in their application of the out-of-date DSM-4, which also allowed for the witnessing of such traumatic events. Fourth, their finding that Plaintiff's mental wounds were not combat related was unsupported by substantial evidence because a reasonable mind would be compelled to find that serving as a forward air observer was directly related to combat. Fifth, as just noted, they were mistaken in finding that Plaintiff had never stated that he had felt his life was in danger.

The PDBR's finding that Plaintiff lacked a documented HSE was unsupported by substantial evidence in and of itself and requires setting aside under 5 U.S.C. § 706(2)(E). When taken in combination with the four serious material errors of fact made by the PDBR when assessing Plaintiff's eligibility for VASRD § 4.129, in order to implicitly find that Plaintiff did not meet the criteria for PTSD under an out-of-date DSM-4, the need for setting aside this decision under the A.P.A. as unsupported by substantial evidence only grows stronger. As such, this Court should set aside the PDBR's finding and find itself that the evidentiary record requires a finding that Plaintiff had a documented HSE.

B. Since the evidentiary record compels a reasonable mind to find that Plaintiff had suffered from a highly stressful event, and it is uncontested that (1) Plaintiff's mental disorder stemmed from that highly stressful event, and (2) that this disorder resulted in his separation from the Navy, the PDBR's holding that Plaintiff was not eligible for VASRD § 4.129 must be set aside under the A.P.A. as contrary to the law.

VASRD § 4.129 requires the assigning of a disability evaluation of not less than 50% by a rating agency (including the PDBR) when a veteran develops a mental disorder as a result of an HSE which is severe enough to bringing about the veteran's release from military service. 38 C.F.R. § 4.129. The PDBR, as documented above, refused to apply VASRD § 4.129 on the

grounds that Plaintiff had not suffered from an HSE. AR at 1369. The PDBR based their decision to refuse to apply VASRD § 4.129 on their finding that Plaintiff lacked a documented highly stressful event. As documented above, the evidentiary record compels a reasonable mind to find that Plaintiff, through his coordination, and then assessment in minute detail of the aftermath, of the air strike which killed 180 enemy combatants, clearly had suffered from an HSE. In addition, it is uncontested that Plaintiff's condition developed as a result of this HSE and that it was severe enough to bring about his release from military service. *See* AR at 96, 588 (Plaintiff's statements to medical personnel); *see* AR at 39-41 (PEB); *see* AR at 1322 (DD 214). As such, the PDBR's holding that Plaintiff did not fall under the criteria of VASRD § 4.129 must be set aside as contrary to the law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

II. The PDBR acted arbitrarily under the A.P.A. by completely failing to consider the VA's disability rating for Plaintiff and explain why its own rating diverged.

Under binding Department of Defense Instruction 6040.44 Encl. 3 ¶4(a)(5) (2015), the PDBR is required to consider VA rating determinations, compare the VA rating with the PEB combined disability rating, and consider any variance within its deliberations, particularly if the VA rating was awarded within 12 months of the service member's separation. Though the PDBR is not required to conform to the VA's rating, it must explicitly address the rating and explain why its own rating diverges. *See Sissel v. McCarthy*, 2021 U.S. Dist. LEXIS 244406 at *37-9 (D.D.C. December 22, 2021). Failure to do so is arbitrary decision making and requires setting aside the decision and remanding the issue to the PDBR for it to address the issue. *Id.* In *Sissel*, a PDBR decision was upheld by the D.D.C. in part because the PDBR, though it had diverged from the VA's rating, explained its reasonings for doing so. *Id.*

Here, Plaintiff was issued a 30% separate disability rating for his PTSD from the VA, which was consistent with the MEB's recommendation of an independent rating for severe

PTSD. AR at 552 (VA Rating Dated January 14, 2009); AR at 734 (MEB dated April 8th, 2008). This VA rating was issued within 12 months of Plaintiff's separation from the military on August 17, 2008, and thus merited special consideration. *See* AR at 1322; *see* DoDI 6040.44 Encl. 3 ¶4(a)(5). Despite this, the PDBR completely failed to address the VA's rating, or explain why their decision to continue to subsume Plaintiff's PTSD diagnosis into his 10% rating for major depressive disorder diverged from the VA's rating. *See* AR at 1368-70. This failure to explain their reasoning, despite the explicit binding requirement that they do so pursuant to DoDI 6040.44, rendered the PDBR's decision arbitrary and requires setting aside PD 2016-00401 and remanding the matter for the PDBR to address this issue and explain themselves. *See Sissell*, 2021 U.S. Dist. LEXIS 244406 at *37-9; *see* DoDI 6040.44 Encl. 3 ¶4(a)(5).

III. The PDBR's failure to acknowledge or address Plaintiff's non-frivolous argument as to the impact that the stigmatization of PTSD by the military had on his own self-conception and reporting of his PTSD was arbitrary decision making and requires that PD 2016-00401 be set aside as unlawful under the Administrative Procedure Act.

When an administrative agency fails to either address, or explain why it did not address, a prima facie non-frivolous argument raised by an applicant which could affect the outcome of the case, this renders the decision unlawful under the Administrative Procedure Act and requires that it be set aside. *See, e.g., Rudo v. Geren*, 818 F. Supp. 2d 17, 26-7 (D.D.C. 2011). In *Rudo*, a veteran, as part of his application to the Army Board for the Correction of Military Records, raised a non-frivolous due process issue in his application. *Id.*at 26-7. However, the ABCMR only barely acknowledged it and did not address it or explain why it chose not to address it. *Id.* The District Court for the District of Columbia set aside the decision as arbitrary under the A.P.A., holding that the ABCMR had to provide a sufficient record for judicial review by substantively addressing, or explaining why it did not address, all non-frivolous claims. *Id.* Due

to this holding, the court remanded the case to the ABCMR for it to adequately address the claim. *Id.* Whether or not a claim is frivolous is determined based on the whether the claim is frivolous on its face. *See Calloway v. Brownlee*, 366 F. Supp. 2d 43, 55 (D.D.C. 2005).

A claim is raised if the applicant voices their objections in a way that renders the military administrative board aware of their problems. *Doyle v. United States*, 599 F.2d 984, 1000-1 (Fed. Ct. Cl. 1979). This is reinforced by the fact that correction boards, like the PDBR, have a "moral sanction to determine the *true nature* of an alleged injustice and to take steps to grant thorough and fitting relief. *Yee v. United States*, 512 F.2d 1386, 1387-8 (Fed. Ct. Cl. 1975) (emphasis added). In general, the military is held to a higher standard when reviewing applications than civilian boards, when it comes to the raising, or waiving of claims, as it is supposed to have a "if not paternal, at least avuncular" relationship with service members. *Robinson v. Resor*, 469 F.2d 944, 951 fn. 21 (D.C. Cir. 1972). This requires Boards to approach applications with an attitude of substantial fairness, not nitpicking compliance. *Id.* Binding Department of Defense Guidance reinforces this, through DoD Instruction 6040.44 at ¶3(d) (2015): "The PDBR has no greater obligation to wounded, ill, and injured former Service members than to offer fair and equitable recommendations pertaining to the assessment of disability ratings."

A. The PDBR's failure to address Plaintiff's arguments concerning the impact of the stigmatization of PTSD suffered by service members in observation and coordination roles on the military's assessment of his PTSD was arbitrary.

Here, Plaintiff clearly made the PDBR aware of the issues of the stigmatization of PTSD, especially among those serving in observation roles, within the military. *See* AR at 8-9, 11-12 (Plaintiff's Application to the PDBR) (noting, for example, how the military was forced to back down on a planned medal for drone pilots following institutional pushback and the derisive

labeling of it as the "Nintendo Medal.") In particular Plaintiff clearly highlighted how this culture of stigmatization was manifested by the minority opinion of the Marine line officer in his PEB, who derisively found that Plaintiff was suffering from a moral opposition to the war, not legitimate mental trauma. *See id.*; *see also* AR at 40.

The issue of the derisive stigmatization of PTSD, especially among service members who weren't seen as serving in an archaic definition of "real combat" was clearly prima facie non frivolous, given the blatant attitude of the minority opinion in Plaintiff's PEB. *See id.* In addition, it also would clearly have an impact on the outcome of Plaintiff's case, as it shaped how the military had assessed the severity of Plaintiff's PTSD, especially in regards as to whether it was directly related to combat and whether it was worthy of an independent rating. *See id.* This can is reflected by the PDBR's own decision making, through its findings that Plaintiff's PTSD was not directly related to combat and that he had not suffered from an HSE, which were all founded on undercounting what Plaintiff had endured and seen as a sensor technician and airstrike coordinator. *See* AR at 1369-70.

For these reasons, the PDBR's complete failure to either address Plaintiff's arguments as to the stigmatization and downplaying of the PTSD suffered by service members in observation positions, or to explain why it had not addressed Plaintiff's arguments, was clearly arbitrary and renders PD 2016-00401 unlawful under the A.P.A. *See Rudo*, 818 F. Supp. 2d at 26-7.

B. Plaintiff did not waive his claim as to the issue of how his own training to internally suppress his feelings concerning his PTSD impacted how he reported his condition.

As illustrated above, applicants are given a wider latitude when it comes to raising or waiving claims to military boards, due to the boards' moral sanction to seek out and find the injustice in a matter, and due to the military's closer relation to its service members. *See Yee*, 512

F.2d at 1387-8; *see also Robinson,* 469 F.2d at 951 fn. 21. Plaintiff, by raising the issue of the stigmatization of PTSD in the military, was also making the PDBR aware of the impact of Plaintiff's own internalized suppression of his feelings on how he reported his PTSD. The PDBR, as shown above, based a large part of their decision on their findings that Plaintiff had not reported feeling like his life was in danger, or feeling intense fear or horror. AR at 1369. Yet, Plaintiff also noted, during his first visit on September 22, 2006, that he did not want to be a burden on his unit. AR at 96. This was a clear showing of guilt as to the way in which his mental condition could potentially shift the workload onto his comrades in arms if he was removed from ground duty. *See id.* On October 20, 2006, he noted his guilt as to how this fear had become realized, due to his "buddies picking up the slack." AR at 93 (Health Record dated October 20, 2006). Plaintiff was demonstrating his internalized training and desires to seek to return to deployable status as soon as possible, and if, necessary, to suppress his own issues in order to be able to do so.

As noted previously, one of the categories which saw the greatest change in definition within the DSM when the DSM-4 transitioned to the DSM-5 was PTSD. The dropping of the requirement for stating "intense fear or horror" under (A)(2) was due in large part to the Army's own suggestions, based on the studies of how military personnel were trained to respond to traumatic events. *See* ARMY MEDCOM, Policy Memo 12-035, *Policy Guidance on the Assessment and Treatment of Post-Traumatic Stress Disorder* (April 10, 2012) at ¶¶ 6(c), 7(c). In particular, Army MEDCOM highlighted how service members did not seek out necessary treatment due to internalized perceptions of mental healthcare, as well as to avoid interfering wit their careers. *Id.* at ¶6(g). This could result in a lack of previous documentation of certain

elements of their conditions when they were processed for a disability retirement via the MEB and PEB. *Id.*

Given that Plaintiff had clearly raised the issue of the impact of the stigma in the military as to PTSD on service members, and that military boards are tasked with taking a looser approach to the waiving of claims, Plaintiff did not waive his own claims as to how his own internal suppression of his feelings as to his PTSD may have been reflected in his medical records. For these reasons, the PDBR should at least consider this issue, if not should have considered the issue in 2017, due to the topic having been clearly raised to it.

Thus, given that the argument as to the impact of the stigma towards PTSD in the military was clearly raised to the PDBR, that it was non-frivolous, and that the issue clearly affected Plaintiff's case, the failure of the PDBR to either address Plaintiff's argument as to the argument, or explain why it did not address it, was arbitrary and requires setting aside PD 2016-00401 as unlawful under the A.P.A. *See Rudo*, 818 F. Supp. 2d at 26-7. The matter should thus be remanded to the PDBR for it to address this issue, including the issue of Plaintiff's own self-suppression of his condition.

CONCLUSION

Wherefore, for the reasons set out above, Plaintiff prays that this Court grant his motion for summary judgment and issue an order:

(1) Finding that the evidentiary record compelled a reasonable mind to find that Plaintiff had suffered from a highly stressful event;

(2) Finding that the evidentiary record compelled a reasonable mind to find that Plaintiff's PTSD was combat related;

(3) Holding that the PDBR's refusal to apply VASRD § 4.129 to Plaintiff's case was contrary to the law;

(4) Holding that the PDBR acted arbitrarily by failing to properly consider the VA's disability rating for Plaintiff;

(5) Holding that the PDBR's acted arbitrarily by failing to address Plaintiff's arguments concerning the impact of the stigma placed by the military on PTSD at the time;

(6) Holding that the Plaintiff did not waive consideration of the impact of the stigma placed on PTSD within the military on his own internal suppression of how he reported his own condition;

(7) Setting aside the PDBR's decision, PD 2016-00401, dated November 21, 2017, under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (F), as arbitrary, capricious, and not supported by substantial evidence; and

(8) Remanding this matter to the PDBR for further proceedings in accordance with the Court's order.

Plaintiff maintains his request for attorney's fees and expenses, and he will file a motion for those fees and expenses should he prevail on remand.

Respectfully submitted,

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Dated: December 29, 2021.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Service of Plaintiff's Motion for Summary Judgment was electronically served on the following counsels for the Defendants on December 29, 2021:

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