United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5304 **September Term, 2019**

FILED ON: MAY 8, 2020

JEFFRY SCHMIDT,

APPELLANT

v.

JAMES E. MCPHERSON, ACTING SECRETARY, U.S. NAVY,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01055)

Before: MILLETT, KATSAS, and RAO, *Circuit Judges*.

JUDGMENT

The Court has considered this appeal on the record from the United States District Court for the District of Columbia and on the parties' briefs. The Court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED that the judgment of the district court be **AFFIRMED**.

This appeal arises from the discharge of Jeffry Schmidt from the United States Marine Corps for back pain. In 1988, the Navy determined that Schmidt's back pain rendered him unfit for military service, and it rated Schmidt's condition as 10% disabling. In 1989, the Marine Corps honorably discharged Schmidt with a 10% separation disability rating and severance pay. *See* 10 U.S.C. §§ 1203, 1212.

Schmidt challenged his rating under 10 U.S.C. § 1552(a) (1988). That statute provided that a military secretary, through a civilian board for correction, "may correct any military record … when he considers it necessary to correct an error or remove an injustice." In 1990, Schmidt applied to the Board for Correction of Naval Records for an increase in his disability rating because the Department of Veterans Affairs had awarded him a higher disability rating. In 1992, the Board denied Schmidt's application. It concluded that the VA's rating did not show that the Navy's

rating was erroneous. The Board reasoned that "the VA, unlike the military departments, may assign disability ratings without regard to the issue of fitness for military service." J.A. 69.

In 2008, Schmidt asked the Board to reconsider. The governing regulation permits reconsideration "only upon presentation by the applicant of new and material evidence or other matter not previously considered by the Board." 32 C.F.R. § 723.9. Evidence counts as "new" if it was "not previously considered by the Board and not reasonably available to the applicant at the time of the previous application." *Id.* Evidence counts as "material" if it is "likely to have a substantial effect on the outcome." *Id.* In 2011, the Board denied reconsideration on the ground that Schmidt had not presented new material evidence.

Schmidt challenges the denial under the Administrative Procedure Act. The district court granted summary judgment to the government, and we affirm.

In reviewing a decision of a military corrections board under the APA, the courts employ "an unusually deferential application of the arbitrary or capricious standard." *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (quotation marks omitted). Here, the Board's decision was not arbitrary.

In seeking reconsideration, Schmidt showed that in 1994 the VA rated him 60% disabled, backdated to 1989, based on a degenerative spinal condition, shoulder injury, foot injury, and hypertensive heart disease. Moreover, by 2007, the VA had rated him 100% disabled based on the same ailments plus post-traumatic stress disorder. Schmidt argues that these high disability ratings from the VA show the Navy erred in assigning him a 10% separation disability rating in 1989.

Schmidt misapprehends the difference between military and civilian disability ratings. The Navy and the VA both use the Veterans Affairs Schedule for Rating Disabilities, "but for different purposes." *Stine v. United States*, 92 Fed. Cl. 776, 795 (2010), *aff'd*, 417 F. App'x 979 (Fed. Cir. 2011). The Navy uses the VA schedule to decide "whether or not the service member is fit to perform the duties of office, grade, rank or rating." *Id.* (quotation marks omitted); *see* 10 U.S.C. § 1203. The VA uses the schedule to "determine disability ratings based on an evaluation of the individual's capacity to function and perform tasks in the civilian world." *Stine*, 92 Fed. Cl. at 795 (quotation marks omitted); *see* 38 U.S.C. § 1155. Furthermore, the Navy assigns disability percentages only to conditions found to be "unfitting" for military service. SECNAV Instruction 1850.4E § 3801(a); *see also* 10 U.S.C. § 1203. And the Navy "takes a snapshot of the service member's condition at the time of separation from the service," while the VA "evaluates and adjusts disability ratings throughout the individual's lifetime." *Stine*, 92 Fed. Cl. at 795. For these reasons, disparities between military and VA disability ratings are commonplace, and courts often uphold refusals to correct military records to reflect higher VA disability ratings. *See*, *e.g.*, *Gay v. United States*, 116 Fed. Cl. 22, 32 (2014); *Zappley v. United States*, 135 Fed. Cl. 272, 277–78 (2012); *Stine*, 92 Fed. Cl. at 795–98; *Pomory v. United States*, 39 Fed. Cl. 213, 218–20 (1997).

Given these differences, the Board permissibly concluded that Schmidt's evidence did not warrant reconsideration. According to Schmidt, the VA's backdated disability rating shows that

he had latent disabling conditions at the time of his separation in 1989. But as noted above, the Navy's separation inquiry is limited to conditions that are actually unfitting, not ones that are only potentially so. And Schmidt provided no reason to think that the VA's 1994 assessment of his condition in 1989 was more persuasive evidence of that condition than the contemporaneous physical evaluation performed by the Navy.

When the Navy evaluated Schmidt at separation, it found only one unfitting condition—back pain. Schmidt contends that what the Navy called back pain was actually a much more serious degenerative spinal condition, but he provides no evidence that the Navy's thorough examination of his back simply missed a disabling spinal condition. In addition, the Navy specifically found that Schmidt's shoulder and foot conditions did not render him unfit for military service in 1989, and Schmidt offers no basis for setting aside those findings. Schmidt likewise presents no evidence that his heart condition rendered him unfit in 1989. And there is no evidence that Schmidt was suffering from PTSD at all in 1989, much less that the condition made him unfit at that time.

For these reasons, the district court's judgment is affirmed. The Clerk is directed to withhold the issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk