

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

WILLIAM P. DOLPHIN,

Plaintiff,

v.

JOHN McHUGH, SECRETARY OF THE ARMY,

Defendant.

Civil Action No.: \_\_\_\_

November 8, 2012

Plaintiff William P. Dolphin, through counsel, alleges the following facts upon information and belief:

**COMPLAINT**

William P. Dolphin was drafted into the Army in 1967. Mr. Dolphin deployed to Vietnam and earned a Purple Heart in 1968 when an explosion threw him from a tree he had climbed to pinpoint an enemy position. The Army medically evacuated him from the battlefield and eventually transferred him to St. Albans Hospital in Queens, NY, from where he recalls being sent home on convalescent leave. Years later, he was arrested, charged with being absent without leave, and sentenced by court-martial to a bad conduct discharge.

For decades, Mr. Dolphin has suffered from the physical and mental injuries he sustained in Vietnam. Seeking recognition for his service and access to VA medical care for the very injuries recognized by his Purple Heart, Mr. Dolphin twice unsuccessfully applied *pro se* for a discharge upgrade from the Army Board for the Correction of Military Records (ABCMR or Board). Subsequently, in 2011, a psychiatrist diagnosed Mr. Dolphin with post-traumatic stress

disorder (PTSD), an injury the medical community did not recognize when the Army discharged Mr. Dolphin in 1975. Assisted by undersigned counsel, in 2011 Mr. Dolphin applied to the Board again, presenting new and material evidence and arguments. The ABCMR staff rejected this application without sending it to the Board, and the Board thus failed to waive the statute of limitations in the interest of justice and effectively denied his application on the merits, all in violation of the ABCMR statute and the Administrative Procedure Act.

Mr. Dolphin seeks judicial review of the ABCMR's denial of his discharge upgrade application. This Court should direct the ABCMR to grant the application or, in the alternative, remand this case to the Board to consider the application with its new and material evidence.

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction under 28 U.S.C. § 1331. This action arises under the Administrative Procedure Act, 5 U.S.C. § 706.

2. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(3) because Plaintiff Dolphin 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 P. Dolphin is a veteran of the United States Army. He is a citizen of the United States and resides in Connecticut.

4. Defendant John McHugh, Secretary of the Army, is sued here in his official capacity. Defendant is empowered to act through the ABCMR to change any Army record to correct an error or to remove an injustice.

### **FACTS AND PROCEEDINGS**

#### **Mr. Dolphin's Military Service**

5. William P. Dolphin was born in New Haven, Connecticut, in 1948. He was drafted and joined the U.S. Army on May 9, 1967, at the age of eighteen.

6. Mr. Dolphin attended basic training and Advanced Individual Training before deploying to Vietnam as an infantry rifleman on or about October 23, 1967.

7. Mr. Dolphin received one Article 15 (a type of non-judicial punishment) for reporting late to his unit and one minor disciplinary action for an altercation with an officer who made racially derogatory comments to him.

8. His unit, Company C, 2nd Battalion, 39th Infantry Regiment, 9th Infantry Division, was stationed in the Mekong Delta during the Tet Offensive in early 1968.

9. Mr. Dolphin participated in intense combat operations and performed duties including clearing bunkers and patrolling the countryside. On these operations he witnessed the deaths of soldiers and civilians. He feared for his friends' lives as well as his own.

10. During one firefight, Mr. Dolphin's unit came under heavy fire from an unidentified enemy position. Mr. Dolphin climbed a tree and located the enemy.

11. From the tree, Mr. Dolphin returned fire and hit several enemy soldiers, helping to save his unit. Before he could climb down, however, an explosion threw him to the ground, where he awoke unable to feel or move his limbs. His knees and back were severely injured, and he had lost consciousness due to head trauma.

12. For the injuries he sustained during this firefight, the Army awarded Mr. Dolphin a Purple Heart.

13. The Army medically evacuated Mr. Dolphin from the battlefield, sending him to hospitals in Japan, Alaska, and finally to St. Albans Hospital in Queens, New York.

14. During this time, the Army informed Mr. Dolphin's mother that he had died and presented her with his Purple Heart. The Army did not correct this mistake for approximately one month.

15. While at St. Albans, Mr. Dolphin experienced vivid flashbacks and suffered insomnia because of frequent nightmares of being back on the battlefield.

16. Mr. Dolphin recalls being informed by hospital staff that he could go home on convalescent leave. Accordingly, he went to his family's home in Connecticut.

17. Mr. Dolphin returned from Connecticut to the hospital two or three times for additional treatment. After each visit, he traveled back to Connecticut.

18. While home from the hospital, Mr. Dolphin continued to be plagued by constant pain, memory loss, and depression. He was often dazed, could not pay attention when people spoke to him, and exhibited suicidal tendencies. On one occasion, his mother physically restrained him from jumping out a window in an attempt to take his own life.

#### **Mr. Dolphin's Discharge**

19. In 1974, approximately six years after Mr. Dolphin was medically evacuated from Vietnam and several years after his return home from St. Albans, FBI agents arrested him at his house on three counts of being absent without leave (AWOL). He was taken to Fort Dix, New Jersey, and referred to a general court-martial.

20. Mr. Dolphin does not recall receiving notice that the Army considered him AWOL, either directly or through a family member, prior to his arrest.

21. At the time of Mr. Dolphin's arrest and in-processing at Fort Dix, military doctors identified several physical and psychological health problems, including back pain, anxiety, and headaches due to his injury in Vietnam, and prescribed medication for his pain and anxiety.

22. The medical community did not recognize PTSD as a psychiatric injury until 1980. Accordingly, no physician at Fort Dix could have diagnosed Mr. Dolphin with PTSD in 1974, and none did.

23. While at Fort Dix, Mr. Dolphin was mistreated and threatened. Military police beat him, slammed books on his head, and threatened further beatings.

24. Mr. Dolphin's military lawyer advised him that he should plead guilty because otherwise he might face a sentence of twenty years in Fort Leavenworth. Accordingly, Mr. Dolphin entered guilty pleas to all three counts. The judge sentenced Mr. Dolphin to a bad conduct discharge and reduction in rank to E-1.

25. Mr. Dolphin's treatment in detention and his discharge status were not unique. During the Vietnam era, the Army punished black soldiers such as Mr. Dolphin more frequently and more harshly than white soldiers, and black soldiers were approximately twice as likely to receive an undesirable discharge.

26. According to the Department of Defense's own *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (1972) ("DoD Task Force"), there was "a discernible pattern reflecting disproportionate numbers of black servicemen involved in military justice actions." The DoD Task Force attributed this differential treatment to "racism."

27. Race discrimination in the military discharge system was so pervasive in the Vietnam era that the Equal Employment Opportunity Commission (EEOC) concluded that an employer could not lawfully apply the requirement that job applicants who had served in the armed forces have an honorable discharge. EEOC Dec. 74-25, 10 F.E.P. 260, 265 (1973) (noting that, according to DoD Task Force, 2.6 percent of white service members' discharges and 5.2 percent of black service members' discharges were undesirable in Fiscal Year 1971).

28. Since his discharge, Mr. Dolphin has struggled with memory loss, seizures, and anxiety attacks associated with his head trauma, as well as chronic knee problems and back pain.

29. Despite these restrictions on his employability, over the years he secured short-term employment working at a furniture store, sweeping a barbershop, working for a moving company, and driving a semi-truck.

30. Mr. Dolphin was arrested and convicted of several offenses during the 1960s and 1970s, none of which resulted in incarceration. In 1982, he was convicted in Connecticut Superior Court of larceny and aiding and abetting a robbery and sentenced to five to ten years in prison. He served approximately five years.

31. Mr. Dolphin changed his life and dedicated himself to his faith after his release. Since 1992 when he paid a \$75 fine for tampering with evidence, he has not been charged with or convicted of any criminal offense.

32. In 2000, Mr. Dolphin married Patricia Brown and, together with her, raised his son Miami.

33. Despite Mr. Dolphin's success in transforming his life, as he has grown older his medical bills have become so debilitating that he cannot afford regular care for many of his conditions.

#### **Mr. Dolphin's Applications to the ABCMR**

34. In 1994, Mr. Dolphin applied to the ABCMR *pro se* for a discharge upgrade. The ABCMR denied his application without considering its merits, on the ground that it was not in the interest of justice to waive the three-year statute of limitations.

35. In 2010, Mr. Dolphin again submitted a *pro se* discharge upgrade application to the ABCMR. The ABCMR staff closed the case without forwarding it to a Board panel or

providing any review of the application's merits on the ground that Mr. Dolphin's military records were on loan to another agency. See Exhibit A.

36. In fall 2011, Dr. Kehinde A. Ogundipe, a psychiatrist and fellow at the Yale University School of Medicine, Division of Law and Psychiatry, evaluated Mr. Dolphin. Dr. Ogundipe diagnosed Mr. Dolphin with chronic PTSD.

37. Dr. Ogundipe linked Mr. Dolphin's chronic PTSD to the injuries he had sustained in Vietnam, concluding that "Mr. Dolphin's symptoms meet DSM-IV-TR diagnostic criteria for Post Traumatic Stress Disorder" and that "Mr. Dolphin has experienced persistent, long standing medical and psychiatric problems that are most likely related to his service in Vietnam."

38. Dr. Ogundipe also diagnosed Mr. Dolphin with panic disorder with agoraphobia, mood disorder due to chronic pain with depressive features, insomnia related to mood disorder, and cognitive disorder not otherwise specified.

39. According to Dr. Ogundipe, Mr. Dolphin's cognitive impairments "may have contributed to the poor judgment that resulted in his AWOL."

40. Dr. Ogundipe requested that Madelon Baranoski, PhD, Associate Professor of Psychiatry at the Yale School of Medicine, evaluate Mr. Dolphin for memory loss. Dr. Ogundipe stated that the "[c]ognitive testing performed by Dr. Madelon Baranoski indicated cognitive impairment that is likely to be related to Mr. Dolphin's history of head trauma from injuries sustained during the Vietnam War."

41. On October 3, 2011, Mr. Dolphin applied to the ABCMR for a discharge upgrade for the third time, this time represented by undersigned counsel. On April 27, 2012, his application was returned by ABCMR staff members without Board review and without adjudication on the merits. See Exhibit B.

42. Mr. Dolphin has exhausted all administrative remedies available to him and now petitions this Court for review of the ABCMR's denial of his application to upgrade his discharge status.

## **LEGAL CLAIMS**

### **Count I**

#### **Administrative Procedure Act, 5 U.S.C. § 706(2)(C) Unlawful Imposition of a Non-Waivable Statute of Limitations**

43. The averments of the preceding paragraphs are incorporated by reference as if fully set forth herein.

44. The only time limit Congress imposed on discharge upgrade applications is a waivable three-year statute of limitations. 10 U.S.C. § 1552.

45. The statute draws no distinction between original applications and subsequent requests for reconsideration, treating both as applications for the correction of military records.

46. To decide whether to waive the time limitation, the Board must review the merits of an application, including both its facts and its arguments, to determine whether a waiver would be in the interest of justice.

47. The Board is obligated by law to respond to all contentions raised by the applicant in the materials submitted to the ABCMR. If it rejects an application on statute of limitations grounds, the Board must present a reasoned explanation for its decision and must connect the facts to its conclusion.

48. Contrary to this requirement of case-specific analysis, Paragraph 2-15(b) of Army Regulation 15-185, codified at 32 C.F.R. § 581.3(g)(4)(ii), requires that any motion for reconsideration submitted more than one year after a previous application has been denied by the Board be returned without action.



49. Congress has not authorized the Secretary to impose a non-waivable limitations period on motions to reconsider.

50. Moreover, the ABCMR staff's sole role with respect to applications to reconsider is to review them for the presence of new evidence. If new evidence is present, the staff must present the application to the ABCMR for evaluation on the merits. The Board staff may not perform functions statutorily committed to the Board.

51. The ABCMR previously settled a class action suit in *Heiler v. Williams*, No. 76-912 (D.D.C. filed May 20, 1976), by stipulating that regulations allowing the ABCMR staff to reject applications would be amended so that the staff would forward to the Board all applications with "new evidence or other matter." Under this Stipulation, the staff's sole role with respect to applications to reconsider was limited to determining whether the application contained any "new evidence or other matter." See Exhibit C.

52. Denial of an application for reconsideration on the ground that 32 C.F.R. § 581.3(g)(4)(ii) imposes a non-waivable limitations period is unauthorized by law and in excess of the jurisdiction, authority, and limitations of the Secretary under the statute enacted by Congress.

**Count II**  
**Administrative Procedure Act, 5 U.S.C. § 706(2)(A)**  
**Refusal to Waive Statute of Limitations**

53. The averments of the preceding paragraphs are incorporated by reference as if fully set forth herein.

54. Congress established a waivable three-year statute of limitations for discharge upgrade applications. The Board may excuse a failure to file within three years after discovery in

the interest of justice. 10 U.S.C. § 1552 (b). If it declines to do so, the Board must set forth its reasoning and must connect the facts of the case to its decision.

55. To decide whether to waive the time limitation, the Board must review the merits of the application, including both its facts and its arguments, to determine whether a waiver would be in the interest of justice.

56. Mr. Dolphin has produced substantial evidence that waiver of the three-year statute of limitations would serve the interest of justice, as it would allow the ABCMR to adjudicate his meritorious claim. The ABCMR's refusal to waive the statute of limitations was arbitrary, capricious, unsupported by substantial evidence, and an abuse of discretion.

**Count III**  
**Administrative Procedure Act, 5 U.S.C. § 706(2)(A)**  
**Refusal to Upgrade Discharge Status**

57. The averments of the preceding paragraphs are incorporated by reference as if fully set forth herein.

58. Mr. Dolphin's meritorious combat service resulting in a Purple Heart; his enduring injuries stemming from his combat service, including his PTSD and other psychological and cognitive impairments; his rehabilitation and dedication to God, family, and community, especially since his incarceration in the 1980s; and his current financial and physical need, demonstrate that upgrading Mr. Dolphin's discharge would correct an error or injustice.

59. The ABCMR's refusal to grant Mr. Dolphin's application was arbitrary, capricious, unsupported by substantial evidence, and an abuse of discretion.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- (1) Direct, by issuance of an injunction, that Plaintiff's discharge status be upgraded to honorable or, in the alternative, general under honorable conditions, for all purposes, including VA healthcare benefits.
- (2) In the alternative, vacate the decision that Plaintiff's application is time-barred and remand for consideration by the Board of the merits of his application.
- (3) In the further alternative, vacate the decision and remand the case with direction to the ABCMR staff to forward the application to the Board for consideration of whether the statute of limitations should be waived in the interest of justice.
- (4) Award attorney's fees and costs.
- (5) Grant any other relief this Court deems just and proper.

Dated November 8, 2012

New Haven, Connecticut

Respectfully Submitted,

By: /s/ Michael J. Wishnie

Laura Keay, Law Student Intern  
Matthew Rubenstein, Law Student Intern  
Michael J. Wishnie, Supervising Attorney, ct27221  
Veterans Legal Services Clinic  
Jerome N. Frank Legal Services Organization  
P.O. Box 209090  
New Haven, CT 06520-9090  
(203) 432-4800