



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

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JOHN W. SHEPHERD, JR.

Plaintiff,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY

Defendant.

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

April 21, 2011

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

John W. Shepherd suffers from severe Post-Traumatic Stress Disorder (“PTSD”) as a result of serving his country in Vietnam. Mr. Shepherd saw extensive combat and earned a Bronze Star with Valor Device for destroying an enemy bunker while under fire. He also witnessed the death of several of his comrades. While in Vietnam, Mr. Shepherd began to struggle with symptoms of PTSD. He continued to go out on patrol, but there came a time when his psychological wounds prevented him from continuing in the fight. Mr. Shepherd was convicted by court-martial for failing to obey a direct order, but his sentence of confinement was suspended. He was administratively discharged under other-than-honorable conditions three months later. At the time, Mr. Shepherd suffered from undiagnosed PTSD, a condition not then recognized by medical authorities, and which therefore could not form the basis of what should have been more properly characterized

as a disability discharge. Mr. Shepherd's other-than-honorable discharge has barred him from numerous veterans' compensation benefits programs for which he is otherwise eligible, impaired his employment opportunities, grossly devalued his military service, and imposed upon him a lifetime of stigma and shame.

For the past forty years, Mr. Shepherd has struggled with substance abuse, impulse control, and emotional dysregulation. In 2003, he sought treatment at the New Haven Veterans Center, an outpatient counseling program of the U.S. Department of Veterans Affairs ("VA"). A counselor there told him for the first time that he might have PTSD and encouraged him to seek a formal diagnosis and treatment. Mr. Shepherd had not previously heard of PTSD, nor considered that his symptoms might be connected to his service in Vietnam. Mr. Shepherd followed up on this suggestion, and in 2004, VA diagnosed Mr. Shepherd with PTSD and rated him as 100 percent disabled on account of his service in Vietnam.

Nevertheless, because of his other-than-honorable discharge, Mr. Shepherd is statutorily ineligible for VA disability benefits. Since discovering his PTSD, he has sought to upgrade his discharge administratively. In 2006, the Army Board for the Correction of Military Records ("ABCMR") denied Mr. Shepherd's application to upgrade his discharge status. A year later, another ABCMR panel denied his request for reconsideration. Mr. Shepherd now seeks judicial review of those decisions.

Mr. Shepherd gave not merely one year of his life to the military and the nation. Psychologically, he has been left on the battlefield for over forty years.

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction under 28 U.S.C. § 1331.

2. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(3) as Plaintiff John W. Shepherd, Jr. resides in the District of Connecticut.

### **PARTIES**

3. Plaintiff in this action, John W. Shepherd, Jr., is a veteran of the United States Army. He is a citizen of the United States of America and currently resides in New Haven, Connecticut.

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

### **FACTS AND PROCEEDINGS**

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

5. John W. Shepherd, Jr. was born in Mt. Vernon, Ohio on July 4, 1947 and raised in Paoli, Pennsylvania, where he attended Great Valley High School.

6. After leaving high school in 1965, Mr. Shepherd was employed as a delivery- and repairman for home electronics and appliances. He worked steadily during this period, switching jobs only once, when his family relocated from Pennsylvania to Connecticut.

7. On July 5, 1968, Mr. Shepherd volunteered for the United States Army for a period of three years.

8. Mr. Shepherd attended Basic Training and Advanced Individual Training at the U.S. Army Training Center at Fort Gordon, Georgia.

9. On November 7, 1968, Mr. Shepherd was convicted by a special court-martial of being absent without leave ("AWOL") from September 21, 1968 to October 14, 1968 while in training at Fort Gordon, Georgia. He was sentenced to confinement at hard labor for five months and a forfeiture of pay for five months. Mr. Shepherd's sentence of confinement was suspended and he was deployed to Vietnam two months later.

10. Despite Mr. Shepherd's AWOL conviction, his commanding officer at Advanced Individual Training described him as an "outstanding soldier" in December 1968.

11. Mr. Shepherd was deployed to Vietnam with the United States Army on or about January 21, 1969. He was attached to the Army's 2<sup>nd</sup> Battalion of the 39<sup>th</sup> Infantry Regiment of the 9<sup>th</sup> Infantry Division and stationed at Dong Tam Base in the Mekong Delta.

12. On January 28, 1969, Mr. Shepherd accepted non-judicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice for missing one day of classes at Reliable Academy with the 9<sup>th</sup> Infantry Division. His punishment was forfeiture of pay, a relatively light sentence.

13. During his service in Vietnam, Mr. Shepherd was stationed at Fire Support Base Dirk (renamed Fire Support Base Schroeder in March 1969) in Dinh Tuong Province. The base was frequently under mortar and rocket attacks, in which many members of Mr. Shepherd's unit were killed.

14. Mr. Shepherd was involved in almost daily missions involving search and destroy patrols and ambushes.

15. During one mission, Mr. Shepherd flew by helicopter into a landing zone under enemy fire. Upon landing, Mr. Shepherd rushed to the area from where the enemy fire was coming, carrying grenades and an M-16. In the face of intense enemy fire, he entered the bunker and threw a grenade.

16. The grenade killed all the enemy soldiers in the bunker except for one, who was captured. Mr. Shepherd is still haunted by the images of this scene.

17. Mr. Shepherd was awarded a Bronze Star with Valor Device for his heroic actions under enemy fire during this mission.

18. Mr. Shepherd later witnessed the killing of his Commanding Officer, who was reaching down to help Mr. Shepherd climb out of a ditch at the moment that he was shot multiple times.

19. For his service, Mr. Shepherd was also decorated with a Combat Infantry Badge, recognizing his personal participation in combat as part of an Army infantry unit.

### **Mr. Shepherd's Discharge**

20. In the days and weeks after Mr. Shepherd destroyed the enemy bunker and witnessed the deaths of several comrades due to enemy fire, his mental condition deteriorated.

21. Mr. Shepherd continued going on daily patrols, but could not get images of these events out of his mind. He began acting strangely. At one point, an officer discovered Mr. Shepherd wandering around the fire support base and, seeing Mr. Shepherd's confused state, brought him back to his unit.

22. Eventually, Mr. Shepherd reached a breaking point. His Commanding Officer ordered him to go back out into the field and he refused.

23. Mr. Shepherd was charged with failure to obey a lawful order from a superior officer. Mr. Shepherd had an attorney appointed to represent him. The attorney did not raise Mr. Shepherd's mental state in his defense. On April 29, 1969, Mr. Shepherd was convicted by a special court-martial of disobeying a lawful order to secure his gear and to report to the field at the fire support base on two occasions. He was sentenced to confinement at hard labor for six months and a forfeiture of pay for six months. Mr. Shepherd's sentence of confinement was suspended.

24. On August 4, 1969, more than three months after his sentence was suspended, Mr. Shepherd was administratively discharged from the Army under other-than-honorable conditions for a pattern of shirking.

25. Mr. Shepherd applied to the Army Discharge Review Board ("ADRB") for a discharge upgrade two years later, but on August 10, 1972, the ADRB denied his petition.

26. In 1977, Mr. Shepherd learned that he had been awarded a clemency discharge pursuant to Presidential Proclamation 4313 of September 16, 1974.

27. On April 4, 1977, the Department of Defense ("DOD") directed the services to review less than fully honorable administrative discharges issued in a time period that included Mr. Shepherd's discharge, in a program known as the DOD Special Discharge Review Board ("SDRP"). Service members had to apply for review under this program.

28. Mr. Shepherd timely applied for SDRP consideration, and on July 6, 1977, the SDRP upgraded Mr. Shepherd's discharge status to general (under honorable conditions) in light of his combat decorations and clemency discharge.

29. Later that same year, Congress enacted Pub. L. 95-126, providing that no veteran whose discharge was upgraded by the SDRP was eligible for VA benefits, and

that each service must review SDRP upgrades pursuant to published standards and affirm the SDRP upgrade under those standards.

30. On August 3, 1978, Mr. Shepherd was notified that the ADRB had reviewed his discharge upgrade pursuant to Pub. L. 95-126 and had determined that he did not qualify for an upgrade under the new uniform standards.

31. Due to the ADRB's determination, Mr. Shepherd is disqualified from receiving VA benefits, despite the fact that his discharge remains upgraded to general under honorable conditions.

#### **Mr. Shepherd's Post-Military Life and Post-Traumatic Stress Disorder**

32. Upon discharge, Mr. Shepherd returned home and sought work, struggling to make sense of his experience. He began abusing alcohol and had trouble controlling his anger. He was haunted by the images of his time in Vietnam. These issues have plagued Mr. Shepherd throughout his entire post-military life.

33. After the attacks of September 11, 2001, Mr. Shepherd's mental state deteriorated further and his alcohol abuse worsened. He became more and more tortured by his Vietnam memories and he felt intense shame about his less-than-honorable discharge. He had trouble holding down a job and began living in his truck.

34. In April 2003, Mr. Shepherd sought counseling at the New Haven Veterans Center. Mr. Shepherd's counselor informed him that his symptoms were consistent with PTSD. Prior to that, Mr. Shepherd had not heard of PTSD.

35. On May 17, 2004, Mr. Shepherd submitted a PTSD Stressors Questionnaire to the VA. The VA determined that the questionnaire showed multiple combat-related

stressors from his service in Vietnam. Since Mr. Shepherd had proof of combat, his own testimony was sufficient evidence to verify reported combat stressors.

36. The VA conducted a Stress Disorder Examination of Mr. Shepherd on July 22, 2004. The examination showed a confirmed diagnosis of PTSD based on Mr. Shepherd's combat-related stressors.

37. Mr. Shepherd applied for medical benefits from the VA for service-connected PTSD on August 20, 2004.

38. On November 30, 2004, the VA determined that Mr. Shepherd is fully disabled from service-connected PTSD and qualifies for medical care for his condition.

39. However, despite the VA's determination, Mr. Shepherd cannot receive VA compensation benefits because his SDRP discharge upgrade was not affirmed under Pub. L. 95-126.

40. After his diagnosis, Mr. Shepherd continued to struggle with his PTSD symptoms. They overtook his life and it became clear he was going to need in-patient care. Mr. Shepherd was hospitalized for a period of time at the Perry Point VA Medical Center in Maryland for PTSD.

#### **Mr. Shepherd's Application and Appeal to the ABCMR**

41. The ABCMR operates pursuant to 10 U.S.C. § 1552, which provides for the correction of errors in the record of a member of the military. The Secretary of the Army, through the ABCMR, may correct any record when it is "necessary to correct an error or remove an injustice." *Id.* § 1552(a)(1).

42. A service member must file a "request for the correction within three years after he discovers the error or injustice," but the ABCMR "may excuse a failure to file



within three years after discovery if it finds it to be in the interest of justice.” *Id.* § 1552(b).

43. 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).

44. On June 22, 2005, well within three years after he discovered that he was suffering from service-connected PTSD, Mr. Shepherd applied to the ABCMR for the review of his discharge status. He was not represented by counsel.

45. On April 18, 2006, the ABCMR denied Mr. Shepherd’s application. The ABCMR held that Mr. Shepherd’s application was untimely, and that he had failed to provide evidence sufficient to demonstrate that it would be in the interest of justice to waive the ABCMR’s three-year statute of limitations.

46. On February 27, 2007, assisted by *pro bono* counsel, Mr. Shepherd moved for reconsideration by the ABCMR based on new evidence connecting his PTSD to his military misconduct.

47. In support of his motion to reconsider, Mr. Shepherd submitted a letter from a licensed mental health counselor who had treated him at the New Haven Veterans Center stating that, in her professional opinion, Mr. Shepherd’s undiagnosed, service-connected PTSD contributed substantially to his misconduct and then prevented him from acting in a timely fashion to upgrade his discharge.

48. On June 21, 2007, the ABCMR denied Mr. Shepherd’s application for reconsideration, stating that the new evidence submitted by Mr. Shepherd did not justify amending its prior decision.

49. Mr. Shepherd has exhausted all administrative remedies available to him and now timely petitions this Court for review of the ABCMR's 2006 denial of his application to upgrade his discharge status and 2007 denial of his motion for reconsideration.

## **LEGAL CLAIMS**

### **Count I**

#### **Administrative Procedure Act, 5 U.S.C. § 706(C)**

#### **Ultra Vires Action**

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

51. Congress established a three-year statute of limitations for applications to the ABCMR for a discharge upgrade. 10 U.S.C. § 1552. The ABCMR is not authorized by law to refuse to adjudicate a timely filed upgrade application.

52. The three-year statute of limitations begins to run upon an applicant's discovery of the error or injustice in his discharge. Id. § 1552 (b).

53. Mr. Shepherd's claim of injustice is based on his service-connected PTSD, which he did not discover until his counselor told him he had PTSD in 2003 and which was not formally diagnosed by the VA until 2004.

54. Mr. Shepherd timely filed the instant upgrade application in 2005, within three years of his discovery of his claim of injustice, and well within the three-year statute of limitations established by Congress.

55. The ABCMR's refusal to adjudicate on the merits Mr. Shepherd's timely-filed application, on either Mr. Shepherd's original application or his motion to reconsider, was unauthorized by law and contrary to the statute enacted by Congress.

**Count II**

**Administrative Procedure Act, 5 U.S.C. § 706(A)**

**Arbitrary and Capricious Action and Abuse of Discretion in Failing to Waive the  
Statute of Limitations**

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

57. Congress has authorized the ABCMR to waive the three-year statute of limitations in the interest of justice. 10 U.S.C. § 1552(b).

58. Mr. Shepherd has produced substantial evidence that waiver of the three-year statute of limitations, if applicable in his case, 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 on either Mr. Shepherd's original application or his motion to reconsider was arbitrary, capricious, unsupported by substantial evidence, and an abuse of discretion.

**Count III**

**Administrative Procedure Act, 5 U.S.C. § 706(A)**

**Arbitrary and Capricious Action and Abuse of Discretion in Denying  
Discharge Upgrade**

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

60. In the alternative, in the event that the Court concludes that the ABCMR denied Mr. Shepherd's application on the merits, the ABCMR failed to consider Mr. Shepherd's Bronze Star with Valor Device, the fact that his sentences were suspended, and the significance of Mr. Shepherd's nearly four decades of suffering from PTSD directly caused by his service in reaching its decision not to upgrade Mr. Shepherd's discharge status. The ABCMR's decision on the merits was arbitrary, capricious, unsupported by substantial evidence, and an abuse of discretion.

**PRAYER FOR RELIEF**

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

- (1) Direct, by issuance of an injunction, that defendant Plaintiff's discharge status be upgraded to general (under honorable conditions) affirmed under uniform standards, such that Plaintiff would be eligible for VA disability compensation benefits to which he is otherwise entitled.
- (2) In the alternative, vacate the decision of the ABCMR that Plaintiff's application is time-barred, and remand for consideration of the merits of his application.
- (3) In the further alternative, vacate the decision of the ABCMR not to waive the three-year statute of limitations and remand for consideration of the merits of his application.
- (4) Grant any other relief that the Court deems just and proper.

Dated April 21, 2011  
New Haven, Connecticut

Respectfully Submitted,

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