

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL SABO, NICHOLAS WELLS, )  
JUAN PEREZ, ALAN PITTS, )  
BILLY J. TALLEY, AIMEE SHERROD, and )  
TYLER EINARSON, on behalf of themselves )  
and all other individuals similarly situated )

Plaintiffs, )

v. )

THE UNITED STATES, )

Defendant. )

No. 08-899C  
(Judge G. Miller)

**SETTLEMENT AGREEMENT AND  
STIPULATION AND ORDER OF DISMISSAL**

For purposes of disposing of the claims of the plaintiffs in the above captioned action, No. 08-899C, without any further judicial proceedings, and without any trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of any party, and for other purposes expressly stated in this Settlement Agreement And Stipulation And Order Of Dismissal ("Settlement Agreement"), and for no other purpose, the parties agree and the Court orders as follows:

1. The names of each of the individual plaintiffs ("plaintiffs") are set forth on Exhibit A to this Settlement Agreement, which is incorporated by reference. Each of the plaintiffs: (a) served on active duty in the United States Army, Navy, Marine Corps, or Air Force (a "Service"), (b) was found by a Physical Evaluation Board ("PEB") to be unfit for continued service due, at least in part, to post traumatic stress disorder ("PTSD"), (c) was assigned a disability rating for PTSD of less than 50 percent and, as a result, (d) was released, separated, retired, or discharged from active duty after December 17, 2002, and prior to October 14, 2008 (regardless of whether

such release, separation, retirement, or discharge resulted in the individual's placement on the Temporary Disability Retirement List ("TDRL").

2. The parties entered into negotiations designed to resolve amicably the plaintiffs' claims for relief. As a result of these negotiations, the plaintiffs have agreed to settle, release, waive, and abandon each and all of their claims arising from their separations/discharge from the military as they relate to the application of the Veterans Affairs Schedule for Rating Disabilities ("VASRD") section 4.129 to his/her respective case and, for those receiving individualized PTSD ratings, the respective individualized PTSD rating, irrespective of whether such claims have been or could have been asserted administratively or in the complaint, and to dismiss their complaint in the Court of Federal Claims with prejudice. Nothing in this Settlement Agreement shall preclude Plaintiffs from making an application for fees or other applicable relief under the Equal Access to Justice Act ("EAJA") nor from receiving an award pursuant to EAJA, and the government does not waive any defenses to any such EAJA application nor concede or admit any entitlement under EAJA, should such an application be made.

3. All Exhibits to this Settlement Agreement contain personal identifying information and are filed separately under seal.

4. Exhibit A to this Settlement Agreement is a list of the names and tracking identification numbers of the individuals who have timely exercised their right to opt into this lawsuit as a class member (hereinafter, "class members").

5. Exhibit B to this Settlement Agreement is a list of the names and tracking identification numbers of the individuals who: (a) have been identified by defendant as a putative class member; (b) have been mailed a legal notice by defendant providing them an

opportunity to opt into this lawsuit; (c) have not exercised their right to opt-in as of the date of this Settlement Agreement; and (d) have a deadline of August 2, 2011 within which to exercise their right to opt into this lawsuit as a class member. Should a potential class member opt into this lawsuit, the class member's name and tracking identification number will be added to the appropriate Exhibit, described below.

**General Settlement Framework**

6. Within six months of the date on which the Court approves this Settlement Agreement, defendant shall take all steps necessary to execute the following actions:

(i) in the case of a class member who was separated or retired without being placed on the TDRL, change the military records of each such class member, including, but not limited to, issuance of a DD 215, so that they reflect (a) the member was placed on the TDRL and assigned a disability rating for PTSD of 50%, effective for the six-month period beginning on the date the member was released from active service, and (b) the member was taken off the TDRL, and assigned the permanent disability rating for PTSD listed in the applicable exhibit, effective six months after the member was released from active service; or,

(ii) in the case of a class member who was placed on the TDRL, change the military records so that they reflect that the member was assigned a disability rating for PTSD of 50 percent, effective continuously for the TDRL period; and

(iii) in the case of a class member who was found to have an unfitting condition other than PTSD prior to release from active service, change the military records of that class member to reflect a combined disability rating for the member's unfitting conditions that takes into

account the changes in the disability rating for PTSD made pursuant to subsection (i) or (ii) of this paragraph; and

(iv) transmit a copy of the changed military records, including, but not limited to a DD 215, to (a) the class member, (b) counsel for the plaintiff class, and (c) the Defense Finance and Accounting Service (“DFAS”).

**Class Members Receiving Individualized Final PTSD Disability Ratings**

7. Class members listed on Exhibit C were separated with severance pay without first being placed on the TDRL. None of these class members has received a final decision on their respective PTSD rating stemming from an application to a military review board (either the Army Board for Correction of Military Records, the Air Force Board for Correction of Military Records, the Board for Correction of Naval Records, or the Physical Disability Board or Review (hereinafter, “military review boards”)) as of the date of this agreement. The Services will change these class members’ records in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework.

8. Class members listed on Exhibit J were retired for disability without first being placed on the TDRL. None of these class members has received a final decision on their respective PTSD rating stemming from an application to a military review board as of the date of this agreement. The Services will change these class members’ records in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework.

9. Class members listed on Exhibit G were placed on the TDRL. None of these class members have received a decision from a military review board as of the date of this agreement.

The Services will change these class members' records in accordance with sub-paragraphs (ii), (iii), and (iv) of the General Settlement Framework.

**Class Members with Military Review Board Decisions**

10. The Services reached final decisions on some class member applications to the military review boards and those decisions are presumed final. The parties agree that after the Court approves this Settlement Agreement, counsel for the plaintiff class will inform each such class member that he or she may elect, within the 60-day period following the date the Court approves this Settlement Agreement, the relief set forth in the General Settlement Framework above in lieu of whatever records correction was made by the military review board. Counsel for the plaintiff class will provide notice to defendant every week of the identity of those class members from Exhibits D, F, H, and K, described below, who have elected the relief set forth in the General Settlement Framework above in lieu of whatever records correction was made by the military review board. For each class member listed on the Exhibits D, F, H, and K below who timely elects, through counsel for the plaintiff class, the relief set forth in the General Settlement Framework, defendant shall, within six months of the date on which the Court approves the settlement agreement, take all steps necessary to execute the following actions.

11. Class members listed on Exhibit D were separated with severance pay without first being placed on the TDRL. These class members have all received a decision from the appropriate Service on an application to a military review board. Nonetheless, these class members may elect to have their records changed in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework.

12. Class members listed on Exhibit F were separated with severance pay without first being placed on the TDRL. These class members have all received a decision from the appropriate Service on an application to a military review board. Nonetheless, these class members may elect to have their records changed in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework.

13. Class members listed on Exhibit K were retired for disability without first being placed on the TDRL. These class members have all received a decision from the appropriate Service on an application to a military review board. Nonetheless, these class members may elect to have their records changed in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework.

14. Class members listed on Exhibit H were placed on the TDRL. These class members have all received a decision from the appropriate Service on an application to a military review board. Nonetheless, these class members may elect to have their records changed in accordance with sub-paragraphs (ii), (iii), and (iv) of the General Settlement Framework.

**Class Member Election Between Exhibit Rating and Review Board Application**

15. Class members listed on Exhibit E were separated with severance pay or retired for disability without first being placed on the TDRL. None of these class members has received a final decision on their respective PTSD rating stemming from an application to a military review board as of the date of this agreement. After the Court approves this Settlement Agreement, counsel for the plaintiff class will inform each class member listed on Exhibit E that he or she may elect, within the 60-day period following the date the Court approves this Settlement Agreement, to apply to a military review board for relief. Counsel for the plaintiff class will

provide notice to defendant every week of the identity of those class members from Exhibit E who have elected to apply to a military review board.

16. The military review board will make a final decision on the class member's application within 90 days of receiving the complete application and all relevant documents. This process serves as the full and final resolution of the listed plaintiffs' claims related to VASRD section 4.129. If class members listed on Exhibit E do not elect to apply to a military review board, the Services will change their records in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework.

**Class Members Obtaining Additional Information**

17. The parties have agreed to allow a small number of class members the opportunity to obtain additional information.

18. Upon the Court's approval of this Settlement Agreement, counsel for the plaintiff class will inform each such class member listed on Exhibit L that by virtue of this Settlement Agreement, the class member has an opportunity to obtain additional information relevant to this settlement agreement if, within 60 days of such approval, (a) the member files a claim for service-connected disability benefits for PTSD with the Department of Veterans Affairs ("DVA") and (b) provides counsel for the plaintiff class with a copy of such claim. The parties agree to use the rating decision issued by the DVA Regional Office, either the rating decision initially issued on the claim, or, if the class member files a timely Notice of Disagreement, the subsequent rating decision issued in the form of a Statement of the Case (the "Rating Decision"), on the class member's claim to inform the individualized PTSD rating to be used in an amended Exhibit L. Plaintiffs' counsel will provide government counsel periodic updates regarding (a)

whether the class member filed a timely claim, (b) whether the class member has received a Rating Decision issued by the DVA Regional Office on the class member's claim, and (c) if the class member has received a Rating Decision on the claim, a copy of the decision and a statement whether the class member has elected to have his or her records changed in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework. The parties will provide monthly updates to the Court listing the final disability ratings the Services will apply to the claimants and the Services will change each class member's records in accordance with sub-paragraphs (i), (iii), and (iv) of the General Settlement Framework within six months of notice from plaintiffs' counsel of the class member's election. The parties will provide a final version of Exhibit L to this Settlement Agreement once a Rating Decision issued by the DVA Regional Office on each class members' claim submitted under this Settlement Agreement has been issued.

19. For any class members listed on Exhibit L who do not obtain additional information or make an election as described above, and therefore do not receive an individualized PTSD rating on Exhibit L, the services will change these class members' records to reflect retroactive placement on the TDRL with a disability rating of 50 percent for the PTSD unfitting condition for a period of six months following separation. The class member's final rating for PTSD will be the rating the class member received when originally separated.

#### **Jurisdiction**

20. The parties agree that the Court will maintain jurisdiction of the claims brought by claimants listed in Exhibits A and B until the parties submit to the Court a joint status report that lists (in filings made under seal) the names of those plaintiffs whose military records have been

changed pursuant to the agreed upon terms above, and as set forth in the Exhibits to this agreement. By submitting the list of names to the court under cover of these joint status reports, the parties further agree that these plaintiffs' claims can be dismissed from the case with prejudice, consistent with paragraph 2 of this agreement, and with a provision incorporating the terms of this Settlement Agreement in the order of dismissal. The first joint status report will be filed within 60 days of the court's final approval of this agreement. Subsequent joint status reports will be filed on an ongoing basis as additional plaintiff's military records are changed, but at a minimum, every 90 days thereafter. The parties agree that jurisdiction shall be maintained for the sole purpose of entering an order reflecting the contents of the Exhibits, or to otherwise enforce the terms of this Settlement Agreement.

**Administrative Finality**

21. Nothing in this Settlement Agreement shall affect whatever right each such class member might otherwise have to apply for further relief to a military review board, as long as the class member does not rely on 38 C.F.R. § 4.129 as a ground for relief. Nothing in this Settlement Agreement affects (a) whatever right each such class member would have to seek judicial review of the final decision on any such application, as long as the class member does not rely on 38 C.F.R. § 4.129 as a ground for relief, or (b) whatever defenses defendant would have to such a lawsuit.

22. For those class members who receive an individualized disability rating pursuant to the data included in the Exhibits to this Settlement Agreement, that individualized permanent disability rating for PTSD shall be final and not subject to further review by any military review board or court. Notwithstanding the foregoing sentence, nothing in this Settlement Agreement

affects (a) whatever rights each class member might have to seek any and all relief for non-PTSD disabilities, (b) whatever rights each class member might have to seek review or correction of any disability ratings afforded by DVA, or other relief from the DVA; or (c) whatever defenses defendant would have to any such claim or lawsuit.

23. The parties acknowledge that the terms of this settlement have been influenced by the law and policies in effect before and during this litigation. They further acknowledge that future changes in laws, including those affecting entitlement offsets may significantly impact the claimants and/or render choices they make more or less beneficial, or have different collateral consequences. The parties recognize that the full consequences of a record change under this Settlement Agreement may not be anticipated by specific claimants. The parties acknowledge and agree such changes in laws or unanticipated consequences shall not constitute a breach of this Settlement Agreement or otherwise impact the finality of this Settlement Agreement.

24. **REIMBURSEMENT OF MEDICAL EXPENSES.** Class members who have been awarded disability retirement as a result of this Settlement Agreement have the right to request reimbursement of past medical expenses incurred by the class member and qualifying family members during the period from date of release from active military service. Within 60 days of approval of this Settlement Agreement by the Court, the Military Services shall inform TRICARE of the identity of all class members awarded disability retirement and inform TRICARE that such requests, if made within one year of the date of a claimant's individual eligibility determination pursuant to this Settlement Agreement shall not be denied upon the basis that the request was not submitted within one year of when the expenses were incurred.

25. **SEPARATION PAY AND SURVIVOR BENEFIT PLAN (“SBP”)**. The parties hereby incorporate by reference the terms of Chapter 4 of DoD 7000.14-R, Volume 7B (DoD Financial Management Regulation or “FMR”), attached as Exhibit M. Chapter 4 of the FMR establishes policies related to retired pay and benefits for claimants originally separated from military service due to disability. As described in the FMR, class members retired as a result of this settlement agreement will have the option to affirmatively elect no survivor benefit coverage or less than full spouse coverage under the Survivor Benefit Plan, retroactive to the date of the class member’s release from active service (paragraph 040503). Additionally, the FMR describes the exclusive process for recouping severance pay (paragraphs 0405 and 0409). The terms of Chapter 4 of the FMR are applicable to all class members who become eligible for disability retirement under this Settlement Agreement or became eligible for disability retirement as a result of a decision of a military review board.

26. **COMBAT RELATED SPECIAL COMPENSATION**. The parties recognize that there are some class members already in a retired status and receiving Combat Related Special Compensation (“CRSC”) that may experience an adverse impact to their overall monthly entitlement when their disability rating is increased. This could occur if there is a reduction in the class member’s monthly CRSC entitlement. In order to avoid this potential impact for the class members already receiving CRSC the DFAS will compute applicable class members’ potential new entitlement that would result if the class members’ records were changed in accordance with the Settlement Agreement. For the applicable class members, the respective Service’s Physical Evaluation Board will compute the member’s potential disability retirement rating in accordance with the Settlement Agreement. DFAS will compute the potential

entitlement based on the information provided by the class member's respective PEB. The entitlement will be computed with the current CRSC rating on record for each class member that the respective CRSC Board determined in accordance with 10 U.S.C. § 1413a. DFAS will provide counsel for the plaintiff class with a file containing a list of those class members who are already in receipt of CRSC containing the following information:

(i) class member's ID number

(ii) class member's current monthly retired pay entitlement based on current disability rating, including both the member's current gross retired pay entitlement and current applicable VA waiver.

(iii) class member's current monthly CRSC entitlement.

(iv) class member's potential monthly retired pay entitlement with new disability rating, including both the member's potential gross retired pay entitlement and the current applicable VA waiver.

(v) class member's potential monthly CRSC entitlement amount with new disability rating.

(vi) class member's retired pay entitlement based on class member's years of service, including both the member's years of service gross retired pay entitlement and current applicable VA waiver.

Thereafter, counsel for the plaintiff class will inform each such class member that he or she may elect, within the 60-day period following the notification from DFAS to plaintiffs' counsel: 1) the relief set forth in the Settlement Agreement with retired pay calculated on the basis of disability; 2) the relief set forth in the Settlement Agreement but to receive retired pay

based on years of service; or 3) to maintain their current rating. If the class member elects the relief set forth in the Settlement Agreement, the services shall be notified and at that time, modified orders will be processed accordingly. Modified orders will not be created by the service or processed by DFAS until an election is made. If the class member elects to maintain their current rating, no further action will be taken, and no further relief shall be granted. If a class member does not make an election through class counsel within 60 days, DFAS will default to calculation that yields the highest gross monthly retirement pay.

27. **WAIVER.** Plaintiffs hereby waive any right to challenge, in any proceeding, administrative or judicial, the disability ratings listed on Attachments C-L except as provided in paragraphs 22 and 23 above.

28. **RELEASES.** Upon execution of this Settlement Agreement, each plaintiff releases, waives, and abandons any and all claims, causes of action, and demands, whether known or unknown, whether arising in law or in equity, jointly or severally, which they, their heirs, executors, administrators or assignees may have or hereafter acquire against the defendant or any of its agencies, departments, officers, agents or employees on account of the events and circumstances giving rise to this action and claims incident thereto and which are or might be asserted, now or in the future, before any court or administrative body, including without limitation the military review boards. Each plaintiff releases, waives and abandons all such claims, causes of action and demands arising out of or relating to the application of VASRD section 4.129 and any other determination provided for in this settlement agreement. Should any plaintiff violate any of these warranties and representations, at the sole option of the United

States, any monies paid to any plaintiff as a result of this Settlement Agreement will be refunded promptly to the United States, together with interest at the rates provided by 41 U.S.C. § 611.

29. **LIMITATIONS.** The parties agree that neither this Settlement Agreement nor any action taken pursuant to it shall constitute an admission of liability or fault on the part of the defendant or any of its agencies or departments or its present or former officers, agents or employees; any such liability or fault is expressly denied by the defendant. The parties further agree that this Settlement Agreement is entered into for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation. This Settlement Agreement shall not be cited or otherwise referred to in any proceeding, judicial or administrative, except as is necessary to enforce the terms of this Settlement Agreement. It is expressly agreed and understood that no aspect of this Settlement Agreement is precedential or represents, or may be taken to indicate, any policy of, or interpretation of law or regulation by, the Department of Defense, Department of the Army, Department of the Navy, the Department of the Air Force, or the United States.

30. **SCOPE OF SETTLEMENT.** Through this Settlement Agreement, each plaintiff acknowledges that the consideration from the defendant described in this Settlement Agreement constitutes full settlement and satisfaction of all claims hereby released. Each plaintiff enters into this Settlement Agreement after full opportunity to consult with counsel of his choice.

31. **WARRANT.** Through this Settlement Agreement, each plaintiff warrants that he or she has not assigned, transferred or otherwise alienated any cause of action, or claim of any kind, relating in any way to this action. In the event that any claim based on such assignment or transfer or on any claim of a right of subrogation relating in any way to this action is brought, then each such plaintiff whose acts gives rise to such a claim agrees to pay the costs of the

Department of Justice in defending such an action, protect, indemnify, and hold harmless the defendant and any of its agencies, departments, officers, agents and employees from such claim or cause of action.

32. **TAXES**. This Settlement Agreement, including the attachments, does not address and the parties do not intend it to address the income taxes or other taxes for which each plaintiff is or may become liable, as a result of this Settlement Agreement.

33. **ENFORCEMENT**. The terms of this Settlement Agreement are adopted as an order of the Court, are contractual and not merely a recital, and shall be binding upon and inure to the benefit of the parties to it. This Settlement Agreement shall be fully enforceable by the parties in a request to the Court for enforcement or an action at law, and nothing contained in it shall preclude or be construed to preclude enforcement or an action at law by the parties against each other to enforce the provisions of this Settlement Agreement.

34. **COURT APPROVAL REQUIRED**. Pursuant to Rule 23 RCFC this Settlement Agreement will be submitted to the Court for approval and a fairness hearing. If any term, provision, covenant or condition of this Settlement Agreement is not approved by the Court, this Settlement Agreement shall be void.

35. **TERMS OF AGREEMENT**. This Settlement Agreement, including the attachments, embodies the entire Settlement Agreement between the parties to it; provided, however, that as to any individual plaintiff, the entire agreement consists of this Settlement Agreement and only the part of Attachments A thru L that refers to such plaintiff. There are no promises, terms, conditions, or obligations other than those contained in this Settlement Agreement. All parties to this Settlement Agreement pledge to cooperate fully and in good faith

to carry out the terms of this Settlement Agreement, and to use their best efforts to perform all actions required by this Settlement Agreement in a reasonable and expeditious manner. Certain time limits provided for in this Settlement Agreement, as specified in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 24, and 26 shall not be extended. Notwithstanding the foregoing, a party's failure to meet any time limit specified by this Settlement Agreement shall not be automatically construed as a breach of this Settlement Agreement. All prior negotiations, understandings, conversations, and communications are merged into this Settlement Agreement and have no force and effect other than as expressed in this Settlement Agreement. The parties to this Settlement Agreement agree that a copy of the fully executed Settlement Agreement (including the annexes), shall have the legal effect and shall be equally enforceable at law as the original fully executed Settlement Agreement.

Respectfully submitted:



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July 14, 2011

SO ORDERED:

\_\_\_\_\_  
Hon. George W. Miller

\_\_\_\_\_  
Date