21-1553
IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALLEN H. MONROE,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims
in Case No. 18-1059C (Judge Campbell-Smith)

CORRECTED BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Rules of this Court, counsel for defendant-appellant, United States, states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Counsel is also unaware of any cases currently pending before this Court or any other court that will be affected by the Court's decision in this case.

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INTRODUCTION

Defendant-appellant, the United States, appeals from a judgment of the United States Court of Federal Claims granting plaintiff-appellee, Allen H. Monroe, $50,881.27 in attorney fees and expenses, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), even though Mr. Monroe was unsuccessful on the only claim that he actually raised in the Court of Federal Claims. This Court should reverse.

In January 2015, Mr. Monroe was honorably discharged from the United States Air Force (Air Force) based upon the Air Force's determination that his diabetes rendered him unfit for duty. Because his condition was assigned a 20 percent disability rating under the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD), rather than a 30 percent rating or higher, Mr. Monroe was separated with severance pay under 10 U.S.C. § 1203, rather than retired with monthly disability retirement pay under 10 U.S.C. § 1201.

Mr. Monroe challenged the Air Force's unfitness determination at the Air Force Board for the Correction of Military Records (AFBCMR) and requested reinstatement to active duty, but his application was denied, as the AFBCMR found insufficient evidence of material error or injustice in the Air Force's unfitness determination. Mr. Monroe did not challenge his disability rating at the AFBCMR at that time.

Mr. Monroe then filed a complaint in the Court of Federal Claims challenging the AFBCMR's decision. Mr. Monroe founded his claim upon 37 U.S.C. § 204, seeking retroactive restoration to active duty and associated back pay. The Court twice remanded this unlawful discharge claim to the AFBCMR, at the request of the Government, and the AFBCMR twice more rejected Mr. Monroe's challenge to the Air Force's unfitness determination and his request for retroactive restoration to active duty.

Near the end of the second remand, however, Mr. Monroe asserted, for the first time before the trial court or the AFBCMR, an alternative argument that he should have received a 40 percent disability rating and, thus, a disability retirement under 10 U.S.C. § 1201. In response to this new argument, the AFBCMR determined that it would serve the interest of justice to increase Mr. Monroe's disability rating to 40 percent and grant him a disability retirement. Although Mr. Monroe received no relief on the claim that he raised in his complaint, he was satisfied with this alternative relief and moved to voluntarily dismiss the action.

After the dismissal, Mr. Monroe sought $50,881.27 in attorney fees and expenses under EAJA, and the trial court granted his motion in full. The trial court found that the Government's position was not substantially justified because Mr. Monroe "has been forced to litigate defendant's position since the Air Force's determination in 2014, which the AFBCMR ultimately determined was faulty," and because, in the trial court's view, "the process by which both the Air Force and the AFBCMR made their determinations about plaintiff's disability rating was flawed and involved clear errors." Appx7.

The trial court abused its discretion in determining that the Government's position was not substantially justified by: 1) focusing upon Mr. Monroe's initial 20 percent disability rating, rather than the Government's overall position on the unlawful discharge claim actually raised in Mr. Monroe's complaint;

2) determining that the Government's position with regard to Mr. Monroe's initial 20 percent disability rating was not substantially justified based solely upon the AFBCMR's ultimate decision to increase it and an unsupported assertion of flaws in the process of determining the disability rating; and 3) criticizing the AFBCMR for not correcting Mr. Monroe's disability rating in its initial decision or first remand decision, even though Mr. Monroe had not yet challenged the disability rating at the AFBCMR. Because our overall position in the litigation was substantially justified, this Court should reverse the trial court's judgment in favor of Mr. Monroe.

Also, even if Mr. Monroe is entitled to *some* attorney fees, which he is not, the trial court still abused its discretion in awarding Mr. Monroe *all* the fees and expenses he incurred pursuing *both* his unlawful discharge claim under 37 U.S.C. § 204 and his disability retirement claim under 10 U.S.C. § 1201, notwithstanding that Mr. Monroe's unlawful discharge claim was unsuccessful. Mr. Monroe's disability retirement claim is distinctly different from and diametrically opposed to his unlawful discharge claim. The success of Mr. Monroe's delayed disability retirement claim was dependent upon the AFBCMR *upholding* the very unfitness determination that Mr. Monroe challenged before the trial court and the AFBCMR. Accordingly, Mr. Monroe may not recover fees and expenses incurred pursuing the unsuccessful unlawful discharge claim.

Moreover, although Mr. Monroe sought more than $600,000 in active duty back pay and associated allowances at the trial court, he was entitled to *$0* in back pay and allowances as a result of his disability retirement, and he *owed the Government* more than $75,000 dollars as a result of the AFBCMR decision. The trial court's failure to reduce Mr. Monroe's EAJA award for his limited success is another reason why the Court should reverse the trial court's judgment.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3). On November 16, 2020, the Court of Federal Claims entered a final judgment awarding Mr. Monroe attorney fees and expenses that he had requested pursuant to EAJA. Appx10. We filed a timely notice of appeal of this judgment on January 11, 2021. Appx605-06.

The trial court possessed jurisdiction to entertain Mr. Monroe's underlying complaint pursuant to 28 U.S.C. § 1491(a)(1) because Mr. Monroe raised a claim for retroactive active duty pay, based upon an allegedly unlawful discharge, pursuant to a money-mandating statute, 37 U.S.C. § 204. Appx90-91, Appx145-146.

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in finding that the position of the United States was not substantially justified, where the

Government's overall position with regard to the claim Mr. Monroe raised in his complaint was vindicated and where his partial success at the AFBCMR on remand was solely the result of a new claim that he never raised at the trial court.

2. Whether the trial court abused its discretion by awarding Mr. Monroe all the attorney fees and expenses that he sought, rather than reducing the award based upon Mr. Monroe's limited success.

STATEMENT OF THE CASE

I. Mr. Monroe's Service And Discharge From Active Duty

Mr. Monroe served on active duty as an officer in the Air Force for nearly 15 years, until he was honorably discharged due to disability on January 22, 2015, based upon the Air Force's determination that his insulin-dependent, Type I diabetes mellitus rendered him unfit for duty. Appx107, Appx166. Upon his discharge from active duty, Mr. Monroe received a one-time severance pay award of $227,241, Appx540, rather than a disability retirement – which would have entitled him to monthly payments – because he received a 20 percent disability rating for his diabetes pursuant to the VASRD, rather than a 30 percent rating or higher. *See* 10 U.S.C. §§ 1201(b)(3), 1203(b), 1401(a).[1]

[1] Under the VASRD in effect that the time of Mr. Monroe's disability proceedings, a 20 percent rating under diagnostic code (DC) 7913 was applied to diabetes mellitus "[r]equiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet[.]" 38 C.F.R. § 4.119, DC 7913 (2014). To have received

Mr. Monroe was referred to the Department of Defense (DoD) Integrated Disability Evaluation System (IDES) in 2012 for a determination of whether his diabetes rendered him unfit for duty. *See* Appx92. In the IDES, the determination of whether a service member is fit for duty is made by a DoD Physical Evaluation Board (PEB), while the determination of the appropriate disability rating to be assigned to any unfitting conditions is made by the VA. *See Kaster v. United States*, 149 Fed. Cl. 670, 673 (2020).

In May 2013, an informal PEB determined that Mr. Monroe's diabetes rendered him unfit for duty and recommended that he be discharged with severance pay, based upon the 20 percent disability rating provided by the VA. *See* Appx93, Appx502. Mr. Monroe objected to the informal PEB's unfitness determination and demanded a formal PEB hearing. *See* Appx93; 10 U.S.C. § 1214. In July 2013, the formal PEB also determined that Mr. Monroe was unfit for duty and recommended that he be separated with severance pay. Appx502.

Mr. Monroe then appealed his unfitness determination to the Secretary of the Air Force Personnel Council (SAFPC), alleging errors in the formal PEB proceedings, including the failure to properly create and maintain an audio

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the next highest rating of 40 percent, the diabetes mellitus must have "[r]equir[ed] insulin, restricted diet, and regulation of activities[.]" *Id.* "[R]egulation of activities" means "avoidance of strenuous occupational and recreational activities[.]" *Id.*

recording of the formal PEB. Appx94-95. Due to the lack of an audio recording, the SAFPC directed a second formal PEB to evaluate Mr. Monroe's case. Appx95. In November 2013, the second formal PEB also determined that Mr. Monroe was unfit for duty. Appx95-96.

Mr. Monroe again appealed his unfitness determination to the SAFPC, which denied his appeal in January 2014 and directed that he be discharged with severance pay. Appx98, Appx502. Mr. Monroe then requested that the SAFPC reconsider its January 2014 decision primarily because the decision misreported his blood sugar level on one particular date as higher than it actually was. *See* Appx101. The SAFPC acknowledged the mistake and agreed to reconsider its January 2014 decision. Appx104-105. In June 2014, the SAFPC again determined that Mr. Monroe was unfit and directed his discharge with severance pay. Appx104, Appx502.

"Mr. Monroe's duty performance remained 'stellar' and his level of physical fitness exemplary" through the disability proceedings that led to his discharge. Appx55 (citation omitted). Indeed, notwithstanding his diabetes, Mr. Monroe "continued to be very athletically active, running marathons, and displaying top physical assessment scores." Appx99 (citation omitted).

Mr. Monroe's diabetes, however, also resulted in an Assignment Limitation Code, *see* Appx90, Appx171, which limited his ability to deploy. *See* Air Force

Instruction 41-210, ¶ 4.76 (Jun. 6, 2012) (Appx489-494). Based largely upon his deployment limitations, as well as increased risks to Mr. Monroe's health due to his diabetes, such as incapacitation due to dehydration, hyper/hypoglycemia episodes, poor wound healing, and coronary syndromes, the Air Force determined that Mr. Monroe was unfit for duty. *See* Appx98-100, Appx104-106, Appx277-278. Pursuant to the DoD Instruction (DoDI) in effect at the time of Mr. Monroe's disability proceedings, the ability to deploy and the medical risks to the member's health of continued service were important considerations in determining whether a member was medically fit for duty. *See* Directive-Type Memorandum on Standards for Determining Unfitness Due to Medical Impairment (Deployability) (Dec. 19, 2007) (Appx487-488) (amending DoDI 1332.38, ¶ E3.P3.4.1.3); DoDI 1332.38 ¶ E3.P3.2.2 (Nov. 14, 1996) (Appx428).

After the SAFPC's final June 2014 decision, Mr. Monroe requested that the VA reconsider his 20 percent disability rating before his discharge. Appx502. In August 2014, the VA determined that no change to the rating was warranted. *Id.* Accordingly, Mr. Monroe was honorably discharged with severance pay on January 22, 2015. *Id.*

II. Initial AFBCMR Proceedings

In November 2014, Mr. Monroe submitted an application to the AFBCMR. Appx498-499. The AFBCMR was established pursuant to 10 U.S.C. § 1552 to

consider applications of service members and former service members seeking to correct their military records. *See* 32 C.F.R. §§ 865.1-865.3. The AFBCMR "is not an investigative body." 32 C.F.R. § 865.2(c). Rather, the "applicant has the burden of providing sufficient evidence of material error or injustice," 32 C.F.R. § 865.4(a), and the AFBCMR will determine whether "the applicant has demonstrated the existence of a material error or injustice[.]" 32 C.F.R. § 865.4(h)(4).

In his AFBCMR application, Mr. Monroe requested "reinstatement to active duty as a remedy for the errors or injustice by the Air Force in failing to comply with applicable regulations and the lack of a preponderance of the evidence supporting the determination that he was unfit." Appx108; *see also* Appx498-499. Mr. Monroe did not request an increased disability rating or disability retirement in his application. *See* Appx498-499, Appx501. Rather, in a February 2016 submission to the AFBCMR, Mr. Monroe expressly asserted that he was *not* entitled to a disability retirement. Appx254 (stating that his "otherwise exceptional health is ironically—and counter to how the Boards have depicted his condition—too good, and his diabetes too well-managed to warrant a medical retirement.").

In September 2017, the AFBCMR denied Mr. Monroe's application after determining that he did not demonstrate any material error or injustice. *See* Appx500-507.

III. Initial Court Of Federal Claims Complaint And The First Remand

In July 2018, Mr. Monroe filed a complaint in the Court of Federal Claims challenging the AFBCMR's decision and alleging that "the AFBCMR failed to correct plain legal error committed by the United States Air Force. . . in wrongfully determining that Mr. Monroe was medically unfit and discharging him from active duty service." Appx17. At the trial court, Mr. Monroe was represented *pro bono* by attorney Scott MacKay. Appx58, Appx230.

Mr. Monroe founded his claim upon the Military Pay Act, 37 U.S.C. § 204, Appx18, and sought restoration to active duty, retroactive to January 22, 2015, active duty service credit for that time period, all pay and allowances he would have been entitled to if not for his allegedly unlawful discharge "in an amount in excess of $550,000, plus interest," and a promotion to Lieutenant Colonel. Appx57-58. In his complaint, Mr. Monroe alleged various errors by the AFBCMR in declining to disturb the Air Force's determination that he was unfit for duty. *See* Appx46-57. Mr. Monroe did not allege that his disability rating was incorrect, nor did he seek an increased disability rating or disability retirement in his complaint. *See* Appx45-57.

In October 2018, we filed an unopposed motion to voluntarily remand the case to the Air Force based upon Mr. Monroe's allegations that the AFBCMR did not address arguments that he raised before it. Appx60-63. We stated that our

motion was "predicated upon the interests of justice and is not predicated upon an admission of error by the United States or the Air Force." Appx61.

The trial court granted our October 2018 motion to remand and ordered the AFBCMR to address three specific alleged errors related to Mr. Monroe's unfitness determination and "[a]ddress any other issues Mr. Monroe submits in writing to the AFBCMR within 30 days of the remand order, and consider any evidence or arguments in Mr. Monroe's submission[.]" Appx64-66.

Within the 30-day time period specified by the trial court, Mr. Monroe submitted a letter to the AFBCMR raising additional issues related to the Air Force's determination that Mr. Monroe was unfit for duty and requesting that Mr. Monroe be retroactively restored to active duty. *See* Appx258-259. In his submission to the AFBCMR, Mr. Monroe did not allege that his disability rating was incorrect, nor did he seek an increased disability rating or disability retirement. *See* Appx256-259. In April 2019, the AFBCMR again determined that Mr. Monroe failed to demonstrate any material error or injustice. *See* Appx73-84.

IV. Amended Complaint, Second Remand, And Dismissal

In May 2019, Mr. Monroe filed an amended complaint, alleging that the AFBCMR erred in both its initial September 2017 decision and its April 2019 decision on remand. *See* Appx130-145. Mr. Monroe again focused on the Air Force's determination that he was unfit for duty. *See id.*; *see also* Appx86

(alleging that "the AFBCMR committed multiple errors and erroneously failed to correct plain legal error committed by SAFPC, in wrongfully determining that Mr. Monroe was medically unfit and discharging him from active duty service."). Mr. Monroe founded his claim upon 37 U.S.C. § 204 and sought restoration to active duty, retroactive to January 22, 2015, active duty service credit for that time period, all pay and allowances he would have been entitled to if not for his allegedly unlawful discharge "in an amount in excess of $600,000, plus interest," a promotion to Lieutenant Colonel, restoration of leave, and reimbursement for medical expenses he would not have incurred if he had been on active duty. Appx90, Appx145-146. Like in his initial complaint, Mr. Monroe did not allege that his disability rating was incorrect, nor did he seek an increased disability rating or disability retirement. *See* Appx130-146.

In July 2019, we filed another unopposed motion to voluntarily remand the case to the Air Force. Appx147-154. We explained that we were "seeking a remand in the interests of justice to ensure that the AFBCMR considers the relevant factors in determining whether the SAFPC erred in finding Mr. Monroe unfit for duty." Appx148. We also stated that we "do not concede that the AFBCMR's overall decision to deny relief was erroneous," but "it appears that, in reaching that decision, the AFBCMR inappropriately considered regulations and policy post-dating the Air Force's June 2014 final determination that Mr. Monroe

was unfit for duty." *Id.* We also identified a few issues related to Mr. Monroe's allegations of error that could use further development and permitted Mr. Monroe to add additional issues to the proposed remand instructions. *See* Appx149-150.

The trial court granted our second motion to remand and ordered the AFBCMR to: 1) address seven specific issues related to the Air Force's unfitness determination; 2) "[r]e-determine and explain whether the Air Force's determination that Mr. Monroe was unfit for duty was erroneous in light of the above determinations and without regard to any regulations or policies promulgated after June 26, 2014"; and 3) "[c]onsider any additional arguments or evidence Mr. Monroe submits in writing to the AFBCMR within 30 days of the remand order[.]" Appx155-158.

In August 2019, within the 30-day time period specified by the trial court, Mr. Monroe submitted a letter to the AFBCMR raising additional issues related to the Air Force's determination that Mr. Monroe was unfit for duty and requesting that Mr. Monroe be retroactively restored to active duty. *See* Appx352-353. Once again, Mr. Monroe did not allege that his disability rating was incorrect, nor did he seek an increased disability rating or disability retirement. *See* Appx350-353.

In November 2019, the AFBCMR received three advisory opinions, including an advisory opinion from the AFBCMR medical consultant. Appx390-395. After a lengthy analysis of Mr. Monroe's medical history, *see* Appx390-394,

the medical consultant opined that the AFBCMR's earlier decision regarding Mr. Monroe's unfitness "could have been justified under the standalone policies outlined in DoDI 1332.38[.]" Appx395. The medical consultant also stated:

> [A]lthough the applicant demonstrated the ability to meet or exceed the physical demands of military service, as demonstrated by his Excellent fitness assessments and marathon runs, this also came at another price when considering the disability rating criteria for Diabetes mellitus, as outlined in the Veterans Affairs Schedule for Rating Disabilities; wherein a 20% disability rating is assigned for 'diabetes requiring insulin and restricted diet, *or* an oral hypoglycemic agent and restricted diet,' *versus* a 40% disability rating, when *regulation of activities* has been recommended. On September 3, 2010, one provider recommended restriction of activities and another recommended applicant be 'allowed to do physical training at his own pace and distance,' that he 'may carry a glucose test meter and snacks,' and with authorization for 'separate rations,' as a consequence of his disease.

Appx394 (emphasis in original).

In December 2019, Mr. Monroe submitted a 12-page response to the advisory opinions, largely disagreeing with their reasoning. *See* Appx396-407. Within these 12 pages, Mr. Monroe used less than one-third of one page to briefly address the AFBCMR medical consultant's statements regarding the VASRD and to request, as alternative relief, a 40 percent disability rating and disability retirement under 10 U.S.C. § 1201. *See* Appx406.

In January 2020, the AFBCMR again declined to disturb the Air Force's determination that Mr. Monroe was unfit for duty and declined to restore him to active duty. Appx165-177. The AFBCMR adopted the opinion of the Air Force Personnel Board that "it was unlikely that a combatant command would have been willing to grant a deployment waiver to an insulin dependent diabetic due to the risks that condition poses in an austere, deployed environment[.]" Appx172, Appx175. The AFBCMR indicated that, in a deployed environment, the risks to Mr. Monroe's health would be higher than at his local base. Appx175. The AFBCMR also opined that "this same risk makes the argument for a higher disability rating of 40 percent." *Id.* Accordingly, the AFBCMR determined that "the interest of justice can best be served by medically retiring the applicant with a 40 percent disability rating retroactive to 2015." *Id.*

In February 2020, the parties notified the trial court that Mr. Monroe "considers the case to be resolved at the administrative level based on the AFBCMR's January 15, 2020 remand decision." Appx178-179. Accordingly, Mr. Monroe filed a motion to dismiss this action with prejudice, which the trial court granted on February 6, 2020. Appx182-185.

V. EAJA Proceedings

In April 2020, Mr. Monroe filed a motion seeking $50,425.87 in attorney fees and $455.40 in expenses under 28 U.S.C. § 2412(d). Appx191-192. We

contended that the motion should be denied for two reasons: 1) Mr. Monroe was not a prevailing party, as required by 28 U.S.C. § 2412(d)(1)(A); and 2) our position was substantially justified, which also precludes an award of attorney fees and expenses under 28 U.S.C. § 2412(d)(1)(A). *See* Appx4-7. We also explained that if the court (erroneously) determined that an award of attorney fees and expenses was warranted, the award should, based upon Mr. Monroe's limited success, be no higher than $2,353.02, the fees and expenses incurred by Mr. Monroe in seeking a disability retirement and facilitating dismissal of the action. Appx8, Appx476.

In a November 13, 2020 opinion, the trial court granted Mr. Monroe's motion in full. Appx9; *Monroe v. United States*, 150 Fed. Cl. 786, 794 (2020). The trial court determined that Mr. Monroe was a prevailing party because the second remand was premised upon administrative error (the AFBCMR's reliance upon inapplicable DoD policy in its first remand decision) and because the disability retirement that Mr. Monroe received on remand materially altered the parties' relationship. Appx6.[2]

The trial court also determined that the Government's position was not substantially justified because it was "plagued by agency errors and therefore could not have a reasonable basis in law and fact." Appx7. More specifically, the trial

[2] We are not appealing the trial court's prevailing party determination.

court stated that Mr. Monroe "has been forced to litigate defendant's position since the Air Force's determination in 2014, which the AFBCMR ultimately determined was faulty," and that "the process by which both the Air Force and the AFBCMR made their determinations about plaintiff's disability rating was flawed and involved clear errors." Appx7. The court did not identify the purported "clear errors" made by the Air Force and the AFBCMR in "their determinations about plaintiff's *disability rating*[.]" *Id.* (emphasis added).

The trial court also concluded that Mr. Monroe's EAJA award should not be reduced based upon his limited success in obtaining a disability retirement, rather than the retroactive reinstatement to active duty that he sought in his complaint. Appx8-9. In reaching this conclusion, the trial court determined that it did not need to exclude the fees and expenses Mr. Monroe incurred in unsuccessfully seeking the retroactive reinstatement to active duty because the court considered the request for a disability retirement that he made to the AFBCMR during the second remand to be a part of a single, overarching "claim" challenging the AFBCMR's evaluation of his Air Force disability proceedings. *See* Appx8 ("Defendant contends . . . that plaintiff's claim for restoration to active duty was distinct from his disability retirement claim. . . . Defendant confuses plaintiff's claim with his request for relief. In his complaint before this court, plaintiff

claimed that the AFBCMR had erred in various ways when evaluating plaintiff's disability proceeding before the Air Force.").

Accordingly, the court focused on "the significance of the overall relief obtained" and determined that Mr. Monroe's disability retirement was an "'excellent' overall result" that warranted a full EAJA award. Appx8-9 (citations omitted). In determining that Mr. Monroe obtained an excellent result, the trial court did not address the disparity between the more than $600,000 in back pay and allowances that Mr. Monroe sought, and the $0 in back pay and allowances that he ultimately obtained. *Id.*[3]

SUMMARY OF THE ARGUMENT

This Court should reverse the trial court's judgment awarding attorney fees and expenses to Mr. Monroe because the trial court abused its discretion by:

1) finding that the Government's position was not substantially justified; and

2) awarding Mr. Monroe all the attorney fees and expenses he requested, rather than reducing them due to his limited success on remand.

[3] On November 17, 2020, the day after the trial court entered the judgment at issue in this appeal, Mr. Monroe filed a supplemental motion for attorney fees in the amount of $21,004.20, covering attorney fees related to the EAJA proceedings. *See* Appx593. After we filed our notice of appeal, the trial court stayed proceedings on Mr. Monroe's supplemental motion. Appx607. Accordingly, although the result of this appeal should inform the trial court's disposition of Mr. Monroe's supplemental motion, the supplemental motion itself is not directly at issue in this appeal.

The trial court's substantial justification determination was based upon the AFBCMR's failure to increase Mr. Monroe's disability rating during its initial decision and its first remand decision and the trial court's view that "the process by which both the Air Force and the AFBCMR made their determinations about plaintiff's disability rating was flawed and involved clear errors." Appx7. The trial court committed at least three legal errors in this ruling.

First, the trial court misapplied the requirement that the substantial justification finding must be based upon the Government's *overall* position. The trial court focused upon its belief that Mr. Monroe's 20 percent disability rating was not substantially justified, while ignoring that *Mr. Monroe never challenged his disability rating in court*. The Government's overall position on *the claim raised in Mr. Monroe's complaint* was that there was no material error or injustice in the decision to separate Mr. Monroe from active duty because his diabetes made him unfit for duty. Neither the trial court nor the AFBCMR reached a contrary conclusion. Accordingly, the position of the United States was necessarily substantially justified.

Second, even if the trial court's myopic focus upon Mr. Monroe's disability rating was appropriate, which it was not, the trial court nonetheless erred in determining that his initial 20 percent rating was not substantially justified. The trial court stated that "the AFBCMR ultimately determined" that the 20 percent

disability rating "was faulty," Appx7, but it is well-established that losing a case does not by itself mean that the Government's position in that case was not substantially justified. Also, the trial court's conclusory statement that "the process by which both the Air Force and the AFBCMR made their determinations about plaintiff's disability rating was flawed and involved clear errors" is unsupported. Appx7. Although the Air Force and AFBCMR made some interim, non-prejudicial errors in its determinations regarding Mr. Monroe's *fitness for duty*, which were subsequently corrected, these errors were unrelated to Mr. Monroe's *disability rating*. Given Mr. Monroe's undisputed ability to engage in strenuous physical activities, such as marathon running, Mr. Monroe's 20 percent disability rating had a reasonable basis in law and fact and, thus, it was substantially justified.

Third, the trial court erroneously faulted the AFBCMR for not increasing Mr. Monroe's disability rating in its initial decision and first remand decision, even though Mr. Monroe did not challenge his disability rating at the AFBCMR until after these decisions. It is the plaintiff's burden to demonstrate a material error or injustice at the AFBCMR, and the board has no duty to scour the applicant's military records in search of errors that he has not identified. The AFBCMR was well justified in not considering whether to increase Mr. Monroe's disability rating until he challenged the rating.

Accordingly, the trial court erred in finding that the position of the Government was not substantially justified, and this Court should reverse with instructions to enter judgment in the Government's favor.

Alternatively, the Court should reverse the judgment below because the trial court failed to reduce Mr. Monroe's requested fees and expenses based upon his lack of success on the merits. The trial court committed at least two legal errors in awarding Mr. Monroe all of the fees and expenses that he sought.

First, the trial court erroneously determined that Mr. Monroe's unlawful discharge claim and his disability retirement claim are part of a single, overarching claim. Where an action includes "distinctly different claims for relief that are based on different facts and legal theories," and the plaintiff does not succeed on all of his claims, "no fee may be awarded for services on the unsuccessful claim." *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983). Not only are Mr. Monroe's challenge to his unfitness determination and his challenge to his initial disability rating distinctly different claims that are founded upon distinctly different money-mandating statutes, they are also diametrically opposed to each other. The trial court could not retroactively restore Mr. Monroe to active duty if he was medically unfit for duty, and Mr. Monroe could not be retired due to disability if he was fit for duty. The unfitness determination that Mr. Monroe's attorney spent the vast majority of his efforts unsuccessfully challenging was a necessary element of Mr.

Monroe's delayed disability retirement claim. Accordingly, the trial court erred by awarding Mr. Monroe the fees and expenses that he incurred pursuing his unsuccessful unlawful discharge claim.

Second, even if Mr. Monroe's unlawful discharge claim and his disability retirement claim were not so distinctly different that they *per se* required the trial court to exclude the fees and expenses Mr. Monroe incurred pursuing the unsuccessful claim, the trial court still erred by failing to compare the *relief sought* to the *relief obtained* in determining whether Mr. Monroe obtained excellent results. In *Hensley*, the United States Supreme Court explained that a "reduced fee award is appropriate if the relief, *however significant*, is limited in comparison to the scope of the litigation as a whole." *Id.* at 440 (emphasis added). The trial court's opinion failed to consider that Mr. Monroe sought more than $600,000 in active duty back pay and allowances in his complaint, but obtained $0 in back pay and allowances as a result of the successful disability retirement claim that he never even raised in his complaint. Nor did the trial court acknowledge that, if Mr. Monroe had been restored to active duty as a he requested, he would have been eligible for a military retirement in February 2020 with *higher* gross monthly payments than he is receiving now. Under these circumstances, the trial court erred in awarding Mr. Monroe his fees and expenses for pursuing his unsuccessful unlawful discharge claim.

Accordingly, this Court should reverse the trial court's EAJA judgment in full or, alternatively, reverse and remand with instructions to limit Mr. Monroe's EAJA award to the fees and expenses Mr. Monroe incurred pursuing his disability retirement claim and facilitating dismissal of the action, *i.e.*, a maximum of $2,353.02. Appx476.

ARGUMENT

I. Standards Of Review

A. Standard Of Appellate Review

The Court reviews awards of attorney fees and expenses under EAJA for abuse of discretion. *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012). The Court may find an abuse of discretion when: 1) the trial "court's decision is clearly unreasonable, arbitrary, or fanciful"; 2) "the decision is based on an erroneous conclusion of the law"; 3) "the court's findings are clearly erroneous"; or 4) "the record contains no evidence upon which the court rationally could have based its decision." *Hendler v. United States*, 952 F.2d 1364, 1380 (Fed. Cir. 1991); *see also DGR*, 690 F.3d at 1340 ("To constitute an abuse of discretion, a court must either make a clear error of judgment in weighing relevant factors or exercise discretion based upon an error of law.").

B. General Standards For Evaluating EAJA Applications

"EAJA is not a mandatory fee-shifting device." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1290 (Fed. Cir. 2009). Rather, EAJA provides that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, *unless the court finds that the position of the United States was substantially justified* or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

Because it renders the United States liable for attorney fees for which it would not otherwise be liable, EAJA is a partial waiver of sovereign immunity. *Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 137 (1991). Consequently, any such waiver "must be strictly construed in favor of the United States." *Id.* (citations omitted); *accord Levernier Constr., Inc. v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991). EAJA allows courts to make an award against the Government "only to the extent explicitly and unequivocally provided." *Levernier*, 947 F.2d at 502 (citation omitted). Thus, when evaluating an EAJA application, the Court must interpret and apply the law strictly and not attempt to "do equity" in a way that is not in accord with the statute. *Levernier*, 947 F.2d at 502-503.

II. The Trial Court Abused Its Discretion In Finding That The Government's Position Was Not Substantially Justified Where The Government's Overall Position With Regard To The Only Claim Raised In Mr. Monroe's Complaint Was Vindicated

The trial court abused its discretion by committing multiple legal errors in finding that the Government's position was not substantially justified.

The Supreme Court has defined the phrase "substantially justified" to mean "'justified in substance or in the main'–that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Government's position does not need to be "justified to a high degree" in order to be considered substantially justified. *Id.*; *see also Baha v. United States*, No. 14-494C, 2020 WL 7587777, at *4 (Fed. Cl. Dec. 21, 2020) ("Attorney's fees under EAJA are therefore generally awarded only where the government offered 'no plausible defense, explanation, or substantiation for its action.'") (quoting *Griffin & Dickson v. United States*, 21 Cl. Ct. 1, 6-7 (1990)).

A "position can be justified even though it is not correct, and . . . it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it is correct[.]" *Pierce*, 487 U.S. at 566 n.2. The Government's loss on the merits does not raise a presumption that its position was not substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 415 (2004) ("Congress did not . . . want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the

case.'") (citation omitted). Nor does the Government's willingness to settle or to concede issues establish that its position lacked substantial justification. *See Pierce*, 487 U.S. at 568.

In determining whether the position of the United States was substantially justified, the Court must look at the "entirety of the government's conduct" (including the pre-litigation action of the agency) and "make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). Accordingly, "the Court does not examine defendant's stance on every individual issue addressed in the case. Rather, the Court's task is to evaluate, based upon the totality of the circumstances, whether defendant's overall position was substantially justified." *Gargoyles, Inc. v. United States*, 45 Fed. Cl. 139, 148 (1999); *see also Commissioner, Immigration and Naturalization Serv. v. Jean*, 496 U.S. 154, 161-62 (1990) ("While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items.").

"When the Government takes some positions that are substantially justified and some that are not, courts have asked whether the latter were 'sufficiently dramatic in impact' to justify an award of fees." *Greenhill v. United States*, 96 Fed. Cl. 771, 777 (2011) (citations omitted). For example, in *DGR*, this Court

concluded that a jurisdictional argument raised by the Government "has little merit," and explained that, "[b]y itself, it is questionable whether we would hold the Government's jurisdictional argument in this case substantially justified." 690 F.3d at 1343. Nevertheless, the Court held that, "[w]hen viewed in the overall context, as [the Court is] required to do," the Government's position in *DGR* was substantially justified, and the trial court's contrary conclusion was an abuse of discretion. *Id.* at 1343-44; *see also Klinge Corp. v. United States*, No. 08-551C, 2009 WL 3073516, at *5 (Fed. Cl. Sept 23, 2009) ("Because we accepted the government's primary argument, of necessity, its position was substantially justified."); *cf. United Partition Sys., Inc. v. United States*, 95 Fed. Cl. 42, 52 (2010) (concluding that the Government's position was not substantially justified where "the court's acceptance of [the plaintiff's] primary argument dictated the outcome of the case and resulted in the court granting [the plaintiff] the exact relief it sought").

The trial court violated these principles in finding that the Government's position was not substantially justified.

A. The Trial Court Erroneously Focused Upon Mr. Monroe's Initial Disability Rating, Which Mr. Monroe Did Not Challenge In His Complaint, Rather Than The Government's Overall Position On The Unlawful Discharge Claim Actually Raised In His Complaint

The primary error committed by the trial court in finding that the Government's position was not substantially justified was its myopic focus upon

the increase in Mr. Monroe's disability rating and consequent disability retirement, when Mr. Monroe never even challenged his disability rating or sought a disability retirement at the trial court. The trial court's substantial justification inquiry should have focused on the Government's overall position on the claim *actually raised in Mr Monroe's complaint*, *i.e.*, the Government's position that there was no material error or injustice in the decision to separate Mr. Monroe from active duty because his diabetes made him unfit for duty. Because the AFBCMR affirmed this position in its second remand decision, and Mr. Monroe declined to challenge that decision, our position was necessarily substantially justified.

In both his original and amended complaint, Mr. Monroe invoked the Tucker Act as the jurisdictional basis of his suit. Appx18, Appx90. The Tucker Act provides that the Court of Federal Claims has "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Section 1491(a)(1) does not create a substantive right for plaintiffs; rather, "it is a jurisdictional provision 'that operate[s] to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts).'" *Holmes v. United States*, 657 F.3d 1303, 1309 (Fed. Cir. 2011). Every claim brought in the Court of

Federal Claims under section 1491(a)(1) must be founded upon a particular money-mandating source of law, such as a statute or regulation. *See id.* at 1309, 1313-15.

In *Chambers v. United States*, this Court expressly distinguished between "claims for unlawful discharge" (*i.e.*, requests for retroactive restoration to active duty) and "claims of entitlement to disability retirement pay[.]" 417 F.3d 1218, 1224 (Fed. Cir. 2005); *see also Lewis v. United States*, 476 F. App'x 240, 241 (Fed. Cir. 2012) ("[The plaintiff] petitioned the Board for Correction of Naval Records ('BCNR') for amendment of his records to show he had retired on disability. . . . The BCNR denied his request. . . . . [The plaintiff] appealed that decision to the Claims Court and asserted *additional claims* including: *wrongful discharge*") (citations omitted) (emphasis added).

These two separate "claim[s]" under section 1491(a)(1) are "founded" upon two distinctly different "Acts of Congress[.]" A claim for unlawful discharge and retroactive restoration to active duty is founded upon 37 U.S.C. § 204, which provides an entitlement to basic pay for service members on *active duty*; whereas a claim for disability retirement is founded upon 10 U.S.C. § 1201, which provides for disability *retirement* pay for certain service members whose service was cut short by a medical disability. *Chambers*, 417 F.3d at 1224.

In his complaint, Mr. Monroe brought a claim for retroactive restoration to active duty, founded upon 37 U.S.C. § 204, based upon alleged errors by the AFBCMR in upholding the Air Force's determination that Mr. Monroe's diabetes rendered him unfit for duty. *See* Appx17-18, Appx46-58, Appx85-91, Appx130-146. Mr. Monroe's complaint did not challenge his 20 percent disability rating or include a claim for disability retirement founded upon 10 U.S.C. § 1201. *Id.*

The Government's position on the claim *in Mr. Monroe's complaint*, as reflected in the AFBCMR's three decisions, was that the decision to discharge Mr. Monroe from active duty in the Air Force because his diabetes made him unfit for duty was not erroneous or unjust, and, thus, he should not be retroactively restored to active duty. *See* Appx82-83, Appx170-173, Appx175, Appx502-504, Appx506-507. Neither the trial court, nor the AFBCMR on remand, reached a contrary conclusion. Rather, in its second remand decision, the AFBCMR again found no material error or injustice in the unfitness determination and declined to retroactively restore Mr. Monroe to active duty. *See* Appx175-176. After this decision, Mr. Monroe promptly dismissed his suit. Appx182-185.

To the extent that the Air Force or AFBCMR made interim errors in adjudicating Mr. Monroe's fitness for duty that were not substantially justified, such as the AFBCMR's reliance upon inapplicable DoD policy in its first remand decision, such errors were not prejudicial because the AFBCMR, in its second

remand decision, found no material error or injustice in the determination that Mr. Monroe was unfit. *See* Appx175-176. Accordingly, these interim, non-prejudicial errors do not support a finding that the Government's position was not substantially justified when "viewed in the overall context" of the case, as this Court is "required to do." *DGR*, 690 F.3d at 1343. The Government's *overall* position on the only claim actually raised in Mr. Monroe's complaint, his claim for retroactive restoration to active duty, was substantially justified because it was vindicated in the AFBCMR's second remand decision, which Mr. Monroe did not challenge. This alone should have resulted in a finding that the Government's position was substantially justified. *See Klinge*, 2009 WL 3073516, at *5 ("Because we accepted the government's primary argument, of necessity, its position was substantially justified.").

Rather than finding that our position was justified based upon our ultimate success on the only claim raised in Mr. Monroe's complaint, the trial court erroneously focused on our position regarding Mr. Monroe's disability rating. The trial court incorrectly determined that the Government's position regarding Mr. Monroe's disability rating was sufficient to support its finding that the Government's overall positon was not substantially justified because of what the trial court characterized as the "considerable" difference between disability severance pay and a disability retirement. *See* Appx7. The trial court's reasoning

ignores the absence of any challenge to Mr. Monroe's disability rating in his complaint before the trial court or in his arguments to the AFBCMR, until a brief one-paragraph request for a disability retirement in December 2019, late in the second remand. *See* Appx406. Once Mr. Monroe challenged his disability rating before the AFBCMR, the board promptly granted him an increased rating and disability retirement. Appx175-176.

Accordingly, Mr. Monroe's disability rating was a small part of the litigation as a whole and does not affect the Government's overall position that he was not entitled to be restored to active duty, which was vindicated by the AFBCMR. It was error for the trial court to find that the Government's position was not substantially justified based upon the Government's position on an issue that was not even raised in Mr. Monroe's complaint.

B. The Trial Court Erroneously Determined That Mr. Monroe's Initial 20 Percent Disability Rating Was Not Substantially Justified

As demonstrated above, the trial court erred by basing its substantial justification determination primarily upon the Government's position with regard to Mr. Monroe's disability rating. But even if this Court were to agree with the trial court that our position with regard to Mr. Monroe's initial disability rating is relevant to the substantial justification inquiry, the trial court still committed

reversible error by making an unsupported and legally erroneous determination that the initial 20 percent rating was not substantially justified.

The trial court appears to have found that Mr. Monroe's initial 20 percent rating was not substantially justified for two reasons: 1) "the AFBCMR ultimately determined [that the rating] was faulty"; and 2) "the process by which both the Air Force and the AFBCMR made their determinations about plaintiff's disability rating was flawed and involved clear errors." Appx7. The first reason is legally insufficient to establish a lack of substantial justification and the second reason is unsupported.

First, the Supreme Court has explained that "a position can be justified even though it is not correct, and . . . it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it is correct[.]" *Pierce*, 487 U.S. at 566 n.2. Congress did not intend for the "'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case[.]'" *Scarborough*, 541 U.S. at 415 (citation omitted). Accordingly, the trial court could not have lawfully concluded that the Government's position with regard to the Mr. Monroe's 20 percent disability rating was not substantially justified merely because the AFBCMR ultimately decided that it "was faulty." If this were sufficient to render the Government's position not substantially justified, then the statutory provision denying attorney fees when "the

court finds that the position of the United States was substantially justified" would be virtually meaningless. 28 U.S.C. § 2412(d)(1)(A).

Second, the trial court's conclusion that the "the process by which both the Air Force and the AFBCMR made their determinations about plaintiff's *disability rating* was flawed and involved clear errors" is unsupported. Appx7 (emphasis added). We acknowledge that the Air Force and AFBCMR made some interim errors that were subsequently corrected in adjudicating Mr. Monroe's appeals. But these errors, such as the SAFPC reporting one incorrect blood sugar level in its first decision and the AFBCMR relying upon inapplicable DoD policies in its first remand decision, related to Mr. Monroe's challenges to his *unfitness determination*, not his disability rating. Before the SAFPC and AFBCMR, Mr. Monroe challenged the determination that he was unfit for duty, and he did not challenge his 20 percent disability rating before either of these tribunals until shortly before the AFBCMR's second remand decision. *See* Appx96-98, Appx101-104, Appx254, Appx258-259, Appx318-319, Appx323-324, Appx350-353, Appx498-499, Appx501.

The interim errors related to Mr. Monroe's unfitness determination were not prejudicial because the AFBCMR, in its second remand decision, found no material error or injustice in the determination that Mr. Monroe was unfit, *see* Appx175-176, and Mr. Monroe proceeded to dismiss the suit. Appx182-185. The

trial court did not identify any flaws or clear errors in the process by which the Air Force and the AFBCMR made their determinations about plaintiff's *disability rating*. *See* Appx1-9. Indeed, because Mr. Monroe was processed through the IDES, the "Air Force" did not even "determine" Mr. Monroe's disability rating. Rather, the Air Force applied the rating assigned by the VA. *See* Appx502; *Kaster*, 149 Fed. Cl. at 673. And the AFBCMR had no occasion to review Mr. Monroe's 20 percent disability rating until he challenged it late in the second remand proceeding, *see* Section II.C, below, at which time the AFBCMR determined that "the interest of justice can best be served" by increasing Mr. Monroe's disability rating to the next highest rating of 40 percent and granting him a disability retirement. Appx175-176.

Moreover, the trial court never addressed whether Mr. Monroe's initial 20 percent disability rating had a substantively "reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2. In fact, it does.

Under the VASRD, to receive higher than a 20 percent rating for diabetes mellitus, the condition must have required "regulation of activities," meaning that the "avoidance of strenuous occupational and recreational activities" was medically necessary. 38 C.F.R. § 4.119, DC 7913 (2014); *Camacho v. Nicholson*, 21 Vet. App. 360, 363 (2007). It is undisputed that Mr. Monroe had "excellent job performance, outstanding fitness level, and generally good health" while on active

duty. Appx105 (amended complaint quoting June 2014 SAFPC decision). Notwithstanding his diabetes, Mr. Monroe "continued to be very athletically active, *running marathons*, and displaying *top physical assessment scores*." Appx99 (amended complaint quoting January 2014 SAFPC decision) (emphasis added).

These undisputed facts demonstrate that the VA's conclusion that Mr. Monroe was not required to avoid "strenuous occupational and recreational activities" was reasonable. 38 C.F.R. § 4.119, DC 7913 (2014). Indeed, in 2016, Mr. Monroe argued to the AFBCMR that his health was "too good, and his diabetes too well-managed to warrant a medical retirement." Appx254.

The AFBCMR determined that Mr. Monroe should receive a 40 percent rating due to the potential risks to his health in a deployed environment. *See* Appx175 ("the Board believes at a deployed location, with changing physical activity, and likely change in diet, the risk would be higher. Likewise, this same risk makes the argument for a higher disability rating of 40 percent."). But this does not compel the conclusion that Mr. Monroe was medically required to refrain from strenuous "occupational *and* recreational activities," as required for a 40 percent rating. *Camacho*, 21 Vet. App. at 363 ("a 40% disability rating under DC 7913 is assigned to a claimant who demonstrates by evidence that, inter alia, he or she is required to avoid strenuous occupational *and* recreational activities. . . . it

must be shown that a regulation of these activities is medically necessary.") (emphasis in original). Mr. Monroe's ability to run marathons demonstrates that he was able to at least engage in strenuous recreational activities. Appx93, Appx99.

Additionally, the AFBCMR medical consultant's statements that "one provider recommended restriction of activities" more than four years before Mr. Monroe's discharge and another provider recommended that he be "allowed to do physical training at his own pace," Appx394, do not demonstrate that he was required to avoid strenuous occupational and recreational activities, when he was still able to run marathons and achieve top physical assessment scores. Appx99.

In sum, the trial court ignored both the legal standard for a diabetes disability rating and the evidence indicating that Mr. Monroe's initial 20 percent disability rating was substantially justified under that standard. Instead, the trial court erroneously based its substantial justification determination upon the AFBCMR's decision to increase the rating and purported errors in the process of determining the 20 percent disability rating that find no support in the record. This was an abuse of discretion.

C. The Trial Court Incorrectly Faulted The AFBCMR For Not Increasing Mr. Monroe's Disability Rating In Its First Two Decisions, When Mr. Monroe Had Not Yet Challenged His Disability Rating Before The AFBCMR

Another erroneous component of the trial court's finding that the Government's position was not substantially justified is its criticism of the AFBCMR's failure to increase Mr. Monroe's disability rating in its initial decision and first remand decision. *See* Appx7 ("Plaintiff has been forced to litigate defendant's position since the Air Force's determination in 2014, which the AFBCMR ultimately determined was faulty."). This criticism is unjustified and legally erroneous because Mr. Monroe did not challenge his disability rating at the AFBCMR prior to the board's first remand decision. *See* Appx254, Appx258-259, Appx318-319, Appx350-353, Appx498-499, Appx501. The AFBCMR had no occasion to consider whether Mr. Monroe might be entitled to a higher disability rating until its second remand decision, when it promptly granted Mr. Monroe this relief.

The AFBCMR "is not an investigative body." 32 C.F.R. § 865.2(c). Rather, the "applicant has the burden of providing sufficient evidence of material error or injustice," 32 C.F.R. § 865.4(a), and the AFBCMR will determine whether "the applicant has demonstrated the existence of a material error or injustice[.]" 32 C.F.R. § 865.4(h)(4). Accordingly, the AFBCMR has no duty to scour the applicant's military records in search of errors that he has not identified.

Indeed, if an applicant fails to raise an issue before the AFBCMR, he waives his ability to subsequently raise that issue in the Court of Federal Claims. *Metz v. United States*, 466 F.3d 991, 998-99 (Fed. Cir. 2006). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 999 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

Had Mr. Monroe raised a disability retirement claim in his complaint, we could have raised a waiver defense, which would have required the trial court to grant judgment in the Government's favor on that claim. *Metz*, 466 F.3d at 998-99; *see also Lewis*, 476 F. App'x at 243-44 (holding that a plaintiff waived a wrongful discharge claim, where he raised a disability retirement claim before a corrections board, but he did not raise the wrongful discharge claim before the board). The AFBCMR should not be faulted for not addressing a claim that Mr. Monroe did not raise before that tribunal.

The position of the United States in this action was substantially justified, and the trial court's award of attorney fees and expenses to Mr. Monroe should be reversed.

III. The Trial Court Abused Its Discretion By Awarding Mr. Monroe His Full Attorney Fees And Expenses, Despite His Limited Success On Remand

Even if Mr. Monroe were entitled to *some* attorney fees and expenses in this case (which he is not), the trial court nonetheless abused its discretion in granting him *all* of the fees and expenses he sought, despite his limited success on remand.

The movant has the burden of demonstrating the reasonableness of his requested EAJA award. *See, e.g.*, *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004). The Supreme Court has emphasized that in determining the amount of a reasonable attorney fees award, "the most critical factor is the degree of success obtained." *See Hensley*, 461 U.S. at 436. "[W]here the plaintiff achieved only limited success, the [Court] should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

The trial court committed multiple legal errors in determining the amount of Mr. Monroe's EAJA award. First, the trial court erred by failing to exclude fees and expenses Mr. Monroe incurred pursuing his unsuccessful unlawful discharge claim, because it is distinctly different from the disability retirement claim that was ultimately successful. Second, the trial court erred by failing to consider that the relief Mr. Monroe obtained was significantly less than the relief he sought in his complaint.

A. Mr. Monroe Cannot Recover Fees And Expenses Incurred Pursuing His Distinct, Unsuccessful Active Duty Pay Claim

Where an action includes "distinctly different claims for relief that are based on different facts and legal theories," and the plaintiff does not succeed on all his claims, "no fee may be awarded for services on the unsuccessful claim." *Id.* at 434-35; *see also Hitkansut LLC v. United States*, 958 F.3d 1162, 1170 (Fed. Cir. 2020) ("*Hensley* concerns reduction of awards where 'a plaintiff has achieved only partial or limited success' due to prevailing on less than all of its causes of action. . . . In such a case, 'the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.'") (citations omitted).

Similarly, "[u]nder the theory of apportionment, a contractor who receives only a partial judgment is a 'prevailing party' under the EAJA and may recover a pro rata portion of its fees and expenses." *Community Heating and Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143, 1146 (Fed. Cir. 1993). In *Community Heating*, the Court awarded the appellant 30 percent of its claimed attorney fees because its attorneys only spent 30 percent of the time claimed addressing the issue upon which the appellant was successful. *Id.* ("The documentation indicates that [the appellant's] attorneys devoted 30% of their time to the [successful] issue. [The appellant] is therefore entitled to 30% of its total attorney fees.").

The trial court declined to exclude the fees and expenses Mr. Monroe incurred unsuccessfully seeking reinstatement to active duty because it deemed his

request for disability retirement to be part of a single, overarching "claim" challenging the AFBCMR's evaluation of his Air Force disability proceedings. *See* Appx8 ("Defendant contends . . . that plaintiff's claim for restoration to active duty was distinct from his disability retirement claim. . . . Defendant confuses plaintiff's claim with his request for relief. In his complaint before this court, plaintiff claimed that the AFBCMR had erred in various ways when evaluating plaintiff's disability proceeding before the Air Force."). This was legal error.

As we demonstrated in Section II.A, above, Mr. Monroe's challenge to his unfitness determination and request for retroactive restoration to active duty, on the one hand, and his challenge to his disability rating and request for disability retirement, on the other, are separate and distinct claims, founded upon distinctly different money-mandating statutes. *Chambers*, 417 F.3d at 1224; *see also Lewis*, 476 F. App'x at 241.

Mr. Monroe's complaint raised a claim for unlawful discharge and retroactive restoration to active duty under 37 U.S.C. § 204. Appx17-18, Appx46-58, Appx86-90, Appx130-146. But he did not raise his separate and distinct claim for disability retirement pay under 10 U.S.C. § 1201 until a December 2019 submission to the AFBCMR, Appx406, approximately one month before the board's second and final remand decision. Appx165.

Moreover, Mr. Monroe's claim for retroactive restoration to active duty and claim for disability retirement are not merely "distinctly different," *Hensley*, 461 U.S. at 434, they are diametrically opposed to each other. The trial court could not have retroactively restored Mr. Monroe to active duty if he was medically unfit for duty, *see Barnick v. United States*, 591 F.3d 1372, 1379-80 (Fed. Cir. 2010), and Mr. Monroe could not have been retired for disability if he was fit for duty. 10 U.S.C. § 1201(a). The AFBCMR's increased disability rating indicates that it considered Mr. Monroe to be *even more disabled* than the VA had found when rating his condition before discharge. *See* 38 C.F.R. § 4.1 ("The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations."); Appx7 ("the degree of plaintiff's assessed disability nearly doubled"). Any evidence that Mr. Monroe was required to avoid "strenuous occupational and recreational activities," as necessary for a 40 percent rating for diabetes mellitus, 38 C.F.R. 4.119, DC 7913 (2014), could not help demonstrate that he was fit for duty. Rather, such evidence could only lend support to the opposite conclusion.

This is not a situation where the successful claim shares a "common core of facts" or "related legal theories" with the unsuccessful claim, such that "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it

difficult to divide the hours expended on a claim-by-claim basis." *Hensley*, 461 U.S at 435. The record is clear that Mr. Monroe never raised his contradictory claim for disability retirement under 10 U.S.C. § 1201 at the trial court, nor did he seek a disability retirement from the AFBCMR until after he received the November 2019 AFBCMR medical consultant's advisory opinion. Appx17-18, Appx46-58, Appx85-91, Appx130-146, Appx254, Appx258-259, Appx318-319, Appx323-324, Appx350-353, Appx406, Appx498-499, Appx501.

The trial court should have recognized that *none* of Mr. Monroe's counsel's time before receiving the November 2019 advisory opinion was devoted to pursuing the disability retirement claim that he submitted to the AFBCMR in December 2019. Accordingly, the trial court should have excluded all fees for that time from the EAJA award. *See Hensley*, 461 U.S. at 434-35; *Community Heating*, 2 F.3d at 1146.

In our opposition to Mr. Monroe's motion for attorney fees and expenses, we estimated that Mr. Monroe incurred $2,353.02 in attorney fees and expenses pursuing his successful disability retirement claim and facilitating the dismissal of this action. Appx476. Mr. Monroe did not dispute this estimate. Appx562-570. Accordingly, if the Court (incorrectly) determines that the trial court did not abuse its discretion in finding that the Government's position was not substantially

justified, then it should reverse and remand with instructions to reduce Mr. Monroe's EAJA judgment to $2,353.02.

B. The Trial Court Erroneously Failed To Reduce Mr. Monroe's EAJA Award Because He Obtained Significantly Less Relief Than He Sought In His Complaint

Even if the Court were to (incorrectly) determine that the trial court was not required to exclude all of the fees and expenses Mr. Monroe incurred pursuing his unsuccessful challenge to his unfitness determination for the reasons set forth in Section III.A, above, the trial court still erred by failing to compare the *relief sought* to the relief obtained in determining that "the ultimate result of plaintiff's case—permanent disability retirement—was an 'excellent' overall result" and awarding Mr. Monroe his full fees and expenses. Appx9 (citation omitted).

In *Hensley*, the Supreme Court "emphasize[d] that the inquiry does not end with a finding that the plaintiff obtained significant relief." *Id.* at 440. Accordingly, a "reduced fee award is appropriate if the relief, *however significant*, is limited in comparison to the scope of the litigation as a whole." *Id.* (emphasis added). In *Hubbard v. United States*, this Court applied *Hensley* to the EAJA context and observed that the trial court's attorney fees award "on its face seems grossly excessive" when the damages awarded was "less than 1/10th of 1% of the amount sought" and the EAJA award was 275 times the amount of the damages award. 480 F.3d 1327, 1333 (Fed. Cir. 2007).

In his complaint, Mr. Monroe sought restoration to active duty and more than $600,000 in back pay and allowances. Appx145-146. But Mr. Monroe was not restored to active duty and was entitled to *$0* in back pay and allowances as a result of the AFBCMR decision, because his gross retroactive retirement pay was offset by the VA benefits he received for that period, *see* 38 U.S.C. §§ 5304(a)(1), 5305, as well as his disability severance pay that had not yet been recouped by the VA under 38 C.F.R. § 3.700(a)(3). *See, e.g.*, DoD 7000.14-R, Financial Management Regulation, Vol. 7B, Chap. 4, ¶ 040603 (Mar. 2020) (Appx497); *Frith v. United States*, 156 Ct. Cl. 188, 191 (1962).

At the trial court, we estimated that Mr. Monroe was entitled to approximately $178,000 in retroactive *gross* monthly retired pay through April 2020, which would be offset by: 1) approximately $44,000 in VA disability compensation; and 2) the approximately $210,000 of his severance pay ($227,241) that had not yet been recouped by the VA. *See* Appx479-480; *see also* Appx544-546 (supporting calculations); Appx508-510, Appx518-43 (supporting documentation). Accordingly, Mr. Monroe *owed the Government* more than $75,000 as a result of the "relief" he received from the AFBCMR.[4] *See* DoD 7000.14-R, Vol. 7B, Chap. 4, ¶ 040603 (Appx497). Although Mr. Monroe

[4] $210,000 + $44,000 – $178,000 = $76,000.

disputed the "significance" of our calculations at the trial court, he did not dispute the calculations themselves. Appx569 n.7.[5]

We recognize that Mr. Monroe may at some point profit financially from his disability retirement and that there are benefits of a military retirement in addition to a monthly payment. This does not, however, render his results sufficiently "excellent" to justify a fully compensatory EAJA award because it is undisputed that if Mr. Monroe had received the retroactive restoration to active duty that he requested in his complaint, he would have been eligible for a military retirement after February 2020 under 10 U.S.C. 9311(a), but with a *higher* monthly payment. *See* Appx481 (Government explanation in EAJA response), Appx562-570 (Mr. Monroe not disputing this in his reply).

In summary, in his complaint, Mr. Monroe sought more than *$600,000* in back pay and allowances, plus retroactive restoration to active duty that would have likely made him eligible for a longevity retirement pursuant to 10 U.S.C. § 9311(a). Instead, he received a disability retirement with *zero* back pay and

[5] At the time we filed our response to Mr. Monroe's EAJA motion, the Defense Finance and Accounting Services (DFAS) had not yet completed its calculation of Mr. Monroe's retroactive disability retired pay, Appx538, which is why we provided estimates in our response. Appx479. DFAS completed its calculations and provided them to Mr. Monroe while his EAJA motion was pending, but neither party moved to supplement the trial court's record with the final calculations, nor did they contend that any differences between the estimates and the final calculations were material to the parties' positions. *See* Appx15. Accordingly, we continue to rely upon the estimates in the trial court record.

allowances, a *debt* of more than $75,000, and future gross monthly retired pay that will be *less than* the gross monthly retired pay he likely would have received if he had been retroactively restored to active duty, as he requested. Even if Mr. Monroe is better off than if the AFBCMR had granted him no relief, he is *significantly worse off* than if the trial court or the AFBCMR had granted him the full relief he sought in his complaint, a fact that the trial court should have considered in determining a reasonable attorney fees award. *See Hensley*, 461 U.S. at 439-40; *Hubbard*, 480 F.3d at 1333.

In his reply at the trial court, Mr. Monroe relied upon this Court's recent decision in *Hitkansut* to argue that the trial court should not reduce his EAJA award based upon limited success. Appx569-570. In *Hitkansut*, the Court concluded that the trial court did not abuse its discretion by declining to reduce the plaintiff's EAJA award, based upon the plaintiff obtaining significantly less damages than it sought, because the plaintiff "succeeded on its sole claim, and proved a material amount of actual, compensable damages," 958 F.3d at 1170, which the Court indicated was "the maximum amount of damages allowable by law." *Id.* at 1169. Mr. Monroe's reliance upon *Hitkansut* is misplaced for at least two reasons.

First, unlike the plaintiff in *Hitkansut*, Mr. Monroe did not succeed on the "sole claim" in his complaint. As we demonstrated in Section II.A, above, Mr.

Monroe's successful disability retirement claim before the AFBCMR is separate and distinct from the unsuccessful unlawful discharge claim that he raised in his complaint, in which he challenged his unfitness determination and sought retroactive restoration to active duty. This alone makes *Hitkansut* inapposite to this case.

Second, even if this litigation involved a single claim, which it does not, *Hitkansut* should not be read to prohibit a court from reducing a plaintiff's attorney fees award *anytime* the plaintiff succeeds on its sole claim and recovers more than nominal damages, as such a holding would be inconsistent with the Supreme Court's decision in *Jean* and this Court's earlier decision in *Hubbard*. In *Jean*, the Supreme Court relied upon *Hensley* to explain that, when a plaintiff is seeking fees for the work pursuing its EAJA application, "if the Government's challenge to a requested rate for paralegal time resulted in the court's recalculating and reducing the award for paralegal time from the requested amount, then the applicant should not receive fees for the time spent defending the higher rate." 496 U.S. at 163 n.10. A "rate for paralegal time" is obviously not a separate "claim," but the Supreme Court nevertheless explained that a plaintiff should not recover attorney fees for time spent pursuing this unsuccessful aspect of its case.

In *Hubbard*, this Court reversed the trial court's unreduced EAJA award, where the plaintiff sought damages of $627,000 for breach of contract, but was

awarded only $400. The trial court "rejected most of his *claim* because [he] had not shown that the breaches had caused his alleged lost profits." 480 F.3d at 1330, 1332-33 (emphasis added). Although the Court construed the plaintiff's breach allegations as a single "claim," *id.* at 1330, and concluded that his $400 damages award was not the type of "nominal damages" that would preclude an attorney fees award, *id.* at 1331, the Court held that the trial court failed to explain how its EAJA award was reasonable given the huge difference between the damages plaintiff sought and the damages he obtained. *Id.* at 1333.

Read in harmony with *Jean* and *Hubbard*, *Hitkansut* merely stands for the proposition that a court is not "*require[d]* . . . to reduce a fee award where the plaintiff succeeded on *its sole claim and* recovered the *maximum amount* of damages allowable by law," even though the plaintiff obtained significantly less relief than it sought in its complaint. 958 F.3d at 1169 (emphasis added). But the trial court must still address a significant difference between the relief sought and the relief obtained and explain why its ultimate EAJA award is reasonable given any difference. *See Hubbard*, 480 F.3d at 1333.[6] The trial court cannot simply declare, as it did here, that the plaintiff achieved "excellent" results based solely upon the relief obtained. *See Hensley*, 461 U.S. at 440. In any event, because Mr.

[6] To the extent that *Hitkansut* and *Hubbard* conflict, the earlier *Hubbard* decision controls. *Snyder v. Sec'y of Veterans Affairs*, 858 F.3d 1410, 1413 (Fed. Cir. 2017).

Monroe's successful disability retirement claim was not the "sole claim" that he brought in this litigation, *Hitkansut* is inapposite.

To the extent that Mr. Monroe was entitled to an EAJA award, which he was not, the trial court erred by awarding him fees and expenses incurred pursuing his unsuccessful claim for restoration to active duty, given that the relief that he ultimately obtained on his delayed disability retirement claim was significantly less than what he sought in his complaint.

CONCLUSION

For these reasons, we respectfully request that the Court reverse the judgment of the Court of Federal Claims and remand with instructions to: 1) deny Mr. Monroe's April 2020 request for attorney fees and expenses in full, because the Government's position was substantially justified; or, alternatively, 2) reduce Mr. Monroe's EAJA award to $2,353.02 because this is the maximum reasonable EAJA award given Mr. Monroe's limited success in this litigation.

Respectfully submitted,

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Attorneys for Defendant-Appellant,
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Dated: July 22, 2021

ADDENDUM A
Opinion And Judgment

In the United States Court of Federal Claims

No. 18-1059C

(E-Filed: November 13, 2020)

ALLEN H. MONROE, Plaintiff, v. THE UNITED STATES, Defendant.	)	RCFC 54(d)(2); Equal Access to Justice Act; Attorneys' Fees; Prevailing Party; Substantially Justified

Scott W. MacKay, Hebron, NH, for plaintiff.

William P. Rayel, Senior Trial Counsel, with whom appeared Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, and Elizabeth M. Hosford, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Gregory J. Morgan, United States Air Force Legal Operations, Joint Base Andrews-Naval Air Facility, MD, of counsel.

OPINION

CAMPBELL-SMITH, J.

Before the court is plaintiff's motion for attorneys' fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, and Rule 54(d)(2) of the Rules of the United States Court of Federal Claims (RCFC). See ECF No. 32. Plaintiff filed his motion on April 8, 2020, and defendant filed its response on May 6, 2020. See ECF No. 33. Plaintiff filed a reply on May 19, 2020, see ECF No. 34, completing briefing on the motion.

For the reasons set forth below, plaintiff's motion for attorneys' fees and expenses is **GRANTED**.

I. Background

Plaintiff filed his complaint in this court on July 19, 2018. See ECF No. 1. Therein, plaintiff challenges the Air Force Board for Correction of Military Records' (AFBCMR) decision to deny his application for relief from a determination that plaintiff was medically unfit and involuntarily separating him from service with severance pay. See id.; ECF No. 32 at 8-9. On October 15, 2018, defendant filed an unopposed motion for a voluntary remand of the case to the AFBCMR on the grounds that plaintiff had alleged that the AFBCMR failed to address several arguments he raised in his case before the board. See ECF No. 7 at 2 (defendant's motion for voluntary remand). Defendant stated that its motion was "predicated upon the interests of justice and is not predicated upon an admission of error by the United States or the [United States] Air Force." Id. The court granted the motion and remanded this matter to the AFBCMR for 180 days to address the issues it had not previously addressed, along with any new issues raised by plaintiff on remand. See ECF No. 8 (remand order). Specifically, the court directed the AFBCMR to:

> (a) Explain whether the Secretary of the Air Force Personnel Council (SAFPC) erred by failing to apply the benefit of any unresolved doubt regarding [plaintiff's] fitness in favor of [plaintiff] under the rebuttable presumption that he desired to be found fit for duty, in violation of Department of Defense Instruction (DoDI) 1332.38 (effective at the time of the final SAFPC decision);
>
> (b) Explain whether the SAFPC violated DoDI 1332.38 by considering the potential precedential effect of its decision when determining whether [plaintiff] was fit for duty; [and]
>
> (c) Explain whether the SAFPC erred by failing to consider [plaintiff's] prior deployments and the availability of waivers for Air Force members with assignment limitation codes.

Id. at 2. The court also ordered that the matter be stayed during the pendency of the remand. Id.

Plaintiff then submitted a request to the AFBCMR to "consider evidence and arguments related to multiple allegations of material error or injustice by SAFPC and the AFBCMR associated with [plaintiff's] disability evaluation proceedings." ECF No. 32 at 11. During the remand proceedings, the AFBCMR also received an advisory opinion from an AFBCMR medical advisor, which plaintiff alleged contained "numerous factual and legal flaws." Id. at 12. The AFBCMR denied plaintiff relief in a decision dated April 29, 2019. See ECF No. 15 (notice regarding remand decision).

Plaintiff filed an amended complaint in this court on May 31, 2019, alleging, among other things that the AFBCMR remand decision improperly relied on the United States Department of Defense (DOD) policy that became effective after plaintiff's evaluation proceedings. See ECF No. 18 at 48 (amended complaint). In response, on July 30, 2019, defendant once again filed an unopposed motion for a voluntary remand to the AFBCMR. See ECF No. 19. In its motion, defendant noted that it was "seeking a remand in the interests of justice" and did not "concede that the AFBCMR's overall decision to deny relief was erroneous." Id. at 2. It did, however, note that "it appears that, in reaching that decision, the AFBCMR inappropriately considered regulations and policy post-dating the Air Force's June 2014 final determination that [plaintiff] was unfit for duty." Id. Defendant further stated that "[t]here are also other issues in the record that could use further factual development," and that it wanted the board to "squarely address" plaintiff's "argument that the SAFPC improperly considered the potential precedential effect of its decision." Id. at 3-4.

The court granted defendant's motion and remanded this case to the AFBCMR on July 31, 2019, for 150 days, during which time the case remained stayed in the court. See ECF No. 20 (order). The court instructed the AFBCMR, at the parties' request, to, among other things:

> (c) Determine and explain whether, in determining the medical fitness of a member of the Air Force, it is appropriate to consider the potential precedential effect that the decision may have on medical fitness determinations of other members of the Air Force, specifically addressing Enclosure 3, Part 3 of the version of Department of Defense Instruction (DoDI) 1332.38 in effect on June 26, 2014 (the date of the final Secretary of the Air Force Personnel Council (SAFPC) decision with regard to [plaintiff]);
>
> . . . .
>
> (e) Determine and explain whether, under Air Force regulation and policy in effect on June 26, 2014 (including Air Force Instruction (AFI) 41-210), [plaintiff] was eligible for a waiver of his assignment limitation code and whether SAFPC considered any availability of such a waiver, as well as any deployments or temporary duty assignments by [plaintiff] outside the Continental United States; [and]
>
> . . . .
>
> (h) Re-determine and explain whether the Air Force's determination that [plaintiff] was unfit for duty was erroneous in light of the above

> determinations and without regard to any regulations or policies promulgated after June 26, 2014 (including DoDI 1332.18 and DoDI 1332.45)[.]

ECF No. 20 at 2-4.

During the second remand, the AFBCMR reviewed a new memorandum from an AFBCMR medical advisor, which concluded that the twenty percent disability rating originally assigned to plaintiff was incorrect, and that plaintiff should have been assigned a forty percent disability rating. See ECF No. 32 at 16. Plaintiff then responded to the medical advisor's conclusion in a letter to the AFBCMR and requested that, should the board deny plaintiff's application for restoration to active duty, it place plaintiff on the permanent disability retirement list with the forty percent disability rating retroactive to January 2015. See id. at 16-17. The AFBCMR decided on January 15, 2020, that "plaintiff's military records should be corrected to reflect that plaintiff was permanently retired by reason of physical disability on January 23, 2015, with a 40 percent disability rating." ECF No. 26 at 1 (defendant's notice regarding remand decision).

On February 4, 2020, plaintiff filed a motion to dismiss his case pursuant to RCFC 52.2(d). See ECF No. 29. The court granted his motion on February 6, 2020, see ECF No. 30, and judgment was entered on the same day, see ECF No. 31. Plaintiff then filed his motion for attorney's fees and expenses on April 8, 2020. See ECF No. 32. The motion is now fully briefed and ripe for decision.

II. Legal Standards

As a general rule, plaintiffs may not recover attorneys' fees from the United States. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983). In this case, however, plaintiff is eligible to request attorneys' fees and costs pursuant to the EAJA, 28 U.S.C. § 2412, which creates an exception to the general rule, and provides, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). The statute also requires that a requesting party satisfy several criteria for eligibility: (1) be a "prevailing party"; (2) the government's position

must not have been substantially justified; (3) no "special circumstances make an award unjust"; (4) the fee application must have been submitted within thirty days of final judgment in the action; and (5) have a net worth as an individual of less than $2,000,000 at the time the action was filed. 28 U.S.C. § 2412(d)(1)(A), (d)(1)(B), (d)(2)(B); Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154, 158 (1990). The plaintiff bears the burden of establishing each requirement, except the defendant must establish that its position was substantially justified. See Davis v. Nicholson, 475 F.3d 1360, 1366 (Fed. Cir. 2007); Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995) ("When a party has prevailed in litigation against the government, the government bears the burden of establishing that its position was substantially justified.").

Because the EAJA thus renders defendant liable for attorneys' fees for which it would not otherwise be responsible, the statute operates as a partial waiver of sovereign immunity. See Ardestani v. Immigration & Naturalization Serv., 502 U.S. 129, 137 (1991). The statute must, therefore, "be strictly construed in favor of the United States." Id.

III. Analysis

A. Prevailing Party

Plaintiff argues that he is a prevailing party because "each of the two remands of the case to the AFBCMR was predicated on error by the AFBCMR," and plaintiff succeeded in his case when the board ordered the correction of his military records. See ECF No. 32 at 19. The first remand, plaintiff contends, was based on the AFBCMR's failure to address arguments that plaintiff raised in his application, while the second was based on the AFBCMR's consideration of DOD policy implemented subsequent to plaintiff's disability determination at issue. See id. at 20, 23. Plaintiff further argues that he succeeded at the AFBCMR because the relief he obtained "substantially enhanced [his] military-related status." Id. at 24.

Defendant responds that plaintiff is not a prevailing party because the relief plaintiff sought—restoration to active duty—was not the relief he ultimately obtained; and the relief he obtained—disability retirement—was premised on the unfitness determination that plaintiff alleged was improper. See ECF No. 33 at 18. Defendant further argues that plaintiff cannot be a prevailing party because the remand orders were not "premised upon administrative error." Id. Defendant thus concludes that the decision to grant plaintiff disability retirement "was not the result of any findings of administrative error by this [c]ourt, and, thus, the relief granted by the AFBCMR is not marked by the judicial imprimatur necessary for [plaintiff] to be a prevailing party." Id.

To be a prevailing party against the government, there must be some relief on the merits such that there is a material alteration of the parties' legal relationship. See Former Emp. of Motorola Ceramic Prod. v. United States, 336 F.3d 1360, 1364 (2003). When a case is remanded to an agency and the court retains jurisdiction, the plaintiff is a prevailing party if it succeeds before the agency. See id. at 1366. However, if the court remanded the case "without a judicial finding of administrative error or a concession of such error by the agency," the plaintiff bears the burden of proving, based on the record, that the remand "had to have been predicated on administrative error even though the remand order does not say so." Davis v. Nicholson, 475 F.3d 1360, 1366 (Fed. Cir. 2007).

The court agrees with plaintiff that he is a prevailing party in this matter. Although the court did not explicitly find in its remands of this case that the AFBCMR had erred, and defendant did not concede as much, plaintiff has shown, based on the record, that at least one of the remands to the agency was predicated on agency error. According to defendant, the second remand was based on the AFBCMR's consideration of DOD policy implemented subsequent to plaintiff's determination at issue. See ECF No. 19 at 2 (acknowledging in its motion for remand that "the AFBCMR inappropriately considered regulations and policy post-dating the Air Force's June 2014 final determination"). That remand, given the entirety of the record, was indeed premised on agency error. See Davis, 475 F.3d at 1365 ("[T]he determination of agency error is not limited to the four corners of the Remand Order.").

Further, in its final determination, the AFBCMR recognized that plaintiff was entitled to a permanent disability retirement with a forty percent disability rating, rather than the discharge with a twenty percent disability rating he was initially assigned. See ECF No. 26-1 at 11-12. This change materially altered the parties' legal relationship. See Former Emp. of Motorola, 336 F.3d at 1364. Therefore, plaintiff is a prevailing party for purposes of the EAJA.

B. Substantial Justification

Because the court has determined that plaintiff is a prevailing party for purposes of the EAJA, the burden now shifts to defendant to show that its position in the litigation was substantially justified. See Doty, 71 F.3d at 385. To establish that its position was substantially justified, defendant must demonstrate that its position had "a reasonable basis in law and fact." Norris v. SEC, 695 F.3d 1261, 1265 (Fed. Cir. 1999) (quoting Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988)). The court "look[s] to the entirety of the government's conduct and make[s] a judgment call" to determine whether defendant's position had a reasonable basis in law and fact. Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991).

Defendant argues that its position was substantially justified because its "overall position" in the litigation—that the Air Force's determination that plaintiff's diabetes diagnosis made him unfit for duty was not "erroneous or unjust" and, therefore, plaintiff should not be restored to active duty as he requested—was upheld by the AFBCMR on remand. ECF No. 33 at 27. Defendant contends that "the AFBCMR's ultimate decision not to disturb the unfitness determination and [plaintiff's] subsequent dismissal of his suit demonstrate that [defendant's] overall position was substantially justified." Id. at 30.

Plaintiff argues, however, that defendant's position was not substantially justified because it was based on agency error and the board continued "pressing a tenuous factual or legal position" through the first remand decision. ECF No. 32 at 26-27. Plaintiff maintains that defendant's position in the litigation "was that no error or injustice existed because there was 'no evidence that the applicant was improperly separated from active duty in 2015.'" ECF No. 34 at 12 (citation omitted). Plaintiff argues that this position failed to comply with the law, which defendant recognized when it requested remands to correct agency error rather than defend the AFBCMR's decision. Id. Plaintiff contends that the board ultimately "conceded [it] was wrong" when it granted plaintiff relief. Id. at 13.

Given the factual circumstances of this case, the court cannot find that defendant's position was substantially justified. Viewing the entirety of defendant's conduct, the court agrees with plaintiff that defendant's position was plagued by agency errors and therefore could not have a reasonable basis in law and fact. See Chiu, 948 F.2d at 715. Plaintiff has been forced to litigate defendant's position since the Air Force's determination in 2014, which the AFBCMR ultimately determined was faulty. See ECF No. 34 at 13; ECF No. 26-1 (AFBCMR January 15, 2020 remand decision). The difference between defendant's position that plaintiff should be discharged from active duty with a twenty percent disability rating and severance pay and the AFBCMR's final conclusion that plaintiff should be included on the permanent disability retirement list with a forty percent disability rating, is considerable. That plaintiff continues to bear a disability rating does not render defendant's actions substantially justified in this case, as the degree of plaintiff's assessed disability nearly doubled once defendant's errors were addressed. In addition to this change in the ultimate outcome, the process by which both the Air Force and the AFBCMR made their determinations about plaintiff's disability rating was flawed and involved clear errors.

Plaintiff has alleged that his net worth is within the limit set by the EAJA and defendant has not challenged plaintiff's assertion. See ECF No. 32-1 at 4-5 (plaintiff's declaration); see generally ECF No. 33. Plaintiff filed his EAJA application on April 8, 2020, within thirty days after the judgment in this case became final. See ECF No. 31. And, the court does not find that any "special circumstances make an award unjust."

Comm'r, INS, 496 U.S. at 158. Therefore, plaintiff has satisfied the statutory conditions for award and is entitled to reimbursement of his attorney's fees and costs pursuant to the EAJA.

C. Reasonable Fees

When requesting fees pursuant to the EAJA, plaintiffs "bear[ ] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). In making a calculation of the reasonable amount of attorneys' fees, the court multiplies the number of hours reasonably expended in the litigation by a reasonable hourly rate. Bywaters v. United States, 670 F.3d 1221, 1225-26 (Fed. Cir. 2012). The court then adjusts the fee award to ensure it is reasonable in light of the results obtained by counsel. See Hensley, 461 U.S. at 434.

Plaintiff seeks reimbursement of his attorney's fees and expenses for the time during the two remand periods, including his submissions to the AFBCMR during that time. See ECF No. 32 at 34. Plaintiff argues that, although the AFBCMR characterized the relief it granted plaintiff as "partial," the relief is "appropriately characterized as an excellent result commensurate with full attorney's fees." Id. at 37. Therefore, plaintiff contends, there is "no basis to reduce the amount of attorney's fees to be awarded." Id.

Defendant responds that any award to plaintiff should be "limited to his attorney's work in requesting the disability retirement and facilitating the dismissal of this action," ECF No. 33 at 34, because plaintiff's relief was partial and no relief may awarded for "services on the unsuccessful claim." ECF No. 33 at 32 (quoting Hensley, 670 U.S. at 434-35). Defendant contends that plaintiff's success before the AFBCMR "require[d] the very finding of unfitness that [plaintiff] had been seeking to reverse," and that plaintiff's claim for restoration to active duty was distinct from his disability retirement claim. Id. at 33, 35-36. Thus, defendant argues, any fees and expenses awarded to plaintiff should be limited to those spent working on requesting a disability retirement. See id. at 40.

Defendant confuses plaintiff's claim with his request for relief. In his complaint before this court, plaintiff claimed that the AFBCMR had erred in various ways when evaluating plaintiff's disability proceeding before the Air Force. See ECF No. 18 at 46-61. Plaintiff's claim was grounded in the same facts pertaining to his Air Force evaluation and the AFBCMR's decisions regardless of the relief sought. The court therefore views the case as a whole and evaluates "the significance of the overall relief obtained." Hensley, 461 U.S. at 435 (holding that where plaintiff's claims "involve a common core of facts or will be based on related legal theories . . . . the [ ] court should focus on the significance of the overall relief obtained by the plaintiff in relation to the

hours reasonably expended on the litigation."). The court finds that the ultimate result of plaintiff's case—permanent disability retirement—was an "excellent" overall result, and plaintiff prevailed at each procedural stage of the litigation, securing two remands and an AFBCMR decision in his favor. Id. ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . . In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."). Therefore, plaintiff's counsel should "recover a fully compensatory fee." Id.

Plaintiff attached to his motion attorney billing records that show 245.25 hours worked, billed at an hourly rate of $204.20, when plaintiff filed his complaint, and increasing slowly over the course of the litigation to $209.67, when plaintiff filed this motion. See ECF No. 32-1 at 9-15 (attorney's billing records). Counsel's hourly rate was calculated using the formula articulated by this court previously. See ECF No. 32 at 33-34 (citing Greenhill v. United States, 96 Fed. Cl. 771, 784 (2011); Metropolitan Van & Storage, Inc. v. United States, 101 Fed. Cl. 173, 191-92 (2011)). Plaintiff requests a total of $50,425.87 in attorney's fees and $455.40 in expenses, which includes his filing fee in this court, copying costs, and postage costs. See ECF No. 32-1 at 9-15. Defendant has not challenged plaintiff's counsel's hourly rate. See ECF No. 33 at 32-40. Nor has defendant challenged the sufficiency of plaintiff's counsel's documentation of the time spent on this matter. See id.

Therefore, the court finds plaintiff's hourly fee calculation to be in line with the court's precedent, and the court finds that counsel's billing entries describe counsel's work with sufficient detail and clarity for the court's effective review. The court further finds that the fees and expenses requested are reasonable in light of the excellent results obtained by counsel. See Hensley, 461 U.S. at 434. Plaintiff is therefore entitled to the full amount of attorney's fees and expenses he requested.

IV. Conclusion

Accordingly, plaintiff's motion for attorney's fees and expenses pursuant to the Equal Access to Justice Act, ECF No. 32, is **GRANTED**. The clerk's office is directed to **ENTER** judgment for plaintiff in the amount of $50,425.87 in attorney's fees and $455.40 in expenses, for a total award of **$50,881.27**.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 18-1059 C
Filed: November 16, 2020

ALLEN H. MONROE
Plaintiff

v.

JUDGMENT

THE UNITED STATES
Defendant

Pursuant to the court's Opinion, filed November 13, 2020, granting plaintiff's motion for attorneys' fees and expenses,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff is awarded $50,425.87 in attorneys' fees and $455.40 in expenses, for a total award of $50,881.27. Said amount is to be paid by the subject agency as provided for in 28 U.S.C. § 2412(d).

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

ADDENDUM B
Statutes And Regulations

United States Code Annotated
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
Part II. Personnel (Refs & Annos)
Chapter 61. Retirement or Separation for Physical Disability (Refs & Annos)

10 U.S.C.A. § 1201

§ 1201. Regulars and members on active duty for more than 30 days: retirement

Effective: October 14, 2008
Currentness

(a) Retirement.--Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

(b) Required determinations of disability.--Determinations referred to in subsection (a) are determinations by the Secretary that--

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either--

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either--

(i) the disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service);

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after September 14, 1978.

(c) Eligible members.--This section and sections 1202 and 1203 of this title apply to the following members:

(1) A member of a regular component of the armed forces entitled to basic pay.

(2) Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 10148(a) of this title) for a period of more than 30 days.

(3) Any other member of the armed forces who is on active duty but is not entitled to basic pay by reason of section 502(b) of title 37 due to authorized absence (A) to participate in an educational program, or (B) for an emergency purpose, as determined by the Secretary concerned.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 91; Pub.L. 85-861, § 1(28)(A), Sept. 2, 1958, 72 Stat. 1451; Pub.L. 87-651, Title I, § 107(a), Sept. 7, 1962, 76 Stat. 508; Pub.L. 95-377, § 3(1), Sept. 19, 1978, 92 Stat. 719; Pub.L. 96-343, § 10(c)(1), Sept. 8, 1980, 94 Stat. 1129; Pub.L. 96-513, Title I, § 117, Dec. 12, 1980, 94 Stat. 2878; Pub.L. 99-145, Title V, § 513(a)(1)(A), Nov. 8, 1985, 99 Stat. 627; Pub.L. 101-189, Div. A, Title XVI, § 1621(a)(1), Nov. 29, 1989, 103 Stat. 1602; Pub.L. 103-337, Div. A, Title XVI, § 1671(c)(6), Oct. 5, 1994, 108 Stat. 3014; Pub.L. 104-201, Div. A, Title V, § 572(a), Sept. 23, 1996, 110 Stat. 2533; Pub.L. 110-181, Div. A, Title XVI, § 1641(a), Jan. 28, 2008, 122 Stat. 464; Pub.L. 110-417, [Div. A], Title VII, § 727(a), Oct. 14, 2008, 122 Stat. 4510.)

10 U.S.C.A. § 1201, 10 USCA § 1201
Current through PL 117-1 with the exception of PL 116-283 and PL 116-315. Incorporation of changes from PL 116-283 and PL 116-315 are in progress. Refer to statute section credits for more details.

End of Document

United States Code Annotated
Title 37. Pay and Allowances of the Uniformed Services (Refs & Annos)
Chapter 3. Basic Pay (Refs & Annos)

37 U.S.C.A. § 204

§ 204. Entitlement

Effective: December 26, 2013
Currentness

(a) The following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title--

(1) a member of a uniformed service who is on active duty; and

(2) a member of a uniformed service, or a member of the National Guard who is not a Reserve of the Army or the Air Force, who is participating in full-time training, training duty with pay, or other full-time duty, provided by law, including participation in exercises or the performance of duty under section 10302, 10305, 10502, or 12402 of title 10, or section 503, 504, 505, or 506 of title 32.

(b) For the purposes of subsection (a), under regulations prescribed by the President, the time necessary for a member of a uniformed service who is called or ordered to active duty for a period of more than 30 days to travel from his home to his first duty station and from his last duty station to his home, by the mode of transportation authorized in his call or orders, is considered active duty.

(c)(1) A member of the National Guard who is called into Federal service for a period of 30 days or less is entitled to basic pay from the date on which the member, in person or by authorized telephonic or electronic means, contacts the member's unit.

(2) Paragraph (1) does not authorize any expenditure to be paid for a period before the date on which the unit receives the member's contact provided under such paragraph.

(3) The Secretary of the Army, with respect to the Army National Guard, and the Secretary of the Air Force, with respect to the Air National Guard, shall prescribe such regulations as may be necessary to carry out this subsection.

(d) Full-time training, training duty with pay, or other full-time duty performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in his status as a member of the National Guard, is active duty for the purposes of this section.

(e) A payment accruing under any law to a member of a uniformed service incident to his release from active duty or for his return home incident to that release may be paid to him before his departure from his last duty station, whether or not he actually

performs the travel involved. If a member receives a payment under this subsection but dies before that payment would have been made but for this subsection, no part of that payment may be recovered by the United States.

(f) A cadet of the United States Military Academy or the United States Air Force Academy, or a midshipman of the United States Naval Academy, who, upon graduation from one of those academies, is appointed as a second lieutenant of the Army or the Air Force is entitled to the basic pay of pay grade *O*-1 beginning upon the date of his graduation.

(g)(1) A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated--

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance in an inactive status at an educational institution under the sponsorship of an armed force or the Public Health Service);

(C) while traveling directly to or from such duty or training;

(D) in line of duty while remaining overnight immediately before the commencement of inactive-duty training, or while remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training; or

(E) in line of duty while--

(i) serving on funeral honors duty under section 12503 of title 10 or section 115 of title 32;

(ii) traveling to or from the place at which the duty was to be performed; or

(iii) remaining overnight at or in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence.

(2) In the case of a member who receives earned income from nonmilitary employment or self-employment performed in any month in which the member is otherwise entitled to pay and allowances under paragraph (1), the total pay and allowances shall be reduced by the amount of such income. In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

(h)(1) A member of a reserve component of a uniformed service who is physically able to perform his military duties, is entitled, upon request, to a portion of the monthly pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for each month for which the member demonstrates a

loss of earned income from nonmilitary employment or self-employment as a result of an injury, illness, or disease incurred or aggravated--

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance in an inactive status at an educational institution under the sponsorship of an armed force or the Public Health Service);

(C) while traveling directly to or from such duty or training;

(D) in line of duty while remaining overnight immediately before the commencement of inactive-duty training, or while remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training; or

(E) in line of duty while--

(i) serving on funeral honors duty under section 12503 of title 10 or section 115 of title 32;

(ii) traveling to or from the place at which the duty was to be performed; or

(iii) remaining overnight at or in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence.

(2) The monthly entitlement may not exceed the member's demonstrated loss of earned income from nonmilitary or self-employment. In calculating such loss of income, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

(i)(1) The total amount of pay and allowances paid under subsections (g) and (h) and compensation paid under section 206(a) of this title for any period may not exceed the amount of pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for that period.

(2) Pay and allowances may not be paid under subsection (g) or (h) for a period of more than six months. The Secretary concerned may extend such period in any case if the Secretary determines that it is in the interests of fairness and equity to do so.

(3) A member is not entitled to benefits under subsection (g) or (h) if the injury, illness, disease, or aggravation of an injury, illness, or disease is the result of the gross negligence or misconduct of the member.

(4) Regulations with respect to procedures for paying pay and allowances under subsections (g) and (h) shall be prescribed--

(A) by the Secretary of Defense for the armed forces under the jurisdiction of the Secretary; and

(B) by the Secretary of Homeland Security for the Coast Guard when the Coast Guard is not operating as a service in the Navy.

(j) A member of the uniformed services who is entitled to medical or dental care under section 1074a of title 10 is entitled to travel and transportation allowances, or a monetary allowance in place thereof, for necessary travel incident to such care, and return to his home upon discharge from treatment.

CREDIT(S)

(Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 457; Pub.L. 96-513, Title V, § 506(4), Dec. 12, 1980, 94 Stat. 2919; Pub.L. 98-94, Title X, § 1012(b), Sept. 24, 1983, 97 Stat. 665; Pub.L. 99-433, Title V, § 531(b), Oct. 1, 1986, 100 Stat. 1063; Pub.L. 99-661, Div. A, Title VI, § 604(b), Nov. 14, 1986, 100 Stat. 3875; Pub.L. 100-456, Div. A, Title VI, § 631(a), (b), Sept. 29, 1988, 102 Stat. 1984, 1985; Pub.L. 102-25, Title VII, § 702(b)(1), (c)(1), Apr. 6, 1991, 105 Stat. 117; Pub.L. 103-337, Div. A, Title XVI, § 1676(b)(1), Oct. 5, 1994, 108 Stat. 3019; Pub.L. 104-106, Div. A, Title VII, § 702(c), Feb. 10, 1996, 110 Stat. 371; Pub.L. 105-85, Div. A, Title V, § 513(f), Nov. 18, 1997, 111 Stat. 1732; Pub.L. 106-398, § 1 [Div. A, Title VI, § 665(a)], Oct. 30, 2000, 114 Stat. 1654, 1654A-168; Pub.L. 107-107, Div. A, Title V, § 513(d), Dec. 28, 2001, 115 Stat. 1093; Pub.L. 107-296, Title XVII, § 1704(c), Nov. 25, 2002, 116 Stat. 2314; Pub.L. 113-66, Div. A, Title VI, § 602, Dec. 26, 2013, 127 Stat. 779.)

37 U.S.C.A. § 204, 37 USCA § 204
Current through PL 117-1 with the exception of PL 116-283 and PL 116-315. Incorporation of changes from PL 116-283 and PL 116-315 are in progress. Refer to statute section credits for more details.

End of Document

Code of Federal Regulations
Title 32. National Defense
Subtitle A. Department of Defense
Chapter VII. Department of the Air Force
Subchapter G. Organization and Mission—General
Part 865. Personnel Review Boards
Subpart A. Air Force Board for Correction of Military Records (Refs & Annos)

32 C.F.R. § 865.2

§ 865.2 Board responsibilities.

Effective: October 28, 2010
Currentness

(a) Considering applications. The Board considers all individual applications properly brought before it. In appropriate cases, it directs correction of military records to remove an error or injustice, or recommends such correction.

(b) Recommending action. When an applicant alleges reprisal under the Military Whistleblowers Protection Act, 10 U.S.C. 1034, the Board may recommend to the Secretary of the Air Force that disciplinary or administrative action be taken against those responsible for the reprisal.

(c) Deciding cases. The Board normally decides cases on the evidence of the record. It is not an investigative body. However, the Board may, in its discretion, hold a hearing or call for additional evidence or opinions in any case.

SOURCE: 75 FR 59613, Sept. 28, 2010, unless otherwise noted.

Notes of Decisions (15)

Current through April 8, 2021; 86 FR 18215.

End of Document

32 C.F.R. § 865.4

§ 865.4 Board actions.

Effective: October 28, 2010
Currentness

(a) Board information sources. The applicant has the burden of providing sufficient evidence of material error or injustice. However, the Board:

(1) May get additional information and advisory opinions on an application from any Air Force organization or official.

(2) May ask the applicant to furnish additional information regarding matters before the Board.

(b) Applicants will be given an opportunity to review and comment on advisory opinions and additional information obtained by the Board. They will also be provided with a copy of correspondence to or from the Air Force Review Boards Agency with an entity outside the Air Force Review Boards Agency in accordance with the provisions of 10 U.S.C. 1556.

(c) Consideration by the Board. A panel consisting of at least three board members considers each application. One panel member serves as its chair. The panel's actions and decisions constitute the actions and decisions of the Board.

(d) The panel may decide the case in executive session or authorize a hearing. When a hearing is authorized, the procedures in § 865.4(f), of this part, apply.

(e) Board deliberations. Normally only members of the Board and Board staff will be present during deliberations. The panel chair may permit observers for training purposes or otherwise in furtherance of the functions of the Board.

(f) Board hearings. The Board in its sole discretion determines whether to grant a hearing. Applicants do not have a right to a hearing before the Board.

(1) The Executive Director will notify the applicant or counsel, if any, of the time and place of the hearing. Written notice will be mailed 30 days in advance of the hearing unless the notice period is waived by the applicant. The applicant will respond not later than 15 days before the hearing date, accepting or declining the offer of a hearing and, if accepting,

provide information pertaining to counsel and witnesses. The Board will decide the case in executive session if the applicant declines the hearing or fails to appear.

(2) When granted a hearing, the applicant may appear before the Board with or without counsel and may present witnesses. It is the applicant's responsibility to notify witnesses, arrange for their attendance at the hearing, and pay any associated costs.

(3) The panel chair conducts the hearing, maintains order, and ensures the applicant receives a full and fair opportunity to be heard. Formal rules of evidence do not apply, but the panel observes reasonable bounds of competency, relevancy, and materiality. Witnesses other than the applicant will not be present except when testifying. Witnesses will testify under oath or affirmation. A recorder will record the proceedings verbatim. The chair will normally limit hearings to 2 hours but may allow more time if necessary to ensure a full and fair hearing.

(4) Additional provisions apply to cases processed under 10 U.S.C. 1034. See DoDD 7050.06, Military Whistleblower Protection [2], and AFI 90–301, Inspector General Complaints Resolution.

[2] Copies may be obtained via the Internet at http://www.dtic mil/whs/directives/corres/pdf/705006p.pdf.

(g) The Board will not deny or recommend denial of an application on the sole ground that the issue already has been decided by the Secretary of the Air Force or the President of the United States in another proceeding.

(h) Board decisions. The panel's majority vote constitutes the action of the Board. The Board will make determinations on the following issues in writing:

(1) Whether the provisions of the Military Whistleblowers Protection Act apply to the application. This determination is needed only when the applicant invokes the protection of the Act, or when the question of its applicability is otherwise raised by the evidence.

(2) Whether the application was timely filed and, if not, whether the applicant has demonstrated that it would be in the interest of justice to excuse the untimely filing. When the Board determines that an application is not timely, and does not excuse its untimeliness, the application will be denied on that basis.

(3) Whether the applicant has exhausted all available and effective administrative remedies. If the applicant has not, the application will be denied on that basis.

(4) Whether the applicant has demonstrated the existence of a material error or injustice that can be remedied effectively through correction of the applicant's military record and, if so, what corrections are needed to provide full and effective relief.

(5) In Military Whistleblowers Protection Act cases only, whether to recommend to the Secretary of the Air Force that disciplinary or administrative action be taken against any Air Force official whom the Board finds to have committed an act of reprisal against the applicant. Any determination on this issue will not be made a part of the Board's record of proceedings and will not be given to the applicant, but will be provided directly to the Secretary of the Air Force under separate cover (Sec 865.2b, of this part).

(i) Record of proceedings. The Board staff will prepare a record of proceedings following deliberations which will include:

(1) The name and vote of each Board member.

(2) The application.

(3) Briefs and written arguments.

(4) Documentary evidence.

(5) A hearing transcript if a hearing was held.

(6) Advisory opinions and the applicant's related comments.

(7) The findings, conclusions, and recommendations of the Board.

(8) Minority reports, if any.

(9) Other information necessary to show a true and complete history of the proceedings.

(j) Minority reports. A dissenting panel member may prepare a minority report which may address any aspect of the case.

(k) Separate communications. The Board may send comments or recommendations to the Secretary of the Air Force as to administrative or disciplinary action against individuals found to have committed acts of reprisal prohibited by the Military Whistleblowers Protection Act and on other matters arising from an application not directly related to the requested correction of military records. Such comments and recommendations will be separately communicated and will not be included in the record of proceedings or given to the applicant or counsel.

(l) Final action by the Board. The Board acts for the Secretary of the Air Force and its decision is final when it:

(1) Denies any application (except under 10 U.S.C. 1034).

(2) Grants any application in whole or part when the relief was recommended by the official preparing the advisory opinion, was unanimously agreed to by the panel, and does not affect an appointment or promotion requiring confirmation by the Senate, and does not affect a matter for which the Secretary of the Air Force or his or her delegee has withheld decision authority or required notification before final decision.

(3) The Board sends the record of proceedings on all other applications to the Secretary of the Air Force or his or her designee for final decision.

(m) The Board may identify DoD or Air Force policies, instructions, guidance or practices that are leading to, or likely to lead to unsound business decisions, unfair results, waste of government funds or public criticism. The Board will forward such observations directly to the appropriate offices of the Secretariat and/or Air Staff for review and evaluation. Such observations will not be included in the record of proceedings.

SOURCE: 75 FR 59613, Sept. 28, 2010, unless otherwise noted.

Notes of Decisions (74)

Current through April 8, 2021; 86 FR 18215.

End of Document

	Rating
With localized or episodic cutaneous involvement and intermittent systemic medication, such as immunosuppressive retinoids, required for a total duration of less than six weeks during the past 12-month period	10
No more than topical therapy required during the past 12-month period	0
7825 Urticaria:	
Recurrent debilitating episodes occurring at least four times during the past 12-month period despite continuous immunosuppressive therapy	60
Recurrent debilitating episodes occurring at least four times during the past 12-month period, and; requiring intermittent systemic immunosuppressive therapy for control	30
Recurrent episodes occurring at least four times during the past 12-month period, and; responding to treatment with antihistamines or sympathomimetics	10
7826 Vasculitis, primary cutaneous:	
Recurrent debilitating episodes occurring at least four times during the past 12-month period despite continuous immunosuppressive therapy	60
Recurrent debilitating episodes occurring at least four times during the past 12-month period, and; requiring intermittent systemic immunosuppressive therapy for control	30
Recurrent episodes occurring one to three times during the past 12-month period, and; requiring intermittent systemic immunosuppressive therapy for control	10
Or rate as disfigurement of the head, face, or neck (DC 7800) or scars (DC's 7801, 7802, 7803, 7804, or 7805), depending upon the predominant disability.	
7827 Erythema multiforme; Toxic epidermal necrolysis:	
Recurrent debilitating episodes occurring at least four times during the past 12-month period despite ongoing immunosuppressive therapy	60
Recurrent episodes occurring at least four times during the past 12-month period, and; requiring intermittent systemic immunosuppressive therapy	30
Recurrent episodes occurring during the past 12-month period that respond to treatment with antihistamines or sympathomimetics, or; one to three episodes occurring during the past 12-month period requiring intermittent systemic immunosuppressive therapy	10
Or rate as disfigurement of the head, face, or neck (DC 7800) or scars (DC's 7801, 7802, 7803, 7804, or 7805), depending upon the predominant disability.	
7828 Acne:	
Deep acne (deep inflamed nodules and pus-filled cysts) affecting 40 percent or more of the face and neck	30
Deep acne (deep inflamed nodules and pus-filled cysts) affecting less than 40 percent of the face and neck, or; deep acne other than on the face and neck	10
Superficial acne (comedones, papules, pustules, superficial cysts) of any extent	0
Or rate as disfigurement of the head, face, or neck (DC 7800) or scars (DC's 7801, 7802, 7803, 7804, or 7805), depending upon the predominant disability.	
7829 Chloracne:	
Deep acne (deep inflamed nodules and pus-filled cysts) affecting 40 percent or more of the face and neck	30
Deep acne (deep inflamed nodules and pus-filled cysts) affecting less than 40 percent of the face and neck, or; deep acne other than on the face and neck	10
Superficial acne (comedones, papules, pustules, superficial cysts) of any extent	0
Or rate as disfigurement of the head, face, or neck (DC 7800) or scars (DC's 7801, 7802, 7803, 7804, or 7805), depending upon the predominant disability.	
7830 Scarring alopecia:	
Affecting more than 40 percent of the scalp	20
Affecting 20 to 40 percent of the scalp	10
Affecting less than 20 percent of the scalp	0
7831 Alopecia areata:	
With loss of all body hair	10
With loss of hair limited to scalp and face	0
7832 Hyperhidrosis:	
Unable to handle paper or tools because of moisture, and unresponsive to therapy	30
Able to handle paper or tools after therapy	0
7833 Malignant melanoma:	
Rate as scars (DC's 7801, 7802, 7803, 7804, or 7805), disfigurement of the head, face, or neck (DC 7800), or impairment of function (under the appropriate body system).	
Note: If a skin malignancy requires therapy that is comparable to that used for systemic malignancies, *i.e.*, systemic chemotherapy, X-ray therapy more extensive than to the skin, or surgery more extensive than wide local excision, a 100-percent evaluation will be assigned from the date of onset of treatment, and will continue, with a mandatory VA examination six months following the completion of such antineoplastic treatment, and any change in evaluation based upon that or any subsequent examination will be subject to the provisions of § 3.105(e). If there has been no local recurrence or metastasis, evaluation will then be made on residuals. If treatment is confined to the skin, the provisions for a 100-percent evaluation do not apply.	

(Authority: 38 U.S.C. 1155)

[67 FR 49596, July 31, 2002; 67 FR 58448, 58449, Sept. 16, 2002; 73 FR 54710, Oct. 23, 2008; 77 FR 2910, Jan. 20, 2012]

THE ENDOCRINE SYSTEM

§ 4.119 Schedule of ratings—endocrine system.

	Rating
7900 Hyperthyroidism	

	Rating
Thyroid enlargement, tachycardia (more than 100 beats per minute), eye involvement, muscular weakness, loss of weight, and sympathetic nervous system, cardiovascular, or astrointestinal symptoms	100
Emotional instability, tachycardia, fatigability, and increased pulse pressure or blood pressure	60
Tachycardia, tremor, and increased pulse pressure or blood pressure	30
Tachycardia, which may be intermittent, and tremor, or; continuous medication required for control	10
NOTE (1): If disease of the heart is the predominant finding, evaluate as hyperthyroid heart disease (DC 7008) if doing so would result in a higher evaluation than using the criteria above.	
NOTE (2): If ophthalmopathy is the sole finding, evaluate as field vision, impairment of (DC 6080); diplopia (DC 6090); or impairment of central visual acuity (DC 6061–6079).	
7901 Thyroid gland, toxic adenoma of	
Thyroid enlargement, tachycardia (more than 100 beats per minute), eye involvement, muscular weakness, loss of weight, and sympathetic nervous system, cardiovascular, or gastrointestinal symptoms	100
Emotional instability, tachycardia, fatigability, and increased pulse pressure or blood pressure	60
Tachycardia, tremor, and increased pulse pressure or blood pressure	30
Tachycardia, which may be intermittent, and tremor, or; continuous medication required for control	10
NOTE (1): If disease of the heart is the predominant finding, evaluate as hyperthyroid heart disease (DC 7008) if doing so would result in a higher evaluation than using the criteria above.	
NOTE (2): If ophthalmopathy is the sole finding, evaluate as field vision, impairment of (DC 6080); diplopia (DC 6090); or impairment of central visual acuity (DC 6061–6079).	
7902 Thyroid gland, nontoxic adenoma of	
With disfigurement of the head or neck	20
Without disfigurement of the head or neck	0
NOTE: If there are symptoms due to pressure on adjacent organs such as the trachea, larynx, or esophagus, evaluate under the diagnostic code for disability of that organ, if doing so would result in a higher evaluation than using this diagnostic code.	
7903 Hypothyroidism	
Cold intolerance, muscular weakness, cardiovascular involvement, mental disturbance (dementia, slowing of thought, depression), bradycardia (less than 60 beats per minute), and sleepiness	100
Muscular weakness, mental disturbance, and weight gain	60
Fatigability, constipation, and mental sluggishness	30
Fatigability, or; continuous medication required for control	10
7904 Hyperparathyroidism	
Generalized decalcification of bones, kidney stones, gastrointestinal symptoms (nausea, vomiting, anorexia, constipation, weight loss, or peptic ulcer), and weakness	100
Gastrointestinal symptoms and weakness	60
Continuous medication required for control	10
NOTE: Following surgery or treatment, evaluate as digestive, skeletal, renal, or cardiovascular residuals or as endocrine dysfunction.	
7905 Hypoparathyroidism	
Marked neuromuscular excitability (such as convulsions, muscular spasms (tetany), or laryngeal stridor) plus either cataract or evidence of increased intracranial pressure (such as papilledema)	100
Marked neuromuscular excitability, or; paresthesias (of arms, legs, or circumoral area) plus either cataract or evidence of increased intracranial pressure	60
Continuous medication required for control	10
7907 Cushing's syndrome	
As active, progressive disease including loss of muscle strength, areas of osteoporosis, hypertension, weakness, and enlargement of pituitary or adrenal gland	100
Loss of muscle strength and enlargement of pituitary or adrenal gland	60
With striae, obesity, moon face, glucose intolerance, and vascular fragility	30
NOTE: With recovery or control, evaluate as residuals of adrenal insufficiency or cardiovascular, psychiatric, skin, or skeletal complications under appropriate diagnostic code.	
7908 Acromegaly	
Evidence of increased intracranial pressure (such as visual field defect), arthropathy, glucose intolerance, and either hypertension or cardiomegaly	100
Arthropathy, glucose intolerance, and hypertension	60
Enlargement of acral parts or overgrowth of long bones, and enlarged sella turcica	30
7909 Diabetes insipidus	
Polyuria with near-continuous thirst, and more than two documented episodes of dehydration requiring parenteral hydration in the past year	100
Polyuria with near-continuous thirst, and one or two documented episodes of dehydration requiring parenteral hydration in the past year	60
Polyuria with near-continuous thirst, and one or more episodes of dehydration in the past year not requiring parenteral hydration	40
Polyuria with near-continuous thirst	20
7911 Addison's disease (Adrenal Cortical Hypofunction)	
Four or more crises during the past year	60
Three crises during the past year, or; five or more episodes during the past year	40
One or two crises during the past year, or; two to four episodes during the past year, or; weakness and fatigability, or; corticosteroid therapy required for control	20

	Rating
NOTE (1): An Addisonian ''crisis'' consists of the rapid onset of peripheral vascular collapse (with acute hypotension and shock), with findings that may include: anorexia; nausea; vomiting; dehydration; profound weakness; pain in abdomen, legs, and back; fever; apathy, and depressed mentation with possible progression to coma, renal shutdown, and death.	
NOTE (2): An Addisonian ''episode,'' for VA purposes, is a less acute and less severe event than an Addisonian crisis and may consist of anorexia, nausea, vomiting, diarrhea, dehydration, weakness, malaise, orthostatic hypotension, or hypoglycemia, but no peripheral vascular collapse.	
NOTE (3): Tuberculous Addison's disease will be evaluated as active or inactive tuberculosis. If inactive, these evaluations are not to be combined with the graduated ratings of 50 percent or 30 percent for non-pulmonary tuberculosis specified under § 4.88b. Assign the higher rating.	
7912 Pluriglandular syndrome	
Evaluate according to major manifestations.	
7913 Diabetes mellitus	
Requiring more than one daily injection of insulin, restricted diet, and regulation of activities (avoidance of strenuous occupational and recreational activities) with episodes of ketoacidosis or hypoglycemic reactions requiring at least three hospitalizations per year or weekly visits to a diabetic care provider, plus either progressive loss of weight and strength or complications that would be compensable if separately evaluated	100
Requiring insulin, restricted diet, and regulation of activities with episodes of ketoacidosis or hypoglycemic reactions requiring one or two hospitalizations per year or twice a month visits to a diabetic care provider, plus complications that would not be compensable if separately evaluated	60
Requiring insulin, restricted diet, and regulation of activities	40
Requiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet	20
Manageable by restricted diet only	10
NOTE (1): Evaluate compensable complications of diabetes separately unless they are part of the criteria used to support a 100 percent evaluation. Noncompensable complications are considered part of the diabetic process under diagnostic code 7913.	
NOTE (2): When diabetes mellitus has been conclusively diagnosed, do not request a glucose tolerance test solely for rating purposes.	
7914 Neoplasm, malignant, any specified part of the endocrine system	100
NOTE: A rating of 100 percent shall continue beyond the cessation of any surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals.	
7915 Neoplasm, benign, any specified part of the endocrine system rate as residuals of endocrine dysfunction.	
7916 Hyperpituitarism (prolactin secreting pituitary dysfunction)	
7917 Hyperaldosteronism (benign or malignant)	
7918 Pheochromocytoma (benign or malignant)	
NOTE: Evaluate diagnostic codes 7916, 7917, and 7918 as malignant or benign neoplasm as appropriate.	
7919 C-cell hyperplasia of the thyroid	100
NOTE: A rating of 100 percent shall continue beyond the cessation of any surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals.	

[61 FR 20446, May 7, 1996]

NEUROLOGICAL CONDITIONS AND CONVULSIVE DISORDERS

§ 4.120 Evaluations by comparison.

Disability in this field is ordinarily to be rated in proportion to the impairment of motor, sensory or mental function. Consider especially psychotic manifestations, complete or partial loss of use of one or more extremities, speech disturbances, impairment of vision, disturbances of gait, tremors, visceral manifestations, injury to the skull, etc. In rating disability from the conditions in the preceding sentence refer to the appropriate schedule. In rating peripheral nerve injuries and their residuals, attention should be given to the site and character of the injury, the relative impairment in motor function, trophic changes, or sensory disturbances.

§ 4.121 Identification of epilepsy.

When there is doubt as to the true nature of epileptiform attacks, neurological observation in a hospital adequate to make such a study is necessary. To warrant a rating for epilepsy, the seizures must be witnessed or verified at some time by a physician. As to frequency, competent, consistent lay testimony emphasizing convulsive and immediate post-convulsive characteristics may be accepted. The frequency of seizures should be ascertained under the ordinary conditions of life (while not hospitalized).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(b)(1) of this Court's rules. The brief contains 11,862 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Rule 32(b)(2) of this Court's rules. In making this certification, I have relied upon the word count function in Microsoft Word.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

/s/ William P. Rayel
July 22, 2021