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)

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

This Court should reverse the United States Court of Federal Claims' judgment awarding attorney fees and expenses to Mr. Monroe under the Equal Access to Justice Act (EAJA) 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 fees and expenses he requested, rather than reducing them due to his limited success on remand.

This case resulted in two voluntary remands to the Air Force Board for the Correction of Military Records (AFBCMR) before it was voluntarily dismissed. Neither the trial court, nor plaintiff-appellee, Allen H. Monroe, suggests that the Government's litigating position at the trial court was not substantially justified. Instead, the trial court determined that the Government's position was not substantially justified primarily because the AFBCMR failed to increase Mr. Monroe's disability rating *before* he requested an increased disability rating from the board, even though Mr. Monroe had the burden of demonstrating material error or injustice at the AFBCMR.

Even worse, the trial court made this determination despite the absence of any challenge to Mr. Monroe's disability rating or request for a disability retirement in his complaint. Instead, Mr. Monroe's complaint sought a retroactive restoration to active duty, based upon the AFBCMR's allegedly erroneous failure to reverse the Air Force's determination that he was medically unfit for duty due to diabetes. The Government's consistent, unrebutted position on this claim, as reflected in the AFBCMR's three decisions, has been that there was no material error or injustice in the Air Force's decision that Mr. Monroe should be separated from active duty due to his medical unfitness.

In his response brief, Mr. Monroe erroneously argues that the disability retirement claim that he raised to the AFBCMR near the end of the second remand

was part of the claim that he raised in his Court of Federal Claims complaint. Mr. Monroe does not identify anything in his complaint challenging his disability rating or seeking a disability retirement, nor does he acknowledge the precedent expressly distinguishing a disability retirement claim from an unlawful discharge/active duty pay claim. Instead Mr. Monroe erroneously attempts to shoehorn his two distinct claims into a single claim challenging the allegedly arbitrary and capricious "AFBCMR decision making related to his disability evaluation process." Pl.Br. 14.[1] The assertion by the trial court and Mr. Monroe that a request for constructive active duty pay founded upon 37 U.S.C. § 204 and a request for disability retirement founded upon 10 U.S.C. § 1201 are part of a single "claim" challenging the disability evaluation process is contrary to statute, this Court's precedent, and the facts of this case.

Mr. Monroe's response brief does not rebut our showing that the trial court improperly focused on Mr. Monroe's disability rating, instead of our overall position that the Air Force's unfitness determination was not erroneous or unjust, a position that was ultimately vindicated in the AFBCMR's unchallenged second

[1] "Gov.Br." refers to our opening brief, filed on April 15, 2021. "Pl.Br." refers to Mr. Monroe's response brief, filed on May 20, 2021. "Am.Br." refers to the amicus brief filed by the National Veterans Legal Services Program, filed on May 27, 2021.

remand decision. Accordingly, this Court should reverse the trial court's finding that the Government's position was not substantially justified.

Alternatively, the Court should reverse the judgment below because the trial court abused its discretion by awarding Mr. Monroe fees and expenses that he incurred pursuing his unsuccessful unlawful discharge claim. Mr. Monroe's successful disability retirement claim is distinctly different from the unsuccessful unlawful discharge claim Mr. Monroe raised in his complaint, as these two claims are mutually exclusive and diametrically opposed to each other.

The trial court also erred by failing to compare the *relief sought* to the *relief obtained* in determining Mr. Monroe's EAJA award, as required by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). The trial court based its EAJA award upon the significance of the military retirement that Mr. Monroe obtained, without considering that: 1) 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 litigation; and 2) if Mr. Monroe had been restored to active duty as he requested, he likely would have received a military retirement with *higher* gross monthly payments than he is receiving now.

Mr. Monroe was unsuccessful on the unlawful discharge claim that he raised in his complaint, and his success before the AFBCMR on the separate disability retirement claim resulted in Mr. Monroe receiving significantly less relief than he

sought in his complaint. Under these circumstances, the trial court abused its discretion by awarding Mr. Monroe the fees and expenses he incurred pursuing his unsuccessful unlawful discharge claim.

ARGUMENT

I. The Trial Court Abused Its Discretion In Finding That The Government's Position Was Not Substantially Justified

Contrary to Mr. Monroe's argument, we are not asking this Court to simply "reweigh the factors considered by the trial court[.]" Pl.Br. 41. Rather, in our opening brief, we demonstrated that the trial court committed multiple legal errors in determining that the Government's position was not substantially justified. Gov.Br. 28-40. Mr. Monroe's response does not rebut our showing.

A. The Trial Court Erroneously Focused Upon The Government's Position On An Issue That Was Not Raised In Mr. Monroe's Complaint

As we demonstrated in our opening brief, the primary error committed by the trial court was its myopic focus upon the increase in Mr. Monroe's disability rating and consequent disability retirement, when Mr. Monroe never challenged his disability rating or sought a disability retirement at the trial court. Gov.Br. 28-32. By statute, "position of the United States" means, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency *upon which the civil action is based*[.]" 28 U.S.C. § 2412(d)(2)(D) (emphasis added). Accordingly, the "position of the United States" does not include any

actions or failures to act by the agency that are not the basis of the plaintiff's complaint, such as Mr. Monroe's initial disability rating and the AFBCMR's "failure" to increase the rating in its first two decisions.

Mr. Monroe does not dispute that, in determining whether the Government's position was substantially justified, courts should focus upon the Government's overall position on the claims raised in the complaint, rather than side issues that were not the primary focus of the litigation. *See* Pl.Br. 17, 24-25; *see also, e.g.*, *Commissioner, Immigration and Naturalization Serv. v. Jean*, 496 U.S. 154, 161-62 (1990); *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). Nor does Mr. Monroe identify anything in his complaint challenging his original 20 percent disability rating or requesting a disability retirement.

Accordingly, as we demonstrated in our opening brief, the Government's overall position on the claim raised in Mr. Monroe's complaint – his challenge to the AFBCMR's decisions declining to disturb the Air Force's unfitness determination and retroactively reinstate him to active duty – was that there was no material error or injustice in the Air Force's decision to separate Mr. Monroe from active duty as medically unfit. Gov.Br. 29, 31. The AFBCMR consistently maintained this position through all three of its decisions, Appx82-83, Appx175-176, Appx506-507, the trial court never found this position to be incorrect, *see*

Appx7, and Mr. Monroe declined to challenge this position after the second remand decision, resulting in the trial court dismissing his suit. Appx182-186. Accordingly, the Government's position was substantially justified. *See 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. Gatimi v. Holder*, 606 F.3d 344, 349-50 (7th Cir. 2010) ("of the two issues in this case the government's position was substantially justified with respect to only one. . . . The social-visibility issue was the more prominent issue and the government's position on that issue was substantially justified, and we therefore conclude that the government's position was substantially justified as a whole").

In response, Mr. Monroe argues that: 1) the Government's overall position, as reflected in the first two AFBCMR decisions, was that his "separation with disability severance pay was proper because his disability evaluation process involved no errors or injustice"; and 2) his delayed challenge to his original disability rating was part of the claim raised in his complaint. Pl.Br. 24-30. Neither of his contentions have merit. Mr. Monroe takes quotes from the AFBCMR decisions out of their factual and legal context, and misunderstands the nature of a "claim" under 28 U.S.C. § 1491(a)(1).

1. The First Two AFBCMR Decisions Did Not Substantively Address Mr. Monroe's Disability Rating, As He Had Not Yet Challenged His Disability Rating Before The AFBCMR

In his response, Mr. Monroe does not assert that he challenged his disability rating or sought a disability retirement in the proceedings leading to the AFBCMR's initial decision or first remand decision. Rather, Mr. Monroe expressly stated to the AFBCMR that he was not entitled to a disability retirement. Appx254. Nevertheless, Mr. Monroe erroneously argues that the first two AFBCMR decisions included a "tenuous" position that his 20 percent disability rating was not erroneous or unjust. *See* Pl.Br. 19, 24-25. Mr. Monroe bases this argument upon quotes from these decisions that he takes out of their legal and factual context. *Id.*

Mr. Monroe emphasizes that the AFBCMR's initial decision stated that it found "*no error in the applicant's disability evaluation process* to include the review from [Secretary of the Air Force Personnel Council (SAFPC)] or at the time of separation" and that the AFBCMR's first remand decision stated that it "found no evidence that the applicant was *improperly separated from active duty in 2015*." Pl.Br. 25 (quoting Appx82, Appx506) (emphasis added by Mr. Monroe). Placed in their factual and legal context, these quotes do not indicate that the AFBCMR considered and endorsed the correctness of Mr. Monroe's initial 20 percent disability rating.

Mr. Monroe had not yet challenged his 20 percent disability rating or sought a disability retirement at the AFBCMR prior to the AFBCMR's first remand decision. *See* Appx254, Appx258-259, Appx318-319, Appx350-353, Appx498-499, Appx501. Rather, Mr. Monroe challenged the Air Force's unfitness determination and sought reinstatement to active duty. *See id*. Accordingly, there is no analysis in the first two AFBCMR decisions about whether the 20 percent rating by the Department of Veterans Affairs (VA) was substantively correct. Appx77-80, Appx82-83, Appx502-504, Appx506. This indicates that the AFBCMR did not *sua sponte* consider whether Mr. Monroe was entitled to a higher disability rating. Rather, the AFBCMR simply determined that "the applicant has failed to sustain *his burden of proof* that he has suffered from an error or injustice," and, thus, "the Board [found] no basis to recommend granting *the relief sought in this application*." Appx83 (first remand decision) (emphasis added); *see also* Appx74 (AFBCMR stating that, in its initial decision, it "considered and denied [Mr. Monroe's] *request to be returned to duty*, finding that the applicant had provided insufficient evidence of an error or injustice to justify relief.") (emphasis added).

Moreover, as we demonstrated in our opening brief, the AFBCMR has no legal duty to address allegations of error or injustice that were not raised by Mr. Monroe. Gov.Br. 39-40. 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). The trial court committed legal error in faulting the AFBCMR for not increasing Mr. Monroe's disability rating before he requested that the AFBCMR increase the rating. *See* Appx7.

Mr. Monroe states that the AFBCMR was required to "determine if an error or injustice existed before deciding what change in Mr. Monroe's military status was the appropriate remedy or relief." Pl.Br. 25. This is true, but irrelevant. The AFBCMR was required to determine if *Mr. Monroe* had *demonstrated* an error or injustice; it was not required to *sua sponte* address potential errors that Mr. Monroe did not allege. *See* 32 C.F.R. §§ 865.2(c), 865.4(a), 865.4(h)(4); *cf. Metz v. United States*, 466 F.3d 991, 998-99 (Fed. Cir. 2006).[2]

The AFBCMR did not substantively address whether Mr. Monroe was entitled to an increased disability rating and disability retirement until its second

[2] NVLSP argues that the "relief initially requested by a *pro se* veteran . . . should not be determinative of whether the government's position was 'substantially justified' in assessing EAJA fees." Am.Br. 18. But our position in this case is substantially justified primarily because our overall position on the unlawful discharge claim raised in Mr. Monroe's *complaint* was vindicated, not because he did not seek disability retirement in his initial AFBCMR application. Moreover, as we have demonstrated, Mr. Monroe did not seek a disability retirement at the AFBCMR, either *pro se or through his counsel*, until late in the second remand.

remand decision, shortly after Mr. Monroe raised the issue for the first time before the AFBCMR or the trial court.

2. Mr. Monroe's Complaint Raised An Unlawful Discharge Claim Founded Upon 37 U.S.C. § 204, Not A Disability Retirement Claim Founded Upon 10 U.S.C. § 1201

It is undisputed that Mr. Monroe's complaint did not allege that his disability rating was erroneous or that he was entitled to a disability retirement. Instead, Mr. Monroe alleged 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." Appx86; *see also* Appx17, Appx46-57, Appx130-145. Mr. Monroe founded his claim upon 37 U.S.C. § 204 and sought retroactive restoration to active duty and associated benefits, including constructive active duty pay and allowances. Appx18, Appx57-58, Appx90, Appx145-146.

Nevertheless, Mr. Monroe incorrectly alleges that his request for disability retirement, which he made late in the second remand proceeding, was a part of the claim in his complaint. *See* Pl.Br. 26-30. Mr. Monroe attempts to recast his complaint as broadly alleging "that the decision making of the Air Force and the AFBCMR in his disability evaluation proceedings and their review did not meet the Administrative Procedure Act's 'arbitrary and capricious' standard applicable to the review of military correction board decisions." *Id.* at 26 (citation omitted).

In Mr. Monroe's erroneous view, it "is of no significance in defining Mr. Monroe's claims" that his complaint was "premised on the money-mandating Military Pay Act, 37 U.S.C. § 204[.]" *Id.* at 28.

Mr. Monroe ignores the statutory language that defines a "claim" under the Tucker Act, 28 U.S.C. § 1491(a)(1), which was the jurisdictional basis of Mr. Monroe's suit. Appx18, Appx90; Pl.Br. 28. The Tucker Act provides in relevant part that the Court of Federal Claims has "jurisdiction to render judgment upon any *claim* against the United States *founded either upon . . . any Act of Congress*[.]" 28 U.S.C. § 1491(a)(1) (emphasis added). In other words, a Tucker Act "claim" must be "founded . . . upon" a particular money-mandating source of law, such as an "Act of Congress[.]" *Id.*

Indeed, this Court has expressly distinguished between "claims for unlawful discharge," which are founded upon 37 U.S.C. § 204, and "claims of entitlement to disability retirement pay," which are founded upon 10 U.S.C. § 1201. *Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005); *see also Lewis v. United States*, 476 F. App'x 240, 241 (Fed. Cir. 2012).

Moreover, an allegation that a corrections board arbitrarily and capriciously denied an application to correct the plaintiff's records would not be a valid Tucker Act claim in the absence of an underlying money-mandating statute or regulation upon which the claim was based, such as 37 U.S.C. § 204. *See, e.g.*, *McCord v.*

United States, 943 F.3d 1354, 1359 (Fed. Cir. 2019); *Martinez v. United States*, 333 F.3d 1295, 1314-15 (Fed. Cir. 2003) (*en banc*); *Nieves v. United States*, 133 Fed. Cl. 306, 311-12 (2017).

Accordingly, the nature of Mr. Monroe's allegations of AFBCMR error and the relief sought in his complaint defines the scope of his Tucker Act "claim." Because Mr. Monroe's complaint challenged the AFBCMR's decisions with regard to the Air Force's unfitness determination and sought retroactive reinstatement to active duty and active duty pay under 37 U.S.C. § 204, but his complaint did not challenge his disability rating or seek a disability retirement under 10 U.S.C. § 1201, his delayed request for a disability retirement during the second remand to the AFBCMR was not within the scope of the "claim" in his complaint.

Although Mr. Monroe is correct that his complaint alleged various errors in his "disability evaluation process," Pl.Br. 27, none of those alleged errors involved a challenge to his disability rating. Thus, although Mr. Monroe alleged that these errors resulted "in an improper separation with severance pay," *id.*, he did not allege that he should have been separated from active duty via a disability retirement. Rather, he alleged that he should not have been *separated from active duty at all* due to errors in his disability evaluation process that resulted in an

erroneous determination that he was unfit for duty. *See* Appx17, Appx86, Appx46-58, Appx130-146.

Our overall position on the actual unlawful discharge claim in Mr. Monroe's complaint, as reflected in the AFBCMR's three decisions, was that there was no material error or injustice in the Air Force's decision to separate Mr. Monroe from active duty due to medical unfitness. *See* Appx82-83, Apppx175-176, Appx506-507. Because this position was never found to be incorrect by the trial court or the AFBCMR, and Mr. Monroe declined to challenge it further after the second remand decision, our position in this litigation was substantially justified. The trial court erred by instead focusing on whether Mr. Monroe's initial 20 percent disability rating was substantially justified, *see* Appx7, an issue that was never raised in the complaint.

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

In our opening brief, we demonstrated that, 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, 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. Gov.Br. 33-39.

We demonstrated that the trial court ignored the legal standard for diabetes disability ratings and the evidence indicating that Mr. Monroe's initial 20 percent disability rating was substantially justified under that standard. *Id.* at 36-38. Instead, the trial court determined that the initial 20 percent rating was not substantially justified because: 1) "the AFBCMR ultimately determined [that the rating] was faulty," which cannot by itself support a determination that the Government's position lacked substantial justification; and 2) the trial court found 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," despite failing to identify any of the supposed "flaw[s]" and "clear errors" in determining "plaintiff's disability rating[.]" *Id.* at 34-36 (quoting Appx7).

In response, Mr. Monroe does not attempt to rebut our showing that Mr. Monroe's 20 percent disability rating was substantively reasonable. Rather, he erroneously argues that our position is an improper "*post hoc* rationale, because those reasons were not provided by the AFBCMR in its 2020 decision nor do they otherwise appear in the administrative record." Pl.Br. 35. Although a court "may not supply a reasoned basis for the agency's action that the agency itself has not given," it "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974). Accordingly, an "explicit explanation [for the

agency's action] is not necessary . . . where the agency's decisional path is reasonably discernible." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369-70 (Fed. Cir. 1998).

The decision that Mr. Monroe was not entitled to a disability rating higher than 20 percent was necessarily based upon a determination that his diabetes did not require "regulation of activities," *i.e.*, "avoidance of strenuous occupational and recreational activities[.]" 38 C.F.R. § 4.119, DC 7913 (2014). Under the VA Schedule for Rating Disabilities (VASRD) in effect during Mr. Monroe's disability proceedings, Mr. Monroe's diabetes must have "[r]equir[ed] insulin, restricted diet, and regulation of activities" in order to have received a 40 percent disability rating (the next highest rating above 20 percent). *Id.* It is undisputed that Mr. Monroe was insulin dependent at the time of his discharge, *see, e.g.*, Appx93-94, and a "restricted diet" was also a requirement for the 20 percent rating that Mr. Monroe received. 38 C.F.R. § 4.119, DC 7913 (2014). Accordingly, the VA's denial of a 40 percent rating was necessarily based upon a determination that Mr. Monroe's diabetes did not require "regulation of activities."

In our opening brief, we explained why the record before the trial court supported the determination that Mr. Monroe's diabetes did not require "regulation of activities," including Mr. Monroe's marathon running. *See* Gov.Br. 36-38. That is not a *post hoc* rationale. *See, e.g.*, *Webb v. Commissioner of Social Sec.*

Admin., No. 8:17-cv-01912-JMC, 2018 WL 4575154, *3 (D.S.C. Sept. 25, 2018); *Wilkes v. Colvin*, No. A-15-CV-1064-AWA, 2016 WL 4402068, *5 (W.D. Tex. Aug. 18, 2016).

Even if Mr. Monroe was correct that our explanation of why Mr. Monroe's initial 20 percent rating was substantially justified was a *post hoc* rationale, which it is not, that would further support our position that the trial court inappropriately focused on the whether the 20 percent rating was substantially justified.

Mr. Monroe erroneously argues that the AFBCMR should have explained why it did not increase Mr. Monroe's disability rating in its first two decisions. *See* Pl.Br. 34. As we demonstrated in Section I.A, above, Mr. Monroe's did not challenge his 20 percent disability rating before the AFBCMR or the trial court until late in the second remand period. Accordingly, the AFBCMR had no reason to justify not disturbing his disability rating in its first two decisions. And the AFBCMR had no reason to justify not disturbing Mr. Monroe's disability rating in its final decision, because it *granted* Mr. Monroe's delayed request to *increase* his disability rating. The AFBCMR's lack of a substantive defense of the 20 percent rating is proper and understandable where it increased the rating shortly after Mr. Monroe challenged it for the first time before the board.

Mr. Monroe also erroneously attempts to recast the trial court's 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." Pl.Br. 39-40 (citation omitted). Like the trial court, Mr. Monroe identifies no flaws or clear errors in the process by which the Air Force and AFBCMR made their determinations about his *disability rating*. Instead, Mr. Monroe asserts that the trial court's language more generally "references the disability evaluation process[.]" *Id.* But the trial court's opinion does not say "disability evaluation process," it says "determinations about plaintiff's disability rating[.]" Appx7. The trial court's conclusory and unsupported statement about unidentified flaws and errors in the "determinations about plaintiff's disability rating" does not support its determination that either Mr. Monroe's initial disability rating or the Government's overall position was not substantial justified.

C. Any Interim Errors By The AFBCMR In Its First Two Decisions Declining To Disturb The Air Force's Unfitness Determination Were Non-Prejudicial And Do Not Support A Finding That The Government's Position Was Not Substantially Justified

Mr. Monroe also erroneously argues that the alleged errors made by the AFBCMR in its initial decision and first remand decision that resulted in voluntary remands are sufficient to support the trial court's finding that the Government's position was not substantially justified. *See* Pl.Br. 19-23, 31-32, 40-41. As we demonstrated in our opening brief, the alleged errors in the first two AFBCMR decisions were non-prejudicial because the AFBCMR corrected these errors and still maintained its position that there was no material error or injustice in the

determination to separate Mr. Monroe from active duty due to unfitness. *See* Gov.Br. 31-32. 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.

In response, Mr. Monroe erroneously argues that the alleged errors are prejudicial and also asserts errors in the initial decision that the trial court did not find. *See* Pl.Br. 19-23, 31-32. Mr. Monroe alleges that the "first remand to the AFBCMR in 2018, resulted from the AFBCMR's erroneous failure to address the three non-frivolous arguments and their supporting evidence raised by Mr. Monroe in his AFBCMR application[.]" *Id.* at 20. But the trial court declined to find that the first remand was based upon agency error. Appx6 (finding that "at least *one* of the remands to the agency was predicated on agency error" and explaining that the "*second* remand . . . was indeed premised on agency error.") (emphasis added).

Moreover, Mr. Monroe's argument that a failure to address a non-frivolous allegation of error is *per se* arbitrary and capricious is contrary to this Court's precedent. *See Melendez Camillo v. United States*, 642 F.3d 1040, 1044-46 (Fed. Cir. 2011). In *Melendez Camillo*, the plaintiff alleged to the AFBCMR that certain officer performance reports (the Ramos OPRs) were written by a biased rater. *Id.* at 1043-45. The AFBCMR did not specifically address the Ramos OPRs in its

decision, and this Court determined that this failure did not render the AFBCMR's decision arbitrary and capricious because the "Correction Board's failure to specifically mention the Ramos OPRs in its decision does not mean that it failed to consider them." *Id.* at 1045-46.

In any event, the three arguments that Mr. Monroe alleged were not addressed in the AFBCMR's initial decision all related to the Air Force's unfitness determination. *See* Pl.Br. 20. Because the AFBCMR maintained its position that the Air Force's unfitness determination was not the result of a material error or injustice, after considering these three arguments, *see* Appx77-80, Appx82-83, Appx170-173, Appx175-176, any failure to address these arguments in the AFBCMR's initial decision was harmless error at worst. *See Fisher v. United States*, 81 Fed. Cl. 155, 158-59 (2008), *aff'd*, No. 2008-5094, 2010 WL 4009437 (Fed. Cir. Oct. 14, 2010); *Ferrell v. United States*, 23 Cl Ct. 562, 570 (1991).

Similarly, the AFBCMR's consideration of inapplicable policies and regulations in its first remand decision regarding Mr. Monroe's unfitness was also non-prejudicial because, in its second remand decision, the AFBCMR maintained that Mr. Monroe's unfitness determination was not erroneous or unjust, without relying upon the inapplicable policies and regulations. *See* Appx170-173, Appx175-176. Indeed, in *Fisher*, the trial court determined that the plaintiff was not prejudiced by the AFBCMR's potential use of an incorrect legal standard in an

earlier decision, 81 Fed. Cl. at 158-59, and this Court affirmed. 2010 WL 4009437.

Mr. Monroe erroneously alleges that "errors upon which the remands were predicated cannot be excused as 'harmless' because in each case the nature of the error precludes a reviewing body from assessing the magnitude of its effect on the outcome of the AFBCMR decision." Pl. Resp. 31. As demonstrated above, it is clear that the alleged errors had no impact upon the outcome of the AFBCMR decisions because the board ultimately reached the same conclusion regarding Mr. Monroe's unfitness for duty after correcting the alleged errors.

Mr. Monroe incorrectly argues that the AFBCMR's failure to address certain arguments in its initial decision was prejudicial because the initial AFBCMR panel decision might have been different if the board had addressed these arguments. *Id.* at 31-32. The Court of Federal Claims rejected a similar argument in *Fisher*, stating that the later remand decision "is controlling now[.]" 81 Fed. Cl. 158. Also, because the initial AFBCMR panel did not deem it necessary to address the three arguments at issue, the initial panel (like the later panel) presumably did not find them persuasive.

Mr. Monroe also erroneously suggests that exposure to the inapplicable regulations and policy during the first remand proceedings may have tainted the same panel's consideration of Mr. Monroe's arguments during the second remand.

Pl.Br. 32. But Government officials are presumed to act in good faith, *e.g.*, *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000), and Mr. Monroe presents no evidence that the AFBCMR relied upon the inapplicable regulations or policy in in its second remand decision.

As we demonstrated in our opening brief, because the alleged interim errors in the AFBCMR's decisions were non-prejudicial, they cannot support a finding that the Government's position was not substantially justified. Gov.Br. 31-32. Rather, the substantial justification determination should be based upon the Government's overall position on the claim raised in Mr. Monroe's complaint, *see, e.g.*, *DGR*, 690 F.3d at 1343; *Klinge*, 2009 WL 3073516, at *5, a position that was ultimately vindicated by the AFBCMR's unchallenged final decision. Accordingly, the trial court abused its discretion in determining that our position was not substantial justified, and its judgment should be reversed.[3]

[3] NVSLP erroneously argues that errors in the AFBCMR's first two decisions cannot be considered "interim and non-prejudicial" because our remand motions were presumably "substantial and justified." Am.Br. 15. As we have demonstrated above, given the AFBCMR's ultimate, unchallenged determination in its second remand decision that Mr. Monroe had not demonstrated that he was fit for duty, *see* Appx175, any errors in the first two AFBCMR decisions are properly characterized as interim and non-prejudicial, even though our unopposed remand motions were undisputedly justified.

NVLSP also argues that voluntary remands without a concession of error "[s]hould [n]ot [b]e [u]sed [a]gainst [v]eterans [s]eeking EAJA [f]ees[.]" Am.Br. 11. But voluntary remands can help the Government fulfill the purpose of EAJA's substantial justification requirement by preventing the Government from

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

In our opening brief, we demonstrated that, even if Mr. Monroe was entitled to *some* attorney fees and expenses in this case (which he is not), the trial court nonetheless abused its discretion by granting him *all* of the fees and expenses he sought, despite his limited success on remand on a claim that was never raised in court. Gov.Br. 41-52. Nothing in Mr. Monroe's response rebuts this showing.

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

When a case involves "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." *Hensley*, 461 U.S. at 434-35. In our opening brief, we demonstrated that the trial court erred by awarding Mr. Monroe his fees and expenses for the unsuccessful unlawful discharge claim founded upon 37 U.S.C. § 204 that forms the basis of his complaint, instead of just his fees and expenses for the successful disability

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"defending claims where the . . . defense might not be frivolous but nevertheless should not have been . . . defended in the first place." *Norris v. Secs. and Exchange Comm'n*, 695 F.3d 1261, 1265 (Fed. Cir. 2012). Moreover, voluntary remands are part of the "entirety of the government's conduct" in a case and, thus, should be considered in the substantial justification inquiry, regardless of which party's position they support. *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991).

retirement claim founded upon 10 U.S.C. § 1201 that Mr. Monroe raised at the AFBCMR late in the second remand. Gov.Br. 42-45.

In response, Mr. Monroe endorses the trial court's determination that these are not separate claims, but, rather, are part of the single claim challenging Mr. Monroe's disability process. *See* Pl.Br. 43-47. As we demonstrated in Section I.A.2, above, Mr. Monroe's argument is meritless, and the trial court was incorrect.

Moreover, these distinct claims are diametrically opposed to each other. 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. 10 U.S.C. § 1201(a). The evidence necessary to demonstrate 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 at the time of discharge and entitled to be retroactively restored to active duty. Rather, such evidence would *undermine* the unlawful discharge claim in his complaint.

Accordingly, the unlawful discharge claim in Mr. Monroe's complaint and the disability retirement claim that he raised during the second remand are not based upon a "common core of facts" or "related legal theories," 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 did not begin pursuing his disability retirement claim at the trial court or AFBCMR until after receiving the AFBCMR medical consultant's November 2019 advisory opinion. Gov.Br. 45.

Mr. Monroe has not disputed our estimate 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. *See id.*; Pl.Br. 43-47. 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

In our opening brief, we also demonstrated that, even if 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 II.A, above, the trial court still erred by failing to compare the *relief sought* to the relief obtained in determining the amount of a reasonable EAJA award. Gov.Br. 46-52.

As we have demonstrated, Mr. Monroe sought more than *$600,000* in active duty back pay and allowances in his complaint, 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). Gov.Br. 47-48. Instead, he received a disability retirement with *zero* back pay and 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. *Id.*

Mr. Monroe does not dispute these facts, except to erroneously argue that his debt is not the result of the AFBCMR's decision because the recoupment of his prior VA disability benefits and disability severance pay "operated as a matter of law separate and apart from the AFBCMR relief and the trial court judgment, neither of which ordered a reduction of or an offset to the relief granted to Mr. Monroe." Pl.Br. 50. Although the AFBCMR did not specifically "order[] a reduction of or an offset to the relief granted to Mr. Monroe," it also did not specifically order that he be paid *any retirement pay*. Appx165.[4] Accordingly, just

[4] The trial court's judgment did not grant Mr. Monroe any relief, as it instead dismissed his complaint with prejudice. Appx186. In any event, Court of Federal Claims judgments for back retired pay should include an offset for VA benefits and disability severance pay that the plaintiff is no longer entitled to retain as a result of a disability retirement. *See Frith v. United States*, 156 Ct. Cl. 188, 191 (1962).

like the VA benefit and severance pay offsets, Mr. Monroe's gross retired pay was *itself* a legal consequence of the disability retirement with a 40 percent rating that the AFBCMR did specifically order. *See, e.g.*, 10 U.S.C. § 1201(a); 38 U.S.C. §§ 5304(a)(1), 5305; DoD 7000.14-R, Financial Management Regulation, Vol. 7B, Chap. 4, ¶ 040603 (Mar. 2020) (Appx497).

The AFBCMR granted Mr. Monroe a disability retirement with a 40 percent rating and left the calculation of any entitlement to a back pay award or any debt to the Defense Finance and Accounting Service (DFAS). *See* Appx165, Appx538. Ultimately, as a result of the AFBCMR's decision, Mr. Monroe was entitled to zero back pay and instead owed the Government more than $75,000. Gov.Br. 47. Accordingly, contrary to Mr. Monroe's argument, the offsets that resulted in zero back pay and a debt of more than $75,000 were not "separate and apart from the AFBCMR relief," Pl.Br. 50, but, rather, were a direct consequence of that relief. In any event, even if the Court were to (incorrectly) construe Mr. Monroe's relief as including approximately $178,000 in back retired pay, that is still less than 30 percent of the more than $600,000 in back active duty pay and allowances (plus interest) that he sought in his complaint. Appx145.

Mr. Monroe also erroneously argues that it is irrelevant that he received significantly less relief than he sought in his complaint because the trial court correctly followed *Hensley* by evaluating "the significance of the overall relief

obtained," *i.e.*, the disability retirement. *See* Pl.Br. 47-53 (quoting Appx8-9). Mr. Monroe, like the trial court, ignores relevant portions of *Hensley*. Specifically, in *Hensley*, the Supreme Court "emphasize[d] that the inquiry does not end with a finding that the plaintiff obtained significant relief, and, thus, a "reduced fee award is appropriate if the relief, *however significant*, is limited in comparison to the scope of the litigation as a whole." 461 U.S. at 440 (emphasis added).

In determining that Mr. Monroe obtained "an 'excellent' overall result," the trial court merely considered the relief that Mr. Monroe obtained (a disability retirement and associated benefits), without comparing that to the relief Mr. Monroe sought in his complaint (retroactive reinstatement to active duty and associated benefits). Appx9 (citation omitted). As we have demonstrated, 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. The trial court's failure to consider this is reversible error. *See Hensley*, 461 U.S. at 439-40; *Hubbard v. United States*, 480 F.3d 1327, 1333 (Fed. Cir. 2007).

As we demonstrated in our opening brief, this Court's decision in *Hitkansut LLC v. United States*, 958 F.3d 1162 (Fed. Cir. 2020), is not to the contrary. Gov.Br. 49-52. First, unlike the plaintiff in *Hitkansut*, Mr. Monroe did not succeed on the "sole claim" in his complaint. 958 F.3d at 1170. Rather, Mr. Monroe

succeeded on a claim on remand that he never raised in his complaint. Section I.A.2, above. Second, when 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." 958 F.3d at 1169 (emphasis added). *Hitkansut* does not permit the trial court to forgo consideration of the difference between the relief sought and the relief obtained in explaining why its ultimate EAJA award is reasonable, especially where the plaintiff did not succeed on all of its claims. Gov.Br. 49-51. The trial court erred by failing to consider this difference in this case. Appx8-9.

Mr. Monroe's reliance upon *Brass v. United States*, 127 Fed. Cl. 505 (2016) is also misplaced. Pl.Br. 49-50. In *Brass*, the plaintiff "received all that she sought in th[e] litigation," *i.e.*, a disability retirement with a 30 percent rating. 127 Fed. Cl. at 515. In contrast, Mr. Monroe received significantly less relief than he sought in this litigation. He did not receive any of the $600,000 in active duty back pay and allowances that he sought, nor was he retroactively restored to active duty, which would have likely resulted in a military retirement with higher gross monthly retired pay than he is currently entitled to.

Given the considerable difference between the relief Mr. Monroe sought and the relief he obtained, awarding him his full attorney fees and expenses was an

abuse of discretion. Rather, the trial court should have limited Mr. Monroe's EAJA award to $2,353.02, *i.e.*, the fees and expenses he incurred pursuing his successful disability retirement claim and facilitating dismissal of his case.

CONCLUSION

For these reasons and the reasons set forth in our opening brief, 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, 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 for Mr. Monroe's limited success.

Respectfully submitted,

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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 6,949 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
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