21-1553

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 NO. 1:18-CV-01059-PEC, JUDGE PATRICIA E. CAMPBELL-SMITH

BRIEF OF PLAINTIFF-APPELLEE ALLEN H. MONROE

SCOTT W. MACKAY
THE LAW OFFICES OF SCOTT W. MACKAY, LLC
P.O. Box 295
Hebron, New Hampshire 03241
(603) 412-2598
swmackay76@gmail.com

Attorney for Plaintiff-Appellee

May 20, 2021

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4(a), counsel for Plaintiff-Appellee Allen H. Monroe certifies the following information is accurate and complete to the best of my knowledge:

(1) Allen H. Monroe is the full name of the only person represented in this case by the undersigned counsel.

(2) There are no entities represented by the undersigned counsel in this case and, as a result, no real parties in interest for any entities.

(3) As there are no entities represented by counsel in this case, there are no parent corporations or any publicly held companies that own 10% or more of the stock in any entities.

(4) There are no law firms, partners, or associates that (a) appeared for any entities in the originating court or agency or (b) are expected to appear in this Court for the entities.

(5) There is no case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

(6) There are no organizational victims in criminal cases and debtors or trustees in bankruptcy cases requiring information under Federal Rule of Appellate Procedure 26.1(b) and (c).

TABLE OF CONTENTS

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT OF RELATED CASES ix

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

I. Initial AFBCMR Proceedings 2

II. U.S. Court of Federal Claims Complaint and First Remand 4

III. Amended Complaint, Second Remand, And Dismissal 6

IV. EAJA Proceedings 9

SUMMARY OF THE ARGUMENT 12

ARGUMENT…… 17

I. The Trial Court Did Not Abuse Its Discretion by Finding that the Government's Position, that There Was No Error or Injustice in Mr. Monroe's Disability Evaluation Process or Its Review Resulting in His Separation from Active Duty with Disability Severance Pay, Was Not Substantially Justified 17

A. The Trial Court Correctly Found That the Government's Position Was Not Substantially Justified Due to the Legally Flawed Decision Making by the AFBCMR that Necessitated Two Remands of Mr. Monroe's Case in 2018 and 2019 19

B. The Trial Court Properly Rejected that the Government's Overall Position Was that Mr. Monroe Was Unfit and that Position Was Vindicated, Correctly Finding that the Government's Position Was that No Error or Injustice Existed Because There Was No Evidence that Mr. Monroe Was Improperly Separated from Active Duty in 2015 24

C. The Government's Assertion that the Remand Errors Were Harmless Is Improper Because Their Nature Precludes a Reviewing Court from Assessing the Magnitude of Their Effect on the Outcome of the AFBCMR Decisions 31

D. The Trial Court Correctly Found that the Government's Position Was Not Substantially Justified Because the AFBCMR Continued Pressing a Tenuous Factual or Legal Position through the First Remand Decision 32

II. The Trial Court Did Not Abuse its Discretion by Evaluating the Significance of the Overall Relief Mr. Monroe Obtained and Finding that the Ultimate Result of Mr. Monroe's Case Converting His Separation with Disability Severance Pay to a Permanent Disability Retirement Was an Excellent Overall Result Warranting a Fully Compensable Award of Attorney's Fees and Expenses 42

A. The Trial Court Properly Found that Mr. Monroe's Claims Involved a Common Core of Facts and a Single Legal Theory 43

B. The Trial Court Correctly Viewed the Case as a Whole and Evaluated the Significance of the Relief Which Mr. Monroe Obtained, Properly Finding His Permanent Disability Retirement an Excellent Overall Result Warranting a Fully Compensable Award of Attorney's Fees and Expenses 47

CONCLUSION……... 54
CERTIFICATE OF COMPLIANCE 55
ADDENDUM

TABLE OF AUTHORITIES

CASES

Adkins v. United States,
68 F.3d 1317 (Fed. Cir. 1995) 28

Axiom Resource Management, Inc. v. United States,
564 F.3d 1374 (Fed. Cir. 2009) 36

Bauer v. DeVos,
325 F.Supp.3d 74 (D.D.C. 2018)...34

Brass v. United States,
127 Fed.Cl. 505 (2016).. 49, 50

Chambers v. United States,
417 F.3d 1218 (Fed. Cir. 2005) 7, 22

Chiu v. United States,
948 F.2d 711 (Fed. Cir. 1991) ....*passim*

Commissioner, Immigration Naturalization Service v. Jean,
496 U.S. 154 (1990).. 52, 53

Fisher v. United States,
402 F.3d 1167 (Fed. Cir. 2005) 28

Frizelle v. Slater,
111 F.3d 172 (D.C. Cir. 1997)...21

Gavette v. Office of Personnel Management,
808 F.2d 1456 (Fed. Cir. 1986) 18

Haga v. Astrue,
482 F.3d 1205 (10th Cir. 2007) 35

Heisig v. United States,
719 F.2d 1153 (Fed. Cir. 1983) 20, 28, 29

Hensley v. Eckerhart,
461 U.S. 424 (1983)... *passim*

Hitkansut LLC v. United States,
958 F.3d 1162 (Fed. Cir. 2020) 16, 51, 52, 53

Hubbard v. United States,
480 F.3d 1327 (Fed. Cir. 2007) 52, 53, 54

Kelly v. Nicholson,
463 F.3d 1349 (Fed. Cir. 2006) 22

McCord v. United States,
943 F.3d 1354 (Fed. Cir. 2019) 48, 51

Melendez Camilo v. United States,
642 F.3d 1040 (Fed. Cir. 2011) 37

Metz v. United States,
466 F.3d 99 (Fed. Cir. 2006) 28

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983) 21, 36

Nalle v. Commissioner of Internal Revenue,
55 F.3d 189 (5th Cir. 1995) 18, 23

Norris v. Securities and Exchange Commision,
695 F.3d 1261 (Fed. Cir. 2012) .... *passim*

Patrick v. Shinseki,
668 F.3d 1325 (Fed. Cir. 2011) 23

Pierce v. Underwood,
487 U.S. 552 (1988)....................9, 17

Prochazka v. United States,
116 Fed.Cl. 444 (2014)....................22

Roth v. United States,
378 F.3d 1371 (Fed. Cir. 2004) 25, 38

Sabo v. United States,
127 Fed.Cl. 606 (2016)....................23

Saint-Fleur v. McHugh,
83 F.Supp.3d 149 (D.D.C. 2015)....................21

Smalls v. United States,
471 F.3d 186 (D.C. Cir. 2006)....................48

Verbeck v. United States,
97 Fed.Cl. 443 (2011)....................21

Wagner v. United States,
365 F.3d 1358 (Fed. Cir. 2004) 31, 32

Walls v. United States,
582 F.3d 1358 (Fed. Cir. 2009) 26

STATUTES

10 U.S.C. § 1174....................51

10 U.S.C. § 1201 .... 8, 28, 48

10 U.S.C. § 1203 48

10 U.S.C. § 1212 48

10 U.S.C. § 1401 48

10 U.S.C. § 2481 48

10 U.S.C. § 9311 6

28 U.S.C. § 1491 26

28 U.S.C. § 2412 36

37 U.S.C. § 204 28

38 U.S.C. § 5304 51

REGULATIONS

32 C.F.R. § 199.17 48

32 C.F.R. § 865.4 .... *passim*

OTHER AUTHORITIES

Department of Defense Instruction 1332.18..7

Department of Defense Instruction 1332.38.. 5, 20, 27

Department of Defense Instruction 1332.45..7

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Plaintiff-Appellee Allen H. Monroe 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.

21-1553

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 NO. 1:18-CV-01059-PEC, JUDGE PATRICIA E. CAMPBELL-SMITH

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion by finding that the position of the United States, that there was no error or injustice in Mr. Monroe's disability evaluation process or its review resulting in his separation from active duty with disability severance pay, did not have a reasonable basis in law and fact and was not substantially justified.

2. Whether the trial court abused its discretion by evaluating the significance of the overall relief Mr. Monroe obtained and finding that the ultimate result of Mr. Monroe's case – conversion of his separation with disability

severance pay to a permanent disability retirement – was an excellent overall result warranting a fully compensable award of attorney's fees and expenses.

STATEMENT OF THE CASE

Pursuant to Federal Circuit Rule 28(b), Mr. Monroe includes in this Statement of the Case a discussion of facts and elements of the trial court's rulings relevant to the issues submitted for review that were omitted from the opening brief of defendant-appellant United States (government).

I. Initial AFBCMR Proceedings

After submitting his application to the Air Force Board for Correction of Military Records (AFBCMR) in November 2014, Mr. Monroe provided to the AFBCMR on February 29, 2016, comments to various advisory opinions received by the AFBCMR. Appx242-255. In those comments, Mr. Monroe requested as alternative relief to his reinstatement to active duty that the AFBCMR consider correction of his records to reflect his retirement under a force reduction initiative authorizing retirement for Air Force officers after 15 years of active duty service. Appx254. In considering Mr. Monroe's application, the AFBCMR was required to make two written determinations: (1) whether an error or injustice existed subject to remedy; and (2) if so, what record correction would provide full relief. 32 C.F.R. § 865.4(h)(4) ("The Board will make determinations on the following issues in writing … [w]hether 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.").

Among the many errors Mr. Monroe raised in his AFBCMR application, as supplemented by his comments to the advisory opinions, were the following three: (1) it was error to characterize Mr. Monroe as non-deployable worldwide because his assignment limitation code was subject to waiver (Appx38, Appx246); (2) the Secretary of the Air Force Personnel Council (SAFPC) erred by considering the potential precedential effect of its decision on other cases when determining whether Mr. Monroe was fit for duty (Appx249-250); and (3) SAFPC erred by failing to apply the benefit of any unresolved doubt regarding Mr. Monroe's fitness in favor of Mr. Monroe. Appx253-254.

In a decision dated July 18, 2017 (transmitted to Mr. Monroe by letter dated September 22, 2017), the AFBCMR denied Mr. Monroe's application stating that "[i]nsufficient relevant evidence has been presented to demonstrate the existence of an error or injustice" and that the AFBCMR found "no error in the applicant's disability evaluation process to include the review from SAFPC or at the time of separation." Appx506. The AFBCMR decision did not address the three non-frivolous assertions of error made by Mr. Monroe regarding his non-deployability status, consideration of the potential precedential effect Mr. Monroe's case may

have on other cases, and resolution of unresolved doubt in favor of a finding of fitness. Appx501-507.

II. U.S. Court of Federal Claims Complaint and First Remand

On July 19, 2018, Mr. Monroe filed a single count complaint in the trial court. Appx17-58. In a section captioned "Claims for Relief" Mr. Monroe alleged that the "AFBCMR Decision was arbitrary or capricious, unsupported by substantial evidence, or contrary to law or regulation" due to multiple errors committed by the Air Force and the AFBCMR in connection with Mr. Monroe's disability evaluation process. Appx46. In support of his claims for relief, Mr. Monroe alleged ten separate errors in thirteen paragraphs. Appx46-57. Included among the errors was the AFBCMR's inappropriate failure to address or consider the three non-frivolous arguments advanced by Mr. Monroe regarding his worldwide non-deployability status (Appx51), the improper consideration of the potential precedential effect of Mr. Monroe's fitness decision on other cases (Appx48), and the failure to apply the benefit of any unresolved doubt regarding Mr. Monroe's fitness in favor of Mr. Monroe. Appx47. In his Demand for Judgment, Mr. Monroe requested that the trial court find that "the AFBCMR Decision denying Mr. Monroe's application for relief was arbitrary or capricious, unsupported by substantial evidence, or contrary to law or regulation …" and that

the trial court order the correction of his records to reflect, among other things, his reinstatement to active duty. Appx57-58.

In its unopposed motion for a voluntary remand filed October 15, 2018, the government requested that the trial court order the AFBCMR to provide an explanation regarding the three arguments it previously had failed to address as alleged in the complaint:

> a. explain whether the SAFPC erred by failing to apply the benefit of any unresolved doubt regarding Mr. Monroe's fitness in favor of Mr. Monroe 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 Mr. Monroe was fit for duty; and
>
> c. explain whether SAFPC erred by failing to consider Mr. Monroe's prior deployments and the availability of waivers for Air Force members with assignment limitation codes.

Appx62.

By letter dated February 6, 2019, Mr. Monroe provided comments to the AFBCMR responding to the medical consultant's advisory opinion, urging the AFBCMR to reject the advisory opinion due to its numerous factual and legal flaws. Appx123-128, Appx289-320. Mr. Monroe explained that the medical consultant's improper concerns regarding his current medical condition were of no

consequence because if he were restored to active duty he would be eligible for retirement for length of service pursuant to 10 U.S.C. § 9311. Appx318-319.

In the AFBCMR remand decision dated April 29, 2019, the AFBCMR stated: "After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board found no evidence that the applicant was improperly separated from active duty in 2015." Appx82. The AFBCMR adopted and made part of the remand decision the medical consultant's advisory opinion, stating: "The applicant's case has undergone an exhaustive review by the BCMR Medical Consultant and the Board did not find the evidence provided, sufficient to overcome his assessment of the case. Therefore, the Board agrees with the opinions and recommendation of the BCMR Medical Consultant and adopts the rationale expressed as the basis for its decision the applicant has failed to sustain his burden of proof that he has suffered from an error or injustice." Appx83.

III. Amended Complaint, Second Remand, And Dismissal

On May 31, 2019, Mr. Monroe filed a single count amended complaint. Appx85-146. In a section captioned "Claims for Relief" Mr. Monroe alleged that the "AFBCMR Decisions were arbitrary or capricious, unsupported by substantial evidence, or contrary to law or regulation" due to multiple errors committed by the Air Force and the AFBCMR in connection with Mr. Monroe's disability evaluation

process. Appx130. In support of his claims for relief, Mr. Monroe alleged ten separate errors in ten paragraphs. Appx130-145. Among the errors alleged was the AFBCMR's improper reliance in its remand decision on DoDI 1332.45 and DoDI 1332.18 and an Air Force deployability policy each issued and effective subsequent to Mr. Monroe's disability evaluation proceedings in violation of the "fundamental precept of administrative law that a military department is required to apply its regulations or policy in effect at the time of the disability proceedings or action in question, rather than current regulations or policy. *See Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005)." Appx132-133. In his Demand for Judgment, Mr. Monroe requested that the trial court find that "the AFBCMR Decisions denying Mr. Monroe's application for relief were arbitrary or capricious, unsupported by substantial evidence, or contrary to law or regulation …" and that the trial court order the correction of his records to reflect, among other things, his reinstatement to active duty. Appx145.

The government's unopposed motion for a second voluntary remand filed on July 30, 2019, stated: "In determining whether the Air Force erred in finding Mr. Monroe unfit for duty, the AFBCMR should not consider instructions and policies issued after the Air Force's final determination of unfitness. *See Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005) ('the Army regulations in

effect at the time of [plaintiff's] discharge in 1970, rather than current regulations, guide our analysis.')." Appx148-149.

By letter dated December 6, 2019, Mr. Monroe provided comments to the AFBCMR regarding the medical consultant's advisory opinion. Appx396, Appx404-406. Among other things, Mr. Monroe's comments addressed the advisory opinion's conclusion that he improperly had been assigned a 20 percent disability rating for his diabetes rather than a 40 percent rating:

> … the Medical Consultant Advisory Opinion states that the record supports a conclusion that rather than being separated as unfit with a 20 percent disability rating, contemporaneous medical evidence indicates that Mr. Monroe's unfitting condition involved a recommendation of a "regulation of activities," which the advisory opinion points out warrants the assignment of a 40 percent disability rating. A 40 percent rating for Mr. Monroe's diabetes found by SAFPC to be unfitting would qualify for a disability retirement. *See* 10 U.S.C. § 1201. To the extent that the AFBCMR opts to adopt the advisory opinion and otherwise deny Mr. Monroe's application for restoration to active duty, the error identified by the advisory opinion would warrant correcting Mr. Monroe's records to reflect his placement on the permanent disability retired list with a 40 percent disability rating effective and retroactive to January 22, 2015.

Appx406.

The AFBCMR second remand decision dated January 15, 2020, changing Mr. Monroe's separation with disability severance pay to a disability retirement with a 40 percent rating, relied on the medical consultant's conclusions that Mr. Monroe's medical records in the AFBCMR case file reflected provider opinions that to control his diabetes, Mr. Monroe was required to regulate his physical

activities. Appx173, Appx175. The AFBCMR second remand decision provided no rationale to explain how its prior, contrary determinations in 2017 and 2019 were made, which despite an "exhaustive review" of the same record evidence evaluated by the medical consultant and the AFBCMR in 2020, concluded separation with disability severance pay based on a 20 percent rating was neither erroneous nor an injustice. Appx166-177.

IV. EAJA Proceedings

The trial court, noting that the government had the burden to show that its position was substantially justified, articulated the appropriate standard: "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 [sic]) (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988))" and 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)." Appx6.

The trial court acknowledged the government's argument that its position was substantially justified because its "overall position" in the litigation – that the Air Force's determination that Mr. Monroe should not be restored to active duty due to his unfitting diabetes – was upheld by the AFBCMR on remand. Appx7. The trial court acknowledged Mr. Monroe's argument that the government'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 position." Appx7. The trial court further acknowledged that Mr. Monroe argued that the government's position – that there was no evidence that Mr. Monroe was improperly separated from active duty in 2015 – "failed to comply with the law, which defendant recognized when it requested remands to correct agency error rather than defend the AFBCMR's decision" and was ultimately conceded by the AFBCMR to be wrong when Mr. Monroe was granted relief. Appx7.

Agreeing with Mr. Monroe's arguments, the trial court found that the government's position was not substantially justified: "[v]iewing 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." Appx7. The trial court, noting that Mr. Monroe "has been forced to litigate defendant's position since the Air Force's determination in 2014, which the Air Force ultimately determined was faulty," found that the significant increase to Mr. Monroe's disability rating "once defendant's errors were addressed" weighed against finding the government's actions were substantially justified. Appx7. The trial court concluded: "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 was flawed and involved clear errors." Appx7.

The trial court granted in full Mr. Monroe's request for reasonable attorney's fees, relying on *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Appx8. The trial court found that the claims asserted in Mr. Monroe's complaint that the AFBCMR had erred in various ways when evaluating his disability proceeding before the Air Force were "grounded in the same facts pertaining to his Air Force evaluation and the AFBCMR's decisions regardless of the relief sought" and, consistent with *Hensley,* involved a common core of facts or were based on related legal theories. Appx8. The trial court expressly rejected the government's argument that Mr. Monroe's fees should be limited because his claim for restoration to active duty was distinct from his disability retirement claim, stating: "[d]efendant confuses plaintiff's claims with his request for relief." Appx8. Consequently, the trial court "view[ed] the case as a whole and evaluate[d] the significance of the overall relief obtained." Appx8. The trial court found "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." Appx9.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's judgment awarding attorney's fees and expenses to Mr. Monroe. The trial court did not abuse its discretion when it properly determined that: (1) the position of the government, that there was no error or injustice in the disability evaluation process resulting in Mr. Monroe's separation from active duty with disability severance pay, did not have a reasonable basis in law and fact and was not substantially justified; and (2) viewing the case as a whole and evaluating the significance of the overall relief obtained, because Mr. Monroe's claims involved a common core of facts related to his disability evaluation process and were based on a single legal theory alleging arbitrary and capricious decision making in connection with that disability evaluation process, Mr. Monroe's permanent disability retirement was an "excellent overall result" warranting a fully compensatory fee award.

The trial court correctly identified two principal reasons for finding that the government's position was not substantially justified: (1) the legally flawed decision making by the AFBCMR that necessitated two remands of Mr. Monroe's case in 2018 and 2019; and (2) the AFBCMR persisted with a tenuous factual and legal position through the first remand decision. Either reason is sufficient independently to affirm the trial court's judgment. The first remand resulted from a failure of the AFBCMR to consider all the evidence and its failure to address the

three non-frivolous arguments presented by Mr. Monroe. Such a failure represents the kind of unreasonable behavior that is not justifiable to a degree that could satisfy a reasonable person. The second remand resulted from the AFBCMR's improper reliance on inapplicable regulations and policy, a position that was unreasonable as manifestly contrary to this Court's clear and controlling precedent.

The unreasonable rationale for the AFBCMR's questionable pressing of a tenuous position is evident from the board's abrupt reversal in 2020 of its prior position that there was no error or injustice in connection with Mr. Monroe's disability evaluation process. The AFBCMR's failure or inability to explain a rational basis for how it arrived at its prior denials of relief in 2017 and 2019 reflected a lack of justification for the government's position to a degree that could satisfy a reasonable person. In addition, the trial court, in exercising its proper discretion, weighed additional factors that cumulatively indicated that the Air Force engaged in conduct over the course of the proceedings which unduly and unreasonably protracted the final resolution of the matter, including: (1) the AFBCMR remand decision in 2019 created a misleading record that unreasonably could convince a lay person that all Mr. Monroe's medical records were properly and exhaustively evaluated when, in fact, they were not; (2) the AFBCMR's reliance on a position it ultimately admitted was wrong prejudiced Mr. Monroe by forcing him to dispute and litigate his disability evaluation process and its review

for years; and (3) the material nature of the change in Mr. Monroe's military-related status after the AFBCMR remedied its error was sufficiently significant to view the AFBCMR's original position as unreasonable.

The trial court properly rejected the government's substantial justification contention that the government's overall position was that Mr. Monroe was unfit and that position was vindicated. The trial court properly found that the government's position was that no error or injustice existed because there was no evidence that Mr. Monroe was improperly separated from active duty in 2015. In addition, the government's contention is without merit, because: (1) it is inconsistent with the AFBCMR decisions, which established that the government's position was that there was no error in Mr. Monroe's disability evaluation process or with his separation from active duty; (2) it is contrary to the AFBCMR regulation, 32 C.F.R. § 865.4(h)(4), which directed the board first to determine if an error or injustice existed before deciding what change in Mr. Monroe's military status was the appropriate remedy or relief; (3) it is inconsistent with Mr. Monroe's complaint and amended complaint, which challenged as arbitrary and capricious the AFBCMR decision making related to his disability evaluation process, the applicable standard of review under the Tucker Act regardless of the money-mandating source of the trial court's jurisdiction; and (4) a challenge to the merits of the Air Force's determination that Mr. Monroe was unfit would have been non-

justiciable and the absence of a government motion to dismiss belies the government's litigation argument that Mr. Monroe made such a challenge.

The government improperly seeks to apply a harmless error analysis in asserting that the errors resulting in each of the two remands were "interim" and not prejudicial because the AFBCMR continued to find Mr. Monroe unfit. The 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.

The trial court correctly relied on *Hensley v. Eckerhart*, 461 U.S. 424 (1983) in awarding Mr. Monroe full attorney's fees. Based on his complaint and amended complaint, the trial court properly found that Mr. Monroe's claims involved the same – or a common core of – facts related to his disability evaluation process and a single legal theory alleging arbitrary and capricious decision making and errors committed by the Air Force and AFBCMR in that process and its review.

The trial court appropriately rejected the government's attempt to limit an award of fees through the fabrication of two purportedly distinct, contradictory legal claims by Mr. Monroe – one that he was fit and should be restored to active duty and one that he was unfit to serve and was eligible for a disability retirement. The trial court understood that the government was conflating Mr. Monroe's

claims focused on arbitrary and capricious decision making in the disability evaluation process and its review with his demand for judgment, succinctly exposing the fundamental flaw in the government's argument: "[d]efendant confuses plaintiff's claims with his request for relief."

Having determined that Mr. Monroe's case involved a common core of facts and a single legal theory, the trial court correctly followed *Hensley* and viewed the case as a whole and evaluated the significance of the overall relief obtained, finding that the ultimate result of Mr. Monroe's case—permanent disability retirement—was an "excellent overall result" and that Mr. Monroe prevailed at each procedural stage of the litigation, securing two remands and an AFBCMR decision in his favor. Again, consistent with *Hensley,* the trial court correctly found that because Mr. Monroe had obtained excellent results a fully compensatory fee award was warranted.

The government disagrees with the trial court's judgment opining that Mr. Monroe achieved only limited success because his recovery of $178,000 in retroactive disability retired pay was much less than the $600,000 in back pay and allowances demanded. The government's argument is foreclosed by *Hitkansut LLC v. United States*, 958 F.3d 1162 (Fed. Cir. 2020), in which this Court ruled that the trial court did not abuse its discretion by failing to reduce attorneys' fees

where the plaintiff succeeded on its sole claim and recovered a material amount in actual, compensable damages of $200,000, despite demanding $5.6 million.

The trial court did not abuse its discretion in finding the government's position was not substantially justified and in awarding full attorney's fees. Accordingly, this Court should affirm the trial court's judgment.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion by Finding that the Government's Position, that There Was No Error or Injustice in Mr. Monroe's Disability Evaluation Process or Its Review Resulting in His Separation from Active Duty with Disability Severance Pay, Was Not Substantially Justified

The trial court used the appropriate standard for determining whether the government's 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. [2012]) (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988))" and 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)." Appx6. The novelty or difficulty of the legal issues presented is relevant in determining whether the government's position was substantially justified, including an assessment of the clarity of governing law and whether judicial decisions on the issue left the status of the law unsettled. *Norris v. SEC*,

695 F.3d at 1265 (citing *Nalle v. C.I.R*., 55 F.3d 189, 192 (5th Cir.1995)). The government must show that it has not persisted in pressing a tenuous factual or legal position. *Gavette v. OPM*, 808 F.2d 1456, 1467 (Fed. Cir. 1986). The judgment call to be made by the trial court on the reasonableness of the government's position as a matter of both law and fact "is quintessentially discretionary in nature." *Chiu v. United States,* 948 F.2d at 715 n.4. "It is for the trial court to weigh each position taken and conclude which way the scale tips, and as an appellate court we must be wary not to redistribute these weights among different positions unless a serious error in judgment has been made." *Id.*

In finding that the government's position was not substantially justified, the trial court identified the determinations by the AFBCMR that had no reasonable basis in law and fact: the legally flawed decision making by the AFBCMR that necessitated the two remands of Mr. Monroe's case and the AFBCMR's steadfast assertion in 2017 and 2019 that Mr. Monroe's separation with disability severance pay was neither error nor unjust, a stance the AFBCMR conceded in 2020 it got wrong. *See* Appx7.

The trial court explained: "[v]iewing 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." Appx7. The trial court identified the agency errors as those asserted by Mr. Monroe in his

EAJA application, cited as ECF No. 32: "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." Appx7. The EAJA application cited by the trial court asserted two reasons for determining that the government's position had no reasonable basis in law and fact: (1) the errors committed by the AFBCMR that necessitated the two remands of Mr. Monroe's case show that the government's position was not reasonable in view of the law and the facts, and (2) the AFBCMR persisted from 2017 through 2019 in pressing a tenuous factual or legal position, as is evident from the board's abrupt reversal in January 2020 of its longstanding position that there was neither an error nor an injustice in connection with Mr. Monroe's separation with severance pay with a 20 percent disability rating. Appx212-213 (ECF No. 32 at 26-27).

A. The Trial Court Correctly Found That the Government's Position Was Not Substantially Justified Due to the Legally Flawed Decision Making by the AFBCMR that Necessitated Two Remands of Mr. Monroe's Case in 2018 and 2019

The trial court properly determined that the government's position was not substantially justified, because Mr. Monroe's separation from active duty in 2015 "failed to comply with the law, which defendant recognized when it requested remands to correct agency error rather than defend the AFBCMR's decision …"

Appx7. The record demonstrates that each remand of Mr. Monroe's case to the AFBCMR was predicated upon legally flawed decision making by the AFBCMR.

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: (1) SAFPC erred by failing to apply the benefit of any unresolved doubt regarding Mr. Monroe's fitness in favor of Mr. Monroe under the rebuttable presumption that he desired to be found fit for duty, in violation of DoDI 1332.38; (2) SAFPC violated DoDI 1332.38 by considering the potential precedential effect of its decision when determining whether Mr. Monroe was fit for duty; and (3) SAFPC erred by failing to consider Mr. Monroe's prior deployments and the availability of waivers for Air Force members with assignment limitation codes. *See* Appx2, Appx62, Appx65.

Under the "arbitrary and capricious" standard, a correction board's conclusion must be supported by substantial evidence, which requires that "*all* of the competent evidence must be considered, whether original or supplemental, and whether or not it supports the challenged conclusion." *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983) (emphasis in original). By failing to consider or address *all* of the evidence and argument Mr. Monroe presented in his application, the AFBCMR decision was not supported by substantial evidence and was arbitrary and capricious, because the board "entirely failed to consider an

important aspect of a problem." *See Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As a result, the AFBCMR failed to consider the relevant factors and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Id.*

In *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997), the United States Court of Appeals for the District of Columbia Circuit held that a correction board's decision was arbitrary because it "did not respond to two of [the plaintiff's] arguments, which do not appear frivolous on their face and could affect the Board's ultimate disposition." The court said that by failing to address plaintiff's arguments, the board's decision lacked a rational connection between the facts found and the choice made. *Id.* That rational connection was similarly absent when the AFBCMR failed to consider Mr. Monroe's evidence and argument on the three non-frivolous issues. *See, e.g., Verbeck v. United States,* 97 Fed.Cl. 443, 460 (2011) (citing *Frizelle*)*; Saint-Fleur v. McHugh*, 83 F.Supp.3d 149, 155 (D.D.C. 2015) (when a correction board fails adequately to address a petitioner's non-frivolous argument, it does not meet the requirement established in *State Farm* that an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made) (collecting cases).

The error by the AFBCMR was sufficiently clear and unreasonable that the government sought a voluntary remand to the board rather than attempting to defend the board's decision at the trial court. *See* Appx7, Appx61-63. The AFBCMR's unwillingness or failure to address Mr. Monroe's evidence and arguments represents the kind of "unreasonable behavior" that can never be justifiable to a degree that could satisfy a reasonable person. *See Prochazka v. United States*, 116 Fed.Cl. 444, 456 (2014) (citing *Kelly v. Nicholson*, 463 F.3d 1349, 1355 (Fed. Cir. 2006) (when the government ignored relevant evidence presented by the plaintiff at the agency level, the government's position was not substantially justified because "a failure to consider evidence of record cannot be substantially justified.")).

The second remand in 2019 was predicated upon the AFBCMR's improper consideration of two DoD instructions and an Air Force policy the effective dates of which were subsequent to the Air Force's June 2014 final determination that Mr. Monroe was unfit for duty. Appx3-4, Appx148-149, Appx155-156. The government admitted as much in its motion for a voluntary remand: "In determining whether the Air Force erred in finding Mr. Monroe unfit for duty, the AFBCMR should not consider instructions and policies issued after the Air Force's final determination of unfitness. *See Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005) ('the Army regulations in effect at the time of [plaintiff's]

discharge in 1970, rather than current regulations, guide our analysis.')." *See* Appx148-149.

The AFBCMR's reliance on a position manifestly contrary to the clear and settled controlling precedent of this Court was unreasonable and cannot be substantially justified. *See Norris v. SEC*, 695 F.3d at 1265 (citing *Nalle v. C.I.R*., 55 F.3d 189, 192 (5th Cir.1995)); *cf. Sabo v. United States*, 127 Fed.Cl. 606, 632-33 (2016) ("[w]here ... the government interprets a statute in a manner that is contrary to its plain language ..., it will prove difficult to establish substantial justification.") (quoting *Patrick v. Shinseki*, 668 F.3d 1325, 1330-31 (Fed. Cir. 2011)).

The fundamental nature of the errors committed by the AFBCMR requiring a remand in 2018 and again in 2019 amply supports the trial court's judgment that the government's "position was plagued by agency errors" and "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" such that the government's position "could not have a reasonable basis in law and fact" and was not substantially justified. Appx7.

B. The Trial Court Properly Rejected that the Government's Overall Position Was that Mr. Monroe Was Unfit and that Position Was Vindicated, Correctly Finding that the Government's Position Was that No Error or Injustice Existed Because There Was No Evidence that Mr. Monroe Was Improperly Separated from Active Duty in 2015

The government concedes that the errors made in the AFBCMR decisions necessitating the remands were not substantially justified, but claims such errors were not prejudicial because they were merely "interim" and were corrected and vindicated by the subsequent board decisions finding Mr. Monroe unfit, reflecting what the government now contends was its "overall position that Mr. Monroe should not be restored to active duty." *See* Defendant-Appellant's Opening Brief (Govt. Br.) 31-32. The government's argument is wrong for two reasons. First, as properly determined by the trial court, the government's overall 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." Appx7 (citing Mr. Monroe's EAJA application reply, ECF No. 34 at 12) (internal quotations omitted). Second, the 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 decisions.

The AFBCMR decisions establish that the government's overall position was that Mr. Monroe's separation with disability severance pay was proper

because his disability evaluation process involved no errors or injustice. The AFBCMR initial decision in 2017 denied relief because it found "*no error in the applicant's disability evaluation process* to include the review from SAFPC or at the time of separation." Appx506 (emphasis added). The AFBCMR first remand decision in 2019 denied relief because it "found no evidence that the applicant was *improperly separated from active duty in 2015*." Appx82 (emphasis added). The AFBCMR second remand decision in 2020, granting relief and changing Mr. Monroe's separation with severance pay to a disability retirement, was devoid of language finding no error or injustice in Mr. Monroe's case, a finding it necessarily would have made if, in fact, the government's "overall position" was that the fitness decision was not erroneous and was "vindicated" despite the decision to grant relief. *See* Appx175-176.

The AFBCMR's focus on whether there was an error or injustice in Mr. Monroe's "disability evaluation process" was mandated by regulation, which directed the board first to determine if an error or injustice existed before deciding what change in Mr. Monroe's military status was the appropriate remedy or relief. *See Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (in carrying out its function, the AFBCMR must determine 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) (citing an earlier version of 32 C.F.R. § 865.4(h)(4)); *see also* 32 C.F.R. § 865.4(h)(4) (2017) ("The Board will make determinations on the following issues in writing … [w]hether 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.").

The government argues that the trial court abused its discretion by failing to focus "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." Govt. Br. 29 (emphasis in original). The government's argument fails because it misapprehends and distorts the nature of Mr. Monroe's claims in the litigation. In his single count complaint and amended complaint, Mr. Monroe alleged pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), 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. *See Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009)); Appx18, Appx86, Appx90-91. The specific errors alleged as "claims for relief" in the complaint and amended complaint covered a variety of

issues, but each involved allegations of error in Mr. Monroe's disability evaluation process or its review and each involved the allegation that Mr. Monroe's separation with severance pay was wrongful because the "arbitrary and capricious" standard of review had not been met. *See* complaint, Appx46-57; amended complaint, Appx130-145 (*e.g.,* violation of DoDI 1332.38 by: failing to apply the benefit of unresolved doubt in favor of Mr. Monroe, Appx46-47, Appx133-135, unlawfully considering the potential precedential impact of Mr. Monroe's case on other cases, Appx47-48, Appx135-136, and relying on speculation and conjecture, Appx48-50, Appx138-139; violation of an Air Force regulation by improperly constituting the November 2013 formal PEB by using the same voting members from the July 2013 PEB, Appx57, Appx130-131; and, wrongful use of DoD regulations and Air Force policy not in effect at the time of Mr. Monroe's disability evaluation process, Appx132-133).

Had Mr. Monroe's lawsuit challenged the merits of the government's purported "overall position" that he was unfit to serve in the military, as the government argues he did, rather than challenging the Air Force errors in the disability evaluation process that resulted in his improper separation with severance pay, as he actually did, the justiciability of the allegations would have been problematic. The lack of a government motion to dismiss Mr. Monroe's complaint on justiciability grounds underscores that contrary to the government's

litigation position, the complaint's claims focused on the arbitrary and capricious errors in the disability evaluation process. *Compare Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) ("responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province"), *with Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) ("although the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy") (emphasis in original).

That Mr. Monroe's substantive right to money damages under the Tucker Act's waiver of sovereign immunity and the trial court's jurisdiction were premised on the money-mandating Military Pay Act, 37 U.S.C. § 204, is of no significance in defining Mr. Monroe's claims as a challenge to the Air Force decision finding him unfit rather than as a challenge to the errors in the disability evaluation process leading to his separation with severance pay. The "arbitrary and capricious" standard of review applies whether jurisdiction is based on the Military Pay Act, *see Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006), or the money-mandating disability retirement provisions of 10 U.S.C. § 1201. *See Fisher v. United States*, 402 F.3d 1167, 1180 (Fed. Cir. 2005).

To be sure, Mr. Monroe sought as a remedy from the trial court restoration to active duty – or at least correction of his records to reflect active duty service

credit with eligibility for immediate retirement. Appx57-58, Appx145-146. But, contrary to the government's argument this relief sought does not define the scope of Mr. Monroe's claims, because before he either could be restored to active duty or be placed in a proper retirement status, he successfully had to demonstrate that his wrongful separation with severance pay resulted from decision making in the disability evaluation process that did not meet the "arbitrary and capricious" standard. *See, e.g., Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (plaintiff must show correction board decision was arbitrary, capricious, contrary to law, or unsupported by substantial evidence). Mr. Monroe did just that in his pleadings and AFBCMR submissions. Mr. Monroe also recognized, consistent with the AFBCMR's regulation, 32 C.F.R. § 865.4(h)(4), that because the decision regarding appropriate relief was separate from and followed only after a determination had been made that a procedural error or injustice existed, he should and did request alternative relief short of restoration to duty. *See* 2016 advisory opinion comments requesting 15-year retirement, Appx254; 2019 advisory opinion comments noting eligibility for longevity retirement, Appx318-319; 2019 advisory opinion comments requesting disability retirement at 40 percent, Appx406.

The government unsuccessfully mischaracterizes Mr. Monroe's response in 2019 to the AFBCMR medical consultant's advisory opinion that the board should have applied a 40 percent disability rating, as a dramatic shift in Mr. Monroe's

"complaint before the trial court or in his arguments to the AFBCMR," because he purportedly for the first time was challenging his disability rating. *See* Govt. Br. 32-33. It was no such thing. Mr. Monroe's argument in his comments to the AFBCMR in 2019, Appx405-406, was simply the continuation of and consistent with his allegations before the trial court and his position before the AFBCMR that the Air Force decision making and its review by the AFBCMR related to his disability evaluation process were "arbitrary and capricious." In this instance, Mr. Monroe's argument acknowledged the obvious implications for potential alternative relief consisting of a disability retirement arising from the AFBMCR medical consultant's concession that after all this time the record did not, in fact, support the prior decisions of the AFBCMR that there was no error or injustice in Mr. Monroe's disability evaluation process and that he had been properly separated from active duty with severance pay in 2015.

The government's contention that the AFBCMR's "interim" errors did not prejudicially affect its purported "overall position" that Mr. Monroe was unfit has no merit. It is inconsistent with the AFBCMR decisions, the AFBCMR regulation, the factual and legal allegations in Mr. Monroe's complaint and amended complaint and his remand submissions to the board, and the arbitrary and capricious standard of review applied to correction board decision making. The

trial court did not abuse its discretion when it rejected the government's substantial justification argument.

C. The Government's Assertion that the Remand Errors Were Harmless Is Improper Because Their Nature Precludes a Reviewing Court from Assessing the Magnitude of Their Effect on the Outcome of the AFBCMR Decisions

In asserting that the errors resulting in each of the two remands were "interim" and not prejudicial because the AFBCMR continued to find Mr. Monroe unfit, the government improperly seeks to apply a harmless error analysis. The 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. *See Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred. This is particularly true here, where a finding of harmlessness would require us to approximate the absolute discretion afforded the Secretary of the Army on personnel matters with a determination of our own.").

With the first AFBCMR decision in 2017, it is impossible to determine without speculation what the board members would have considered relevant and how consideration of the three omitted arguments (benefit of the doubt, improper consideration of precedent, and the availability of deployment waivers) would have

affected the discretionary decision of the board members at the time on whether a material error or injustice existed. *See* Appx61-63, Appx507. Similar speculation would be required regarding the outcome of the first remand decision in 2019 had the new board members at the time the board convened not been presented with inapplicable DoD regulations and Air Force policy on deployability, *see* Appx84, Appx148-149, or how being exposed to that tainted information affected the outcome of the same board members' second remand decision in 2020 granting partial relief. *See* Appx176; *see also* 32 C.F.R. § 865.4(c) ("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.").

The government's argument that the so-called "interim" errors warrant a finding of harmlessness must be rejected, because it inappropriately would require this Court "to approximate the absolute discretion afforded the [AFBCMR board members] … with a determination of [its] own." *See Wagner*, 365 F.3d at 1365.

D. The Trial Court Correctly Found that the Government's Position Was Not Substantially Justified Because the AFBCMR Continued Pressing a Tenuous Factual or Legal Position through the First Remand Decision

In addition to the AFBCMR errors necessitating remand, the trial court scrutinized the "entirety" of the AFBCMR's conduct and identified factors that in the court's judgment weighed in favor of the conclusion that the government's

position had no reasonable basis in law and fact and was not substantially justified. These factors, which were well-within the trial court's discretion to weigh, cumulatively indicated that the Air Force engaged in conduct over the course of the proceedings which unduly and unreasonably protracted the final resolution of the matter. They included: (1) the abrupt reversal of the AFBCMR's position in 2020, after three years of asserting there was no error or injustice associated with Mr. Monroe's separation with severance pay; (2) the AFBCMR's failure in its second remand decision in 2020 to explain how the prior board decisions were unable to reach the correct result on the same record as the second remand board; (3) the AFBCMR first remand decision in 2019 created a misleading record that unreasonably could convince a lay person that all of Mr. Monroe's medical records were properly and "exhaustively" evaluated when, in fact, they were not; (4) the AFBCMR's reliance on a position it ultimately admitted was wrong prejudiced Mr. Monroe by forcing him to dispute and litigate his disability evaluation process and its review for years; and (5) the material nature of the change in Mr. Monroe's status after the AFBCMR remedied its error was sufficiently significant to view the AFBCMR's original position as unreasonable.

The trial court determined that the AFBCMR "continued 'pressing a tenuous factual or legal position' through the first remand decision. ECF No. 32 at 26-27." Appx7. The shaky rationale for the AFBCMR's position is evident from the

board's abrupt reversal, in the second remand decision on January 15, 2020, of its prior position that Mr. Monroe's separation with severance pay based on a 20 percent disability rating was supported by the evidence and there was no error or injustice in connection with his disability evaluation process. *See* Appx212-213 (ECF No. 32 at 26-27). Moreover, the AFBCMR provided no explanation how or why the board in 2017 and 2019 failed to reach the correct outcome on the same record that the board in 2020 used to convert Mr. Monroe's separation with disability severance pay to a disability retirement. The AFBCMR's failure or inability to explain a rational basis for its prior denials of relief in 2017 and 2019 highlights the lack of any justification for the government's position "to a degree that could satisfy a reasonable person." *See Norris v. SEC*, 695 F.3d 1261, 1265 (Fed. Cir. 2012); *see also Bauer v. DeVos*, 325 F.Supp.3d 74, 109 (D.D.C. 2018) ("an unacknowledged and unexplained inconsistency is the hallmark of arbitrary and capricious decision-making").

Recognizing the lack of any rational explanation by the AFBCMR in its second remand decision in 2020 for the deficiencies in its earlier decisions, the government seeks to fill the gap with appellate counsel's version of the AFBCMR's earlier decision making rather than a defense of the AFBCMR's reasoning grounded in the actual administrative record. Among other things, counsel argues that the Department of Veterans Affairs (VA) and not the Air Force

assigned Mr. Monroe's disability rating and the language of the VA rating schedule and its interpretation by the United States Court of Appeals for Veterans Claims, when compared to Mr. Monroe's medical records, purportedly show that the 20 percent rating had a reasonable basis in law and fact. *See* Govt. Br. 36-38.

The reasons proffered by the government must be rejected as 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. *See Haga v. Astrue*, 482 F.3d 1205, 1207-08 (10th Cir. 2007) (finding no substantial justification, the court rejected as *post hoc* rationale the government's proffer of reasons to support an administrative law judge's finding that were not apparent from the administrative decision itself). Although *Haga* involved review of a social security disability decision, it is analogous to the AFBCMR administrative proceeding here where the substantial justification determination must focus on the board's explanation – or lack thereof – in 2020 as to how those incorrect earlier decisions came to be made. This is not to suggest that decisions on the merits and on an EAJA application are not distinct from one another, because they are. The AFBCMR, the merits decision-maker at issue in Mr. Monroe's case, did not decide if its position was substantially justified under EAJA and the trial court, the EAJA decision-maker, cannot relitigate the merits determination. However, in the context of an agency proceeding, the trial court must make a judgment call whether

the actions by the agency had a reasonable basis in law and fact. That judgment call – together with any government defense of the reasonableness of the agency's conduct – is necessarily limited to the administrative record, which neither the court nor the government is permitted to supplement with rationale the agency failed to articulate in the first instance. *See* 28 U.S.C. § 2412(d)(1)(B) ("Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (*including the record with respect to the action or failure to act by the agency* upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.") (emphasis added); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("the courts may not accept appellate counsel's *post hoc* rationalizations for agency action …[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (focus of judicial review of agency action remains the administrative record).

The government also argues that Mr. Monroe did not raise the issue of his 40 percent disability rating until 2019, and the "AFBCMR has no duty to scour the applicant's military records in search of errors that he has not identified." Govt. Br. 39. The government's contention does not square with the AFBCMR's statements or actions in Mr. Monroe's case, which show that the trial court's

determination that the AFBCMR acted unreasonably was not an abuse of discretion. There was little ambiguity in the AFBCMR's initial decision in 2017, which denied relief because it found "no error in the applicant's disability evaluation process to include the review from SAFPC or at the time of separation." Appx506. The AFBCMR justified its first remand decision in 2019 by stressing its comprehensive review of the record: "[a]fter reviewing *all* Exhibits …[t]he Board found no evidence that the applicant was improperly separated from active duty in 2015 …[t]he applicant's case *has undergone an exhaustive review by the BCMR Medical Consultant* and the Board did not find the evidence provided, sufficient to overcome his assessment of the case." Appx82-83 (emphasis added).

The first remand AFBCMR (through its medical consultant) in 2019 "exhaustively reviewed" the same medical records that the second remand AFBCMR (through its medical consultant) reviewed in 2020, but the earlier board failed properly to assess and remedy the error or injustice the records reflected. *Cf. Melendez Camilo v. United States,* 642 F.3d 1040, 1045 (2011) (court presumes that a correction board considers all of the applicant's records). Instead, the AFBCMR issued a first remand decision that unreasonably could convince a lay person that all Mr. Monroe's medical records were properly and "exhaustively" reviewed or evaluated when, in fact, they were not. This conduct readily supports the trial court's judgment that the AFBCMR had no reasonable basis in law and

fact when it "continued 'pressing a tenuous factual or legal position' through the first remand decision" and that "[i]n addition to this change in the ultimate outcome [changing Mr. Monroe's separation with severance pay to a disability retirement], 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. *See Roth v. United States,* 378 F.3d 1371, 1381 (Fed. Cir. 2004) (when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate).

As additional factors weighing in favor of finding the government's position not substantially justified, the trial court noted that Mr. Monroe: (1) was prejudiced by having "been forced to litigate defendant's position since the Air Force's determination in 2014, which the AFBCMR ultimately determined was faulty;" and (2) the change in Mr. Monroe's status after the AFBCMR remedied its error was sufficiently significant to consider the AFBCMR's original position as unreasonable, explaining "[t]hat 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."). Appx7.

The government criticizes the trial court for "basing its substantial justification determination primarily upon the Government's position with regard

to Mr. Monroe's disability rating." Govt. Br. 33. The government contends that this error by the trial court manifested itself in two ways: the trial court's characterization of the initial AFBCMR decisions as "faulty" and 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." Govt. Br. 34.

The government argues that by characterizing as "faulty" the AFBCMR's initial decisions, the trial court ran afoul of the law that a position may be reasonable and substantially justified even if incorrect. Govt. Br. 34. Contrary to the government's claim, the trial court's language shows that its concern was not with the undisputed mistake in the agency's earlier decisions, but on weighing the extent to which the reasonableness of the government's position was diminished by the prejudice Mr. Monroe suffered from the undue delay in the resolution of his case when he was forced to litigate for six years with SAFPC, the AFBCMR, and in the trial court over a disability separation process the Air Force had steadfastly denied was flawed. In arguing that the trial court impermissibly assessed the government's position on Mr. Monroe's disability rating, the government misconstrues 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." Govt. Br. 35. The trial court's

language references the disability evaluation process and merely reiterates the trial court's conclusion that the process had no reasonable basis in law or fact, because the AFBCMR committed errors on two occasions that were sufficiently egregious to require a remand and the Air Force and the AFBCMR failed properly to evaluate the medical evidence in the record while creating a record to the contrary as the agency unreasonably persisted in pressing a tenuous position it ultimately admitted was wrong.

Even if this Court accepts the government's arguments that the AFBCMR did not unreasonably persist with a tenuous position through the remand decision in 2020, which is not the case, the Court must still affirm the trial court's substantial justification decision. First, to be substantially justified, the government's position must have a reasonable basis *both* in law and fact. *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). Mr. Monroe has already established that the trial court properly determined the government's position had no reasonable legal basis, because each remand of the case in 2018 and 2019 resulted from decision making by the AFBCMR that was manifestly contrary to well-established law. *See* pages 19-23, *supra.* That alone is sufficient to affirm the trial court's decision without the necessity to consider the government's arguments defending the AFBCMR's earlier decisions on the merits.

Second, the government's arguments substantially focus on the purported reasonable legal and factual basis for the AFBCMR's decisions in 2017 and 2019, to argue that the trial court abused its discretion. In doing so, the government impermissibly asks that this Court reweigh the factors considered by the trial court in a manner consistent with the government's view. That undertaking, however, runs afoul of this Court's admonition that "[i]t is for the trial court to weigh each position taken and conclude which way the scale tips, and as an appellate court we must be wary not to redistribute these weights among different positions unless a serious error in judgment has been made." *Chiu v. United States,* 948 F.2d at 715 n.4.

The trial court properly determined that the government's position was not substantially justified because it did not have a reasonable basis in law and fact. Mr. Monroe has demonstrated that each remand of the case in 2018 and 2019 resulted from decision making by the AFBCMR that was manifestly contrary to well-established law. That alone is sufficient to affirm the trial court's decision, because the government's position must have a reasonable basis *both* in law and in fact. The trial court also properly determined that the government's position was not substantially justified because the AFBCMR unreasonably persisted in pressing a tenuous factual position, as evidenced by the board's abrupt reversal in the second remand decision in 2020, of its prior position that Mr. Monroe's separation

with severance pay was proper, because there was neither error nor injustice in the disability evaluation process.

II. The Trial Court Did Not Abuse its Discretion by Evaluating the Significance of the Overall Relief Mr. Monroe Obtained and Finding that the Ultimate Result of Mr. Monroe's Case Converting His Separation with Disability Severance Pay to a Permanent Disability Retirement Was an Excellent Overall Result Warranting a Fully Compensable Award of Attorney's Fees and Expenses

The trial court properly exercised its discretion by awarding Mr. Monroe his full attorney's fees and expenses. Because the trial court found that Mr. Monroe's claims involved a common core of facts related to his disability evaluation process and were based on a single legal theory alleging arbitrary and capricious decision making in connection with that disability evaluation process, it viewed the case as a whole and evaluated the significance of the overall relief obtained, which the trial court characterized as an "excellent overall result." Appx8-9. The trial court emphatically rejected the government's argument that Mr. Monroe's fees should be limited because his claim for restoration to active duty was distinct from his disability retirement claim, succinctly explaining: "[d]efendant confuses plaintiff's claims with his request for relief." Appx8.

The trial court correctly relied on *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983) in awarding Mr. Monroe full attorney's fees. Appx8. In *Hensley,* the Supreme Court delineated two categories of cases that arise in the context of

awarding attorney's fees: lawsuits comprised of "distinctly different claims for relief ... based on different facts and legal theories" and lawsuits in which plaintiff's claims are grounded in "a common core of facts or will be based on related legal theories." If a case falls in the former category, fees incurred in relation to any unsuccessful claims must be excluded. *See id.* at 435. If the case falls within the latter category, as the trial court found with Mr. Monroe, "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." *See id.* "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee ... [that] should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.* A plaintiff can obtain "excellent results" even if it lost on some claims and "the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Id.*

A. The Trial Court Properly Found that Mr. Monroe's Claims Involved a Common Core of Facts and a Single Legal Theory

The trial court rightly found that Mr. Monroe's claims involved the same facts related to his disability evaluation process and a single legal theory alleging various errors committed by the AFBCMR in that process:

> 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 [Mr. Monroe's amended complaint, Appx130-145]. 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.

Appx8. Consistent with the trial court's finding, Mr. Monroe has already established that the legal theory in his single count complaint and amended complaint was 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 government agency decisions. *See* pages 26-30, *supra*; complaint, Appx18, amended complaint, Appx86, Appx90. The specific errors alleged as "claims for relief" in the complaint and amended complaint alleged error in Mr. Monroe's disability evaluation process or its review and each involved the allegation that Mr. Monroe's separation with severance pay was wrongful because the "arbitrary and capricious" standard of review had not been met. *See* complaint, Appx46-57; amended complaint, Appx130-145.

Similarly, as the trial court found, there can be no reasonable dispute that Mr. Monroe's complaint and amended complaint were grounded in the common core of facts pertaining to his disability evaluation process and its review by the AFBCMR. The factual allegations in paragraphs three through 24 of the complaint, Appx18-46, and paragraphs five through 35 of the amended complaint, Appx91-130, recite in detail the facts relevant to Mr. Monroe's claims for relief, all of which pertain to the facts surrounding Mr. Monroe's protracted saga with the

Air Force disability evaluation process or its review. That epic included Mr. Monroe's initial Physical Evaluation Board (PEB) in 2010, Appx91; his Medical Evaluation Board in 2013, Appx92-93; his two formal PEB's in 2013, Appx93-94, Appx95-96; his appeals of the PEB decisions to SAFPC in 2013, Appx94-95, Appx96-98; the AFBCMR decisions in 2017, Appx501-507, and 2019, Appx74-84; Mr. Monroe's remand submissions and comments to advisory opinions provided to the AFBCMR in 2018, Appx256-288 (remand submission), and 2019, Appx289-320 (advisory opinion comments), Appx321-348 (supplemental remand submission); Appx349- 389 (second remand submission), Appx396-407 (advisory opinion comments), and the AFBCMR decision in January 2020 granting relief as a disability retirement, Appx166-177.

The trial court considered and correctly rejected the government's attempt to limit an award of fees through its fabrication of two purportedly distinct, contradictory legal claims by Mr. Monroe – one that he was fit and should be restored to active duty and one that he was unfit to serve and was eligible for a disability retirement. Appx8. The trial court understood that the government mistakenly conflated Mr. Monroe's claims focused on arbitrary and capricious decision making in the disability evaluation process with his demand for judgment that he be restored to active duty: "[p]laintiff's claim was grounded in the same facts pertaining to his Air Force evaluation and the AFBCMR's decisions

regardless of the relief sought." Appx8 (emphasis added). The trial court fittingly described the fundamental flaw in the government's argument: "[d]efendant confuses plaintiff's claim with his request for relief." Appx8.

Mr. Monroe already has demonstrated the specious basis for the government's argument that Mr. Monroe unsuccessfully asserted claims for restoration to active duty that were distinct from an alleged disability retirement claim made at the tail end of the proceeding. *See* Argument § I.B., *supra.* For example, Mr. Monroe showed that the government's argument is contradicted by the AFBCMR decisions, which reflected that the government's overall position was that Mr. Monroe's separation with disability severance pay was proper because his disability evaluation process involved no errors or injustice. *See* pages 24-25, *supra* ("no error in the applicant's disability evaluation process to include the review from SAFPC or at the time of separation," Appx506; "no evidence that the applicant was improperly separated from active duty in 2015," Appx82). Mr. Monroe showed that the government's argument was inconsistent with the AFBCMR's controlling regulation, 32 C.F.R. § 865.4(h)(4), which directed the board first to determine if an error or injustice existed before deciding what change in Mr. Monroe's military status was the appropriate remedy or relief. *See* pages 25-26, *supra*. Mr. Monroe showed that had his lawsuit challenged the merits of the Air Force decision that he was unfit to serve in the military, rather than focusing on

the errors in the disability evaluation process that resulted in his improper separation with severance pay, as the trial court correctly found he did, the justiciability of his claims would have been problematic and would have elicited a government motion to dismiss, the absence of which belies the government's argument here. *See* pages 27-28, *supra.*

B. The Trial Court Correctly Viewed the Case as a Whole and Evaluated the Significance of the Relief Which Mr. Monroe Obtained, Properly Finding His Permanent Disability Retirement an Excellent Overall Result Warranting a Fully Compensable Award of Attorney's Fees and Expenses

Having correctly determined that Mr. Monroe's case involved a common core of facts and a single legal theory, the trial court followed *Hensley*, 461 U.S. at 435, and "view[ed] the case as a whole and evaluate[d] 'the significance of the overall relief obtained.'" Appx8-9. The trial court properly found 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." Appx9. Consistent with *Hensley,* 461 U.S. at 435, the trial court aptly found that because Mr. Monroe had obtained excellent results "his attorney should recover a fully compensatory fee … [which] should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." (internal quotations omitted). Appx9.

The trial court's finding that a permanent disability retirement is an excellent result is well-considered, the court having explained that 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." Appx9. Mr. Monroe's disability severance entitled him to a one-time payment, while disability retirement provides monthly disability retired pay for life. *See* 10 U.S.C. §§ 1201(a) (retirement), 1203(a) (separation), 1212 (severance pay), 1401 (retirement pay). In addition, Mr. Monroe's permanent disability retirement had substantial additional benefits beyond lifetime retired pay, as he became eligible to receive for his lifetime: government sponsored healthcare for him and his dependents, *see* 32 C.F.R. § 199.17 (implementing the military-sponsored TRICARE medical program; *see also McCord v. United States,* 943 F.3d 1354, 1359 (Fed. Cir. 2019)); and military exchange and commissary privileges for him and his dependents, *see* 10 U.S.C. § 2481(a); *see also Smalls v. United States,* 471 F.3d 186, 190 (D.C. Cir. 2006) (military disability retirement status has considerable value independent of any future potential for monetary relief).

Although "recogniz[ing] 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," the government argues the trial court abused its discretion because the government does not agree that the results were "sufficiently 'excellent' to justify a fully compensatory EAJA award." Govt. Br. 48. The government argues that Mr. Monroe originally sought $600,000 in back pay and allowances and restoration to active duty but received only disability retirement with no retroactive disability retired pay due to the government's recoupment of disability benefits previously paid by the VA to Mr. Monroe and Mr. Monroe's disability severance payment. *Id.* at 48-49.

The government's argument fails for three reasons. First, the government merely expresses disagreement with the trial court's exercise of judgment in weighing the facts to conclude the ultimate outcome was an excellent result, and improperly requests that this Court reweigh them. *See Chiu v. United States,* 948 F.2d 711, 715 n.4 (Fed. Cir. 1991). In that regard, the government identifies no instance, nor is there any, where any court has concluded in a military pay case that relief resulting in the conversion of a separation with severance pay to a disability retirement constitutes limited or partial success and is a proper basis for the court to exercise its broad discretion to reduce an award of attorney's fees. The government merely cuts, pastes, and recycles for this Court the same arguments it unsuccessfully advanced in other litigation. *See Brass v. United States,* 127 Fed.Cl. 505, 514 (2016). In *Brass,* the Claims Court rejected the government's

contention that the plaintiff achieved only limited or partial success in declining to reduce a full EAJA award, where the plaintiff's separation with disability severance pay was converted to a disability retirement, but her retroactive and prospective military disability retired pay, like that of Mr. Monroe, was subject to recoupment and offset due to her receipt of a disability severance payment and VA benefit payments. *Id.* The court declined the government's invitation to "denigrate the additional benefits" plaintiff's relief entailed, "including the medical care that she and her minor children may now receive." *Id.* at 515. The court found no "basis to further reduce Ms. Brass's EAJA award based on the fact that she is receiving VA benefits." *Id.*

Second, the government's assertion that Mr. Monroe's fees should be reduced because he "*owed the Government* more than $75,000 as a result of the 'relief' he received from the AFBCMR" is misinformed. Govt. Br. 47 (emphasis in original). Mr. Monroe received the full benefit of the disability retired back pay – $178,000 or some similar substantial amount – to which he became entitled following the AFBCMR's grant of relief through the dollar-for-dollar liquidation and reduction of Mr. Monroe's recoupment balance arising from his prior disability severance and VA disability benefits payments. The recoupment of the prior payments operated as a matter of law separate and apart from the AFBCMR relief and the trial court's judgment, neither of which ordered a reduction of or an

offset to the relief granted to Mr. Monroe. The recoupment would have applied to any award of retroactive retired pay, including that resulting if Mr. Monroe had been restored to active duty and retired for longevity. *See* 10 U.S.C. § 1174(h) (requiring recoupment of severance payment if service member later becomes eligible for any retired pay); 38 U.S.C. § 5304 (veteran generally may not receive both military retired pay and VA benefits payments); *see also McCord v. United States,* 943 F.3d 1354, 1357-59 (Fed. Cir. 2019). The incongruity of the government's attempt to characterize Mr. Monroe's entitlement to $178,000 in retroactive disability retired pay as trivial or insignificant is apparent when juxtaposed with the government's commitment of five attorneys at the trial court and now before this Court on appeal to thwart Mr. Monroe's recovery of $50,881 in attorney's fees and expenses.

Third, the government's argument is inconsistent with this Court's precedent that an EAJA applicant may achieve more than partial or limited success even where the applicant did not receive all the relief requested. *Hitkansut LLC v. United States*, 958 F.3d 1162 (Fed. Cir. 2020). In *Hitkansut*, the government argued that the trial court erred by failing to reduce the attorneys' fees awarded, because the plaintiff originally sought $5.6 million in damages, but was awarded only $200,000, which the government said reflected "limited success" in its lawsuit. *Id.* at 1169. This Court disagreed, noting that the plaintiff brought one

patent infringement claim, prevailed on it, and the "fact that it obtained less monetary relief than it may have hoped does not mean that it obtained 'limited success' as the term is used in *Hensley*." *Id.* at 1170. The Court ruled that "because Hitkansut succeeded on its sole claim, and proved a material amount of actual, compensable damages, the Claims Court did not abuse its discretion by declining to further reduce its award of attorneys' fees." *Id.* Consistent with *Hitkansut*, there is no basis to find that the trial court abused its discretion by not reducing Mr. Monroe's attorney's fees for purported limited success. Mr. Monroe brought one count alleging that he was wrongfully separated with disability severance pay due to arbitrary and capricious decision making or errors in his disability evaluation process. He succeeded on that count when the AFBCMR in the second remand concluded his separation with severance pay was erroneous and converted it to a disability retirement. The relief Mr. Monroe obtained, a disability retirement and entitlement to retired back pay of $178,000 subject to recoupment, although "less …relief than [he] may have hoped," was a material amount of actual, compensable damages and warranted the fully compensatory attorney's fees the trial court in its discretion awarded for an excellent result.

The government argues that two cases, *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990) and *Hubbard v. United States*, 480 F.3d 1327 (Fed. Cir. 2007), limit *Hitkansut* to circumstances where a plaintiff succeeds on its sole claim and

recovers the maximum amount of damages allowable by law even though the plaintiff obtained significantly less relief than it sought in its complaint. Govt. Br. 50-51. These cases do no such thing. In *Jean*, the Supreme Court held that a second "substantial justification" finding is not required before EAJA fees are awarded for fee litigation itself. 496 U.S. at 165-166. The footnote upon which the government relies, 465 U.S. at 163 n.10, merely provides an example of how a trial court has the discretion to resolve fee on fee disputes; it has no applicability to the holding of *Hitkansut* nor to this appeal, which involves no issue related to fees or costs claimed in connection with the defense of Mr. Monroe's EAJA application.

In *Hubbard,* this Court determined that the trial court had not explained why a $110,000 fee award was reasonable in light of the degree of success obtained, a breach of contract damages recovery of $400. 480 F.3d at 1333. The Court reiterated, however, consistent with *Hensley,* that a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees. *Id.* *Hubbard* is consistent with and in no way circumscribes *Hitkansut's* holding that a plaintiff who successfully recovers an actual amount of material, compensable damages, even if less than demanded, does not experience limited success requiring a fee reduction.

Unlike in *Hubbard,* the trial court here did assess Mr. Monroe's degree of success when it found that "the ultimate result of [Mr. Monroe]'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." Appx9. The trial court acted well within its broad discretion when it awarded Mr. Monroe fully compensatory attorney's fees and expenses considering the significant monetary and non-pecuniary benefits that he derived from his change in status to a military retiree retroactive to January 2015 – an outcome brought about only through the initiation and litigation of this lawsuit.

CONCLUSION

The trial court did not abuse its discretion in finding the government's position was not substantially justified and in awarding full attorney's fees and expenses. Accordingly, this Court should affirm the trial court's judgment.

Respectfully submitted,

The Law Offices of Scott W. MacKay, LLC
/s/ Scott W. MacKay
P.O. Box 295
Hebron, New Hampshire 03241
(603) 412-2598
swmackay76@gmail.com
Attorney for Plaintiff-Appellee
Allen H. Monroe

May 20, 2021

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 12,560 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, counsel for Plaintiff-Appellee Allen H. Monroe 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.

The Law Offices of Scott W. MacKay, LLC

By: /s/ Scott W. MacKay
Attorney for Plaintiff-Appellee Allen H. Monroe

May 20, 2021

ADDENDUM

ADDENDUM TABLE OF CONTENTS

10 U.S.C. § 1174 1
10 U.S.C. § 1201 6
10 U.S.C. § 1203 8
10 U.S.C. § 1212 10
10 U.S.C. § 1401 12
10 U.S.C. § 2481 14
10 U.S.C. § 9311 16
28 U.S.C. § 1491 17
28 U.S.C. § 2412 19
37 U.S.C. § 204 24
38 U.S.C. § 5304 28
32 C.F.R. § 199.17 30
32 C.F.R. § 865.4 55
Department of Defense Instruction 1332.18 (Extract) 59
Department of Defense Instruction 1332.38 (Extract) 62
Department of Defense Instruction 1332.45 (Extract) 70

10 U.S.C.A. § 1174

§ 1174. Separation pay upon involuntary discharge or release from active duty

Effective: January 1, 2021
Currentness

(a) Regular officers.--(1) A regular officer who is discharged under chapter 36 of this title (except under section 630(1)(A) or 643 of such chapter) or under section 580 or 8372 of this title and who has completed six or more, but less than twenty, years of active service immediately before that discharge is entitled to separation pay computed under subsection (d)(1).

(2) A regular commissioned officer of the Army, Navy, Air Force, Marine Corps, or Space Force who is discharged under section 630(1)(A), 643, or 1186 of this title, and a regular warrant officer of the Army, Navy, Air Force, Marine Corps, or Space Force who is separated under section 1165 or 1166 of this title, who has completed six or more, but less than twenty, years of active service immediately before that discharge or separation is entitled to separation pay computed under subsection (d)(1) or (d)(2), as determined by the Secretary of the military department concerned, unless the Secretary concerned determines that the conditions under which the officer is discharged or separated do not warrant payment of such pay.

(3) Notwithstanding paragraphs (1) and (2), an officer discharged under any provision of chapter 36 of this title for twice failing of selection for promotion to the next higher grade is not entitled to separation pay under this section if either (or both) of those failures of selection for promotion was by the action of a selection board to which the officer submitted a request in writing not to be selected for promotion or who otherwise directly caused his nonselection through written communication to the Board under section 614(b) of this title.

(4) Notwithstanding paragraphs (1) and (2), an officer who is subject to discharge under any provision of chapter 36 of this title or under section 580 or 8372 of this title by reason of having twice failed of selection for promotion to the next higher grade is not entitled to separation pay under this section if that officer, after such second failure of selection for promotion, is selected for, and declines, continuation on active duty for a period that is equal to or more than the amount of service required to qualify the officer for retirement.

(b) Regular enlisted members.--(1) A regular enlisted member of an armed force who is discharged involuntarily or as the result of the denial of the reenlistment of the member and who has completed six or more, but less than 20, years of active service immediately before that discharge is entitled to separation pay computed under subsection (d) unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.

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(2) Separation pay of an enlisted member shall be computed under paragraph (1) of subsection (d), except that such pay shall be computed under paragraph (2) of such subsection in the case of a member who is discharged under criteria prescribed by the Secretary of Defense.

(c) Other members.--(1) Except as provided in paragraphs (2) and (3), a member of an armed force other than a regular member who is discharged or released from active duty and who has completed six or more, but fewer than 20, years of active service immediately before that discharge or release is entitled to separation pay computed under subsection (d)(1) or (d)(2), as determined by the Secretary concerned, if--

(A) the member's discharge or release from active duty is involuntary; or

(B) the member was not accepted for an additional tour of active duty for which he volunteered.

(2) If the Secretary concerned determines that the conditions under which a member described in paragraph (1) is discharged or separated do not warrant separation pay under this section, that member is not entitled to that pay.

(3) A member described in paragraph (1) who was not on the active-duty list when discharged or separated is not entitled to separation pay under this section unless such member had completed at least six years of continuous active duty immediately before such discharge or release. For purposes of this paragraph, a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days.

(4) In the case of an officer who is subject to discharge or release from active duty under a law or regulation requiring that an officer who has failed of selection for promotion to the next higher grade for the second time be discharged or released from active duty and who, after such second failure of selection for promotion, is selected for, and declines, continuation on active duty--

(A) if the period of time for which the officer was selected for continuation on active duty is less than the amount of service that would be required to qualify the officer for retirement, the officer's discharge or release from active duty shall be considered to be involuntary for purposes of paragraph (1)(A); and

(B) if the period of time for which the officer was selected for continuation on active duty is equal to or more than the amount of service that would be required to qualify the officer for retirement, the officer's discharge or release from active duty shall not be considered to be involuntary for the purposes of paragraph (1)(A).

(d) Amount of separation pay.--The amount of separation pay which may be paid to a member under this section is--

(1) 10 percent of the product of (A) his years of active service, and (B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty; or

(2) one-half of the amount computed under clause (1).

(e) Requirement for service in ready reserve; exceptions to eligibility.--(1)(A) As a condition of receiving separation pay under this section, a person otherwise eligible for that pay shall be required to enter into a written agreement with the Secretary concerned to serve in the Ready Reserve of a reserve component for a period of not less than three years following the person's discharge or release from active duty. If the person has a service obligation under section 651 of this title or under any other provision of law that is not completed at the time the person is discharged or released from active duty, the three-year obligation under this subsection shall begin on the day after the date on which the person completes the person's obligation under such section or other provision of law.

(B) Each person who enters into an agreement referred to in subparagraph (A) who is not already a Reserve of an armed force and who is qualified shall, upon such person's discharge or release from active duty, be enlisted or appointed, as appropriate, as a Reserve and be transferred to a reserve component.

(2) A member who is discharged or released from active duty is not eligible for separation pay under this section if the member--

(A) is discharged or released from active duty at his request;

(B) is discharged or released from active duty during an initial term of enlistment or an initial period of obligated service, unless the member is an officer discharged or released under the authority of section 647 of this title;

(C) is released from active duty for training; or

(D) upon discharge or release from active duty, is immediately eligible for retired or retainer pay based on his military service.

(f) Counting fractional years of service.--In determining a member's years of active service for the purpose of computing separation pay under this section, each full month of service that is in addition to the number of full years of service creditable to the member is counted as one-twelfth of a year and any remaining fractional part of a month is disregarded.

(g) Coordination with other separation or severance pay benefits.--A period for which a member has previously received separation pay under this section or severance pay or readjustment pay under any other provision of law based on service in the armed forces may not be included in determining the years of service that may be counted in computing the separation pay of the member under this section.

(h) Coordination with retired or retainer pay and disability compensation.--(1) A member who has received separation pay under this section, or separation pay, severance pay, or readjustment pay under any other provision of law, based on service in the armed forces, and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of separation pay, severance pay, and readjustment pay so paid.

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(2) A member who has received separation pay under this section, or severance pay or readjustment pay under any other provision of law, based on service in the armed forces shall not be deprived, by reason of his receipt of such separation pay, severance pay, or readjustment pay, of any disability compensation to which he is entitled under the laws administered by the Department of Veterans Affairs, but there shall be deducted from that disability compensation an amount equal to the total amount of separation pay, severance pay, and readjustment pay received, less the amount of Federal income tax withheld from such pay (such withholding being at the flat withholding rate for Federal income tax withholding, as in effect pursuant to regulations prescribed under chapter 24 of the Internal Revenue Code of 1986). Notwithstanding the preceding sentence, no deduction may be made from disability compensation for the amount of any separation pay, severance pay, or readjustment pay received because of an earlier discharge or release from a period of active duty if the disability which is the basis for that disability compensation was incurred or aggravated during a later period of active duty.

(i) Special rule for members receiving sole survivorship discharge--(1) A member of the armed forces who receives a sole survivorship discharge shall be entitled to separation pay under this section even though the member has completed less than six years of active service immediately before that discharge. Subsection (e) shall not apply to a member who receives a sole survivorship discharge.

(2) The amount of the separation pay to be paid to a member pursuant to this subsection shall be based on the years of active service actually completed by the member before the member's sole survivorship discharge.

(3) In this subsection, the term "sole survivorship discharge" means the separation of a member from the armed forces, at the request of the member, pursuant to the Department of Defense policy permitting the early separation of a member who is the only surviving child in a family in which--

(A) the father or mother or one or more siblings--

(i) served in the armed forces; and

(ii) was killed, died as a result of wounds, accident, or disease, is in a captured or missing in action status, or is permanently 100 percent disabled or hospitalized on a continuing basis (and is not employed gainfully because of the disability or hospitalization); and

(B) the death, status, or disability did not result from the intentional misconduct or willful neglect of the parent or sibling and was not incurred during a period of unauthorized absence.

(j) Regulations; crediting of other commissioned service.--(1) The Secretary of Defense shall prescribe regulations, which shall be uniform for the Army, Navy, Air Force, Marine Corps, and Space Force, for the administration of this section.

(2) Active commissioned service in the National Oceanic and Atmospheric Administration or the Public Health Service shall be credited as active service in the armed forces for the purposes of this section.

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(Added Pub.L. 96-513, Title I, § 109(c), Dec. 12, 1980, 94 Stat. 2870; amended Pub.L. 97-22, § 10(b)(10)(A), July 10, 1981, 95 Stat. 137; Pub.L. 98-94, Title IX, §§ 911(a), (b), 923(b), Title X, § 1007(c)(2), Sept. 24, 1983, 97 Stat. 639, 640, 643, 662; Pub.L. 98-498, Title III, § 320(a)(2), Oct. 19, 1984, 98 Stat. 2308; Pub.L. 101-189, Div. A, Title XVI, § 1621(a)(1), Nov. 29, 1989, 103 Stat. 1602; Pub.L. 101-510, Div. A, Title V, § 501(a) to (d), (g), (h), Nov. 5, 1990, 104 Stat. 1549 to 1551; Pub.L. 102-190, Div. A, Title XI, § 1131(6), Dec. 5, 1991, 105 Stat. 1506; Pub.L. 103-160, Div. A, Title V, § 501(a), Nov. 30, 1993, 107 Stat. 1644; Pub.L. 103-337, Div. A, Title V, § 560(c), Oct. 5, 1994, 108 Stat. 2778; Pub.L. 104-201, Div. A, Title VI, § 653(a), Sept. 23, 1996, 110 Stat. 2583; Pub.L. 105-85, Div. A, Title X, § 1073(a)(22), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 105-261, Div. A, Title V, § 502(a), Oct. 17, 1998, 112 Stat. 2003; Pub.L. 106-398, § 1 [Div. A, Title V, § 508(a), (b), Oct. 30, 2000, 114 Stat. 1654, 1654A-107; Pub.L. 108-375, Div. A, Title V, § 501(c)(2), Oct. 28, 2004, 118 Stat. 1874; Pub.L. 110-317, § 3, Aug. 29, 2008, 122 Stat. 3527; Pub.L. 111-32, Title III, § 318(a), June 24, 2009, 123 Stat. 1873; Pub.L. 111-383, Div. A, Title X, § 1075(b)(17), Jan. 7, 2011, 124 Stat. 4370; Pub.L. 115-232, Div. A, Title VIII, § 809(a), Aug. 13, 2018, 132 Stat. 1840; Pub.L. 116-283, Div. A, Title IX, § 924(b)(1)(K), (3)(S), Jan. 1, 2021, 134 Stat. 3820, 3821.)

10 U.S.C.A. § 1174, 10 USCA § 1174
Current through PL 117-8 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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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;

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(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 117-8 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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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. § 1203

§ 1203. Regulars and members on active duty for more than 30 days: separation

Currentness

(a) Separation.--Upon a determination by the Secretary concerned that a member described in section 1201(c) of this title 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 section 1201(c)(3) of this title, the member may be separated from the member's armed force, with severance pay computed under section 1212 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) the member has less than 20 years of service computed under section 1208 of this title;

(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;

(3) based upon accepted medical principles, the disability is or may be of a permanent nature; and

(4) either--

(A) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, and the disability was (i) the proximate result of performing active duty, (ii) incurred in line of duty in time of war or national emergency, or (iii) incurred in line of duty after September 14, 1978;

(B) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination, 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), or

(C) 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, the disability was neither (i) the proximate result of performing active

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duty, (ii) incurred in line of duty in time of war or national emergency, nor (iii) incurred in line of duty after September 14, 1978, and the member has less than eight years of service computed under section 1208 of this title on the date when he would otherwise be retired under section 1201 of this title or placed on the temporary disability retired list under section 1202 of this title.

However, if the member is eligible for transfer to the inactive status list under section 1209 of this title, and so elects, he shall be transferred to that list instead of being separated.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 92; 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(2), (3), Sept. 19, 1978, 92 Stat. 719, 720; Pub.L. 96-343, § 10(c)(2), (3), Sept. 8, 1980, 94 Stat. 1129; Pub.L. 96-513, Title I, § 117, Dec. 12, 1980, 94 Stat. 2878; 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(c), Sept. 23, 1996, 110 Stat. 2533; Pub.L. 110-181, Div. A, Title XVI, § 1641(b), Jan. 28, 2008, 122 Stat. 465; Pub.L. 110-417, [Div. A], Title VII, § 727(b), Oct. 14, 2008, 122 Stat. 4510; Pub.L. 111-383, Div. A, Title X, § 1075(b)(19), (e)(12), Jan. 7, 2011, 124 Stat. 4370, 4375.)

10 U.S.C.A. § 1203, 10 USCA § 1203
Current through PL 117-8 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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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. § 1212

§ 1212. Disability severance pay

Effective: January 28, 2008
Currentness

(a) Upon separation from his armed force under section 1203 or 1206 of this title, a member is entitled to disability severance pay computed by multiplying (1) the member's years of service computed under section 1208 of this title (subject to the minimum and maximum years of service provided for in subsection (c)), by (2) the highest of the following amounts:

(A) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when he is separated and (ii) in the grade and rank in which he was serving on the date when his name was placed on the temporary disability retired list, or if his name was not carried on that list, on the date when he is separated.

(B) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in any temporary grade or rank higher than that described in clause (A), in which he served satisfactorily as determined by the Secretary of the military department or the Secretary of Homeland Security, as the case may be, having jurisdiction over the armed force from which he is separated.

(C) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in the permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is separated and which was found to exist as a result of a physical examination.

(D) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in the temporary grade or rank to which he would have been promoted had it not been for the physical disability for which he is separated and which was found to exist as a result of a physical examination, if his eligibility for promotion was required to be based on cumulative years of service or years in grade.

(b) For the purposes of subsection (a), a part of a year of active service that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

(c)(1) The minimum years of service of a member for purposes of subsection (a)(1) shall be as follows:

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(A) Six years in the case of a member separated from the armed forces for a disability incurred in line of duty in a combat zone (as designated by the Secretary of Defense for purposes of this subsection) or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.

(B) Three years in the case of any other member.

(2) The maximum years of service of a member for purposes of subsection (a)(1) shall be 19 years.

(d)(1) The amount of disability severance pay received under this section shall be deducted from any compensation for the same disability to which the former member of the armed forces or his dependents become entitled under any law administered by the Department of Veterans Affairs.

(2) No deduction may be made under paragraph (1) in the case of disability severance pay received by a member for a disability incurred in line of duty in a combat zone or incurred during performance of duty in combat-related operations as designated by the Secretary of Defense.

(3) No deduction may be made under paragraph (1) from any death compensation to which a member's dependents become entitled after the member's death.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 98; Pub.L. 96-513, Title V, § 511(43), Dec. 12, 1980, 94 Stat. 2924; Pub.L. 101-189, Div. A, Title XVI, § 1621(a)(1), Nov. 29, 1989, 103 Stat. 1602; Pub.L. 107-107, Div. A, Title V, § 593(a), Dec. 28, 2001, 115 Stat. 1126; Pub.L. 107-296, Title XVII, § 1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub.L. 110-181, Div. A, Title XVI, § 1646(a), (b), Jan. 28, 2008, 122 Stat. 472.)

10 U.S.C.A. § 1212, 10 USCA § 1212
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United States Code Annotated
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
Part II. Personnel (Refs & Annos)
Chapter 71. Computation of Retired Pay (Refs & Annos)

10 U.S.C.A. § 1401

§ 1401. Computation of retired pay

Effective: January 1, 2018
Currentness

(a) Disability, non-regular service, warrant officer, and DOPMA retirement.--The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, and 3, as modified by the applicable footnotes.

For- mula No.	For sec- tions	Column 1 Take	Column 2 Multiply by	Column 3 Add
1	1201 1204	Retired pay base as computed under section 1406(b) or 1407.	As member elects-- (1) the retired pay multiplier determined for the member under section 1409 of this title;[1] or (2) the percentage of disability, not to exceed 75%, on date when retired.	
2	1202 1205	Retired pay base as computed under section 1406(b) or 1407.	As member elects-- (1) the retired pay multiplier determined for the member under section 1409 of this title;[1] or (2) the percentage of disability, not to exceed 75%, on date when his name was placed on temporary disability retired list.	Amount necessary to increase product of columns 1 and 2 to 50% of retired pay base upon which computation is based.
[3 Repealed. Pub.L. 103-337, Div. A, Title XVI, § 1662(j)(2), Oct. 5, 1994, 108 Stat. 3004]				
4	580 1263 1293 1305	Retired pay base as computed under section 1406(b) or 1407.	The retired pay multiplier prescribed in section 1409 for the years of service credited to him under section 1405.	

5	633 634 635 636 1251 1252 1253	Retired pay base as computed under section 1406(b) or 1407.	The retired pay multiplier prescribed in section 1409 for the years of service credited to him under section 1405.

(b) Use of most favorable formula.--If a person would otherwise be entitled to retired pay computed under more than one formula of the table in subsection (a) or of any other provision of law, the person is entitled to be paid under the applicable formula that is most favorable to him.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 106; Pub.L. 85-422, §§ 6(7), 11(a)(2), May 20, 1958, 72 Stat. 129, 131; Pub.L. 88-132, § 5(h)(1), Oct. 2, 1963, 77 Stat. 214; Pub.L. 89-132, § 6, Aug. 21, 1965, 79 Stat. 547; Pub.L. 90-207, § 3(1), Dec. 16, 1967, 81 Stat. 653; Pub.L. 92-455, § 1, Oct. 2, 1972, 86 Stat. 761; Pub.L. 96-342, Title VIII, § 813(b)(1), Sept. 8, 1980, 94 Stat. 1102; Pub.L. 96-513, Title I, § 113(a), Title V, § 511(49), Dec. 12, 1980, 94 Stat. 2876, 2924; Pub.L. 98-94, Title IX, §§ 922(a)(1), 923(a)(1), (2)(A), Sept. 24, 1983, 97 Stat. 641, 642; Pub.L. 98-557, § 35(b), Oct. 30, 1984, 98 Stat. 2877; Pub.L. 99-348, Title II, § 201(a), July 1, 1986, 100 Stat. 691; Pub.L. 102-484, Div. A, Title X, § 1052(18), Oct. 23, 1992, 106 Stat. 2500; Pub.L. 103-337, Div. A, Title XVI, § 1662(j)(2), Oct. 5, 1994, 108 Stat. 3004; Pub.L. 109-163, Div. A, Title V, § 509(d)(1)(A), Jan. 6, 2006, 119 Stat. 3231; Pub.L. 109-364, Div. A, Title V, § 502(d)(1), Oct. 17, 2006, 120 Stat. 2177; Pub.L. 111-383, Div. A, Title VI, § 631(a), Jan. 7, 2011, 124 Stat. 4239; Pub.L. 112-239, Div. A, Title X, § 1076(f)(19), Jan. 2, 2013, 126 Stat. 1952; Pub.L. 114-92, Div. A, Title VI, § 631(c)(1)(A), Nov. 25, 2015, 129 Stat. 843.)

Footnotes

1 Before applying percentage factor, credit each full month of service that is in addition to the number of full years of service creditable to the member as one-twelfth of a year and disregard any remaining fractional part of a month.

10 U.S.C.A. § 1401, 10 USCA § 1401

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United States Code Annotated
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
Part IV. Service, Supply, and Procurement (Refs & Annos)
Chapter 147. Commissaries and Exchanges and Other Morale, Welfare, and Recreation Activities (Refs & Annos)
Subchapter I. Defense Commissary and Exchange Systems (Refs & Annos)

10 U.S.C.A. § 2481

§ 2481. Defense commissary and exchange systems: existence and purpose

Effective: December 23, 2016
Currentness

(a) Separate systems.--The Secretary of Defense shall operate, in the manner provided by this chapter and other provisions of law, a world-wide system of commissary stores and a separate world-wide system of exchange stores. The stores of each system may sell, at reduced prices, food and other merchandise to members of the uniformed services on active duty, members of the uniformed services entitled to retired pay, dependents of such members, and persons authorized to use the system under chapter 54 of this title. Any reference in this chapter to "the exchange system" shall be treated as referring to each separate administrative entity within the Department of Defense through which the Secretary has implemented the requirement under this subsection for a world-wide system of exchange stores.

(b) Purpose of systems.--The defense commissary system and the exchange system are intended to enhance the quality of life of members of the uniformed services, retired members, and dependents of such members, and to support military readiness, recruitment, and retention.

(c) Oversight.--(1) The Secretary of Defense shall designate a senior official of the Department of Defense to oversee the operation of both the defense commissary system and the exchange system.

(2) The Secretary of Defense shall establish an executive governing body to provide advice to the senior official designated under paragraph (1) regarding the operation of the defense commissary and exchange systems and to ensure the complementary operation of the systems.

(3)(A) The Secretary of Defense shall develop and implement a comprehensive strategy to optimize management practices across the defense commissary system and the exchange system that reduce reliance of those systems on appropriated funding without reducing benefits to the patrons of those systems or the revenue generated by nonappropriated fund entities or instrumentalities of the Department of Defense for the morale, welfare, and recreation of members of the armed forces.

(B) The Secretary shall ensure that savings generated due to such optimization practices are shared by the defense commissary system and the exchange system through contracts or agreements that appropriately reflect the participation of the systems in the development and implementation of such practices.

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(C) If the Secretary determines that the reduced reliance on appropriated funding pursuant to subparagraph (A) is insufficient to maintain the benefits to the patrons of the defense commissary system, and if the Secretary converts the defense commissary system to a nonappropriated fund entity or instrumentality pursuant to paragraph (1) of section 2484(j) of this title, the Secretary shall transfer appropriated funds pursuant to paragraph (2) of such section to ensure the maintenance of such benefits.

(4) On not less than a quarterly basis, the Secretary shall provide to the congressional defense committees a briefing on the defense commissary system, including--

(A) an assessment of the savings the system provides patrons;

(B) the status of implementing section 2484(i) of this title;

(C) the status of implementing section 2484(j) of this title, including whether the system requires any appropriated funds pursuant to paragraph (2) of such section;

(D) the status of carrying out a program for such system to sell private label merchandise; and

(E) any other matters the Secretary considers appropriate.

(d) Reduced prices defined.--In this section, the term "reduced prices" means prices for food and other merchandise determined using the price setting process specified in section 2484 of this title.

CREDIT(S)

(Added Pub.L. 108-375, Div. A, Title VI, § 651(a)(3), Oct. 28, 2004, 118 Stat. 1965; amended Pub.L. 114-328, Div. A, Title VI, § 661(a), (f), Dec. 23, 2016, 130 Stat. 2169, 2172.)

10 U.S.C.A. § 2481, 10 USCA § 2481
Current through PL 117-8 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 10. Armed Forces (Refs & Annos)
Subtitle D. Air Force and Space Force (Refs & Annos)
Part II. Personnel (Refs & Annos)
Chapter 941. Retirement for Length of Service (Refs & Annos)

10 U.S.C.A. § 9311
Formerly cited as 10 USCA § 8911

§ 9311. Twenty years or more: regular or reserve commissioned officers

Effective: January 1, 2021
Currentness

<Additional notes and editorial enhancements from Pub.L. 116-283 will be added to this document when this information is available.>

(a) The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve commissioned officer of the Air Force or the Space Force who has at least 20 years of service computed under section 9326 of this title, at least 10 years of which have been active service as a commissioned officer.

(b)(1) The Secretary of Defense may authorize the Secretary of the Air Force, during the period specified in paragraph (2), to reduce the requirement under subsection (a) for at least 10 years of active service as a commissioned officer to a period (determined by the Secretary of the Air Force) of not less than eight years.

(2) The period specified in this paragraph is the period beginning on January 7, 2011, and ending on September 30, 2018.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 549, § 8911; Pub.L. 101-510, Div. A, Title V, § 523(c), Nov. 5, 1990, 104 Stat. 1562; Pub.L. 103-160, Div. A, Title V, § 561(c), Nov. 30, 1993, 107 Stat. 1667; Pub.L. 105-261, Div. A, Title V, § 561(e), Oct. 17, 1998, 112 Stat. 2025; Pub.L. 106-398, § 1 [Div. A, Title V, § 571(e)], Oct. 30, 2000, 114 Stat. 1654, 1654A-134; Pub.L. 109-163, Div. A, Title V, § 502(c), Jan. 6, 2006, 119 Stat. 3225; Pub.L. 109-364, Div. A, Title X, § 1071(a)(37), Oct. 17, 2006, 120 Stat. 2400; Pub.L. 111-383, Div. A, Title V, § 506(c), Jan. 7, 2011, 124 Stat. 4210; Pub.L. 112-239, Div. A, Title V, § 505(c), Title X, § 1076(e)(6), Jan. 2, 2013, 126 Stat. 1715, 1951; renumbered § 9311 and amended Pub.L. 115-232, Div. A, Title VIII, §§ 806(b)(13), 809(a), Aug. 13, 2018, 132 Stat. 1833, 1840; Pub.L. 116-283, Div. A, Title IX, § 923(c)(13), Jan. 1, 2021, 134 Stat. 3811.)

10 U.S.C.A. § 9311, 10 USCA § 9311
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28 U.S.C.A. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

Effective: December 31, 2011
Currentness

(a)(1) The United States Court of Federal Claims shall have 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. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites[1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

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(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 940; July 28, 1953, c. 253, § 7, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 44(a), (b), 68 Stat. 1241; Pub.L. 91-350, § 1(b), July 23, 1970, 84 Stat. 449; Pub.L. 92-415, § 1, Aug. 29, 1972, 86 Stat. 652; Pub.L. 95-563, § 14(i), Nov. 1, 1978, 92 Stat. 2391; Pub.L. 96-417, Title V, § 509, Oct. 10, 1980, 94 Stat. 1743; Pub.L. 97-164, Title I, § 133(a), Apr. 2, 1982, 96 Stat. 39; Pub.L. 102-572, Title IX, §§ 902(a), 907(b)(1), Oct. 29, 1992, 106 Stat. 4516, 4519; Pub.L. 104-320, § 12(a), Oct. 19, 1996, 110 Stat. 3874; Pub.L. 110-161, Div. D, Title VII, § 739(c)(2), Dec. 26, 2007, 121 Stat. 2031; Pub.L. 110-181, Div. A, Title III, § 326(c), Jan. 28, 2008, 122 Stat. 63; Pub.L. 110-417, [Div. A], Title X, § 1061(d), Oct. 14, 2008, 122 Stat. 4613; Pub.L. 111-350, § 5(g)(7), Jan. 4, 2011, 124 Stat. 3848; Pub.L. 112-81, Div. A, Title VIII, § 861(a), Dec. 31, 2011, 125 Stat. 1521.)

Footnotes

1 So in original.

28 U.S.C.A. § 1491, 28 USCA § 1491

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 161. United States as Party Generally (Refs & Annos)

28 U.S.C.A. § 2412

§ 2412. Costs and fees

Effective: March 12, 2019
Currentness

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) 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.

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(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "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; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5)(A) Not later than March 31 of the first fiscal year beginning after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, and every fiscal year thereafter, the Chairman of the Administrative Conference of the United States shall submit to Congress and make publicly available online a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection.

(B) Each report under subparagraph (A) shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.

(C)(i) Each report under subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to a nondisclosure provision.

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(ii) The disclosure of fees and other expenses required under clause (i) shall not affect any other information that is subject to a nondisclosure provision in a settlement agreement.

(D) The Chairman of the Administrative Conference of the United States shall include and clearly identify in each annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report--

(i) any amounts paid under section 1304 of title 31 for a judgment in the case;

(ii) the amount of the award of fees and other expenses; and

(iii) the statute under which the plaintiff filed suit.

(6) As soon as practicable, and in any event not later than the date on which the first report under paragraph (5)(A) is required to be submitted, the Chairman of the Administrative Conference of the United States shall create and maintain online a searchable database containing, with respect to each award of fees and other expenses under this subsection made on or after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, the following information:

(A) The case name and number, hyperlinked to the case, if available.

(B) The name of the agency involved in the case.

(C) The name of each party to whom the award was made as such party is identified in the order or other court document making the award.

(D) A description of the claims in the case.

(E) The amount of the award.

(F) The basis for the finding that the position of the agency concerned was not substantially justified.

(7) The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or a court order.

(8) The head of each agency (including the Attorney General of the United States) shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7).

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(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of this section of costs enumerated in section 1920 of this title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 973; Pub.L. 89-507, § 1, July 18, 1966, 80 Stat. 308; Pub.L. 96-481, Title II, § 204(a), (c), Oct. 21, 1980, 94 Stat. 2327, 2329; Pub.L. 97-248, Title II, § 292(c), Sept. 3, 1982, 96 Stat. 574; Pub.L. 99-80, §§ 2, 6(a), (b)(2), Aug. 5, 1985, 99 Stat. 184, 186; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 102-572, Title III, § 301(a), Title V, §§ 502(b), 506(a), Title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4511-4513, 4516; Pub.L. 104-66, Title I, § 1091(b), Dec. 21, 1995, 109 Stat. 722; Pub.L. 104-121, Title II, § 232, Mar. 29, 1996, 110 Stat. 863; Pub.L. 105-368, Title V, § 512(b)(1)(B), Nov. 11, 1998, 112 Stat. 3342; Pub.L. 111-350, § 5(g)(9), Jan. 4, 2011, 124 Stat. 3848; Pub.L. 116-9, Title IV, § 4201(a)(2), (3), Mar. 12, 2019, 133 Stat. 763.)

28 U.S.C.A. § 2412, 28 USCA § 2412
Current through PL 117-8 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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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

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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

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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--

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(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
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38 U.S.C.A. § 5304

§ 5304. Prohibition against duplication of benefits

Effective: January 1, 2018
Currentness

(a)(1) Except as provided in section 1414 of title 10 or to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on such person's own service or concurrently to any person based on the service of any other person.

(2) Notwithstanding the provisions of paragraph (1) of this subsection and of section 5305 of this title, pension under section 1521 or 1541 of this title may be paid to a person entitled to receive retired or retirement pay described in section 5305 of this title concurrently with such person's receipt of such retired or retirement pay if the annual amount of such retired or retirement pay is counted as annual income for the purposes of chapter 15 of this title.

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection and in section 1521(i) of this title, the receipt of pension, compensation, or dependency and indemnity compensation by a surviving spouse, child, or parent on account of the death of any person, or receipt by any person of pension or compensation on account of such person's own service, shall not bar the payment of pension, compensation, or dependency and indemnity compensation on account of the death or disability of any other person.

(2) Benefits other than insurance under laws administered by the Secretary may not be paid or furnished to or on account of any child by reason of the death of more than one parent in the same parental line; however, the child may elect one or more times to receive benefits by reason of the death of any one of such parents.

(3) Benefits other than insurance under laws administered by the Secretary may not be paid to any person by reason of the death of more than one person to whom such person was married; however, the person may elect one or more times to receive benefits by reason of the death of any one spouse.

(c) Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.

(d)(1) Other than amounts payable under section 1413a or 1414 of title 10, the amount of pension and compensation benefits payable to a person under this title shall be reduced by the amount of any lump sum payment made to such person under section 1415 of title 10.

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(2) The Secretary shall collect any reduction under paragraph (1) from amounts otherwise payable to the person under this title, including pension and compensation payable under this title, before any pension and compensation payments under this title may be paid to the person.

CREDIT(S)

(Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1230, § 3104; Pub.L. 86-495, § 1, June 8, 1960, 74 Stat. 163; Pub.L. 88-664, § 9, Oct. 13, 1964, 78 Stat. 1096; Pub.L. 91-376, § 6, Aug. 12, 1970, 84 Stat. 790; Pub.L. 95-588, Title III, § 304, Nov. 4, 1978, 92 Stat. 2507; Pub.L. 96-385, Title V, § 503(a), Oct. 7, 1980, 94 Stat. 1534; Pub.L. 99-576, Title VII, § 701(71), Oct. 28, 1986, 100 Stat. 3297; renumbered § 5304 and amended Pub.L. 102-40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-83, §§ 4(a)(1), 5(c)(1), Aug. 6, 1991, 105 Stat. 403, 406; Pub.L. 108-454, Title III, § 308(a), Dec. 10, 2004, 118 Stat. 3614; Pub.L. 114-92, Div. A, Title VI, § 633(b), Nov. 25, 2015, 129 Stat. 850.)

38 U.S.C.A. § 5304, 38 USCA § 5304
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Code of Federal Regulations
Title 32. National Defense
Subtitle A. Department of Defense
Chapter I. Office of the Secretary of Defense
Subchapter M. Miscellaneous
Part 199. Civilian Health and Medical Program of the Uniformed Services (Champus) (Refs & Annos)

32 C.F.R. § 199.17

§ 199.17 TRICARE program.

Effective: May 12, 2020
Currentness

(a) Establishment. The TRICARE program is established for the purpose of implementing a comprehensive managed health care program for the delivery and financing of health care services in the Military Health System.

(1) Purpose. The TRICARE program implements a number of improvements primarily through modernized managed care support contracts that include special arrangements with civilian sector health care providers and better coordination between military medical treatment facilities (MTFs) and these civilian providers to deliver an integrated, health care delivery system that provides beneficiaries with access to high quality healthcare. Implementation of these improvements, to include enhanced access, improved health outcomes, increased efficiencies and elimination of waste, in addition to improving and maintaining operational medical force readiness, includes adoption of special rules and procedures not ordinarily followed under CHAMPUS or MTF requirements. This section establishes those special rules and procedures.

(2) Statutory authority. Many of the provisions of this section are authorized by statutory authorities other than those which authorize the usual operation of the CHAMPUS program, especially 10 U.S.C. 1079 and 1086. The TRICARE program also relies upon other available statutory authorities, including 10 U.S.C. 1075 (TRICARE Select), 10 U.S.C. 1075a (TRICARE Prime cost sharing), 10 U.S.C. 1095f (referrals and pre-authorizations under TRICARE Prime), 10 U.S.C. 1099 (health care enrollment system), 10 U.S.C. 1097 (contracts for medical care for retirees, dependents and survivors: Alternative delivery of health care), and 10 U.S.C. 1096 (resource sharing agreements).

(3) Scope of the program. The TRICARE program is applicable to all the uniformed services. TRICARE Select and TRICARE–for–Life shall be available in all areas, including overseas as authorized in paragraph (u) of this section. The geographic availability of TRICARE Prime is generally limited as provided in this section. The Assistant Secretary of Defense (Health Affairs) may also authorize modifications to TRICARE program rules and procedures as may be appropriate to the area involved.

(4) Rules and procedures affected. Much of this section relates to rules and procedures applicable to the delivery and financing of health care services provided by civilian providers outside military treatment facilities. This section provides that certain rules, procedures, rights and obligations set forth elsewhere in this part (and usually applicable to CHAMPUS) are different under the TRICARE program. To the extent that TRICARE program rules, procedures, rights and obligations set forth in this section are not different from or otherwise in conflict with those set forth elsewhere in this part as applicable to CHAMPUS, the CHAMPUS provisions are incorporated into the TRICARE program. In addition, some

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rules, procedures, rights and obligations relating to health care services in military treatment facilities are also different under the TRICARE program. In such cases, provisions of this section take precedence and are binding.

(5) Implementation based on local action. The TRICARE program is not automatically implemented in all respects in all areas where it is potentially applicable. Therefore, not all provisions of this section are automatically implemented. Rather, implementation of the TRICARE program and this section requires an official action by the Director, Defense Health Agency. Public notice of the initiation of portions of the TRICARE program will be achieved through appropriate communication and media methods and by way of an official announcement by the Director identifying the military medical treatment facility catchment area or other geographical area covered.

(6) Major features of the TRICARE program. The major features of the TRICARE program, described in this section, include the following:

(i) Beneficiary categories. Under the TRICARE program, health care beneficiaries are generally classified into one of several categories:

(A) Active duty members, who are covered by 10 U.S.C. 1074(a).

(B) Active duty family members, who are beneficiaries covered by 10 U.S.C. 1079 (also referred to in this section as "active duty family category").

(C) Retirees and their family members (also referred to in this section as "retired category"), who are beneficiaries covered by 10 U.S.C. 1086(c) other than those beneficiaries eligible for Medicare Part A.

(D) Medicare eligible retirees and Medicare eligible retiree family members who are beneficiaries covered by 10 U.S.C. 1086(d) as each become individually eligible for Medicare Part A and enroll in Medicare Part B.

(E) Military treatment facility (MTF) only beneficiaries are beneficiaries eligible for health care services in military treatment facilities, but not eligible for a TRICARE plan covering non–MTF care.

(ii) Health plans available. The major TRICARE health plans are as follows:

(A) TRICARE Prime. "TRICARE Prime" is a health maintenance organization (HMO)-like program. It generally features use of military treatment facilities and substantially reduced out-of-pocket costs for care provided outside MTFs. Beneficiaries generally agree to use military treatment facilities and designated civilian provider networks and to follow certain managed care rules and procedures. The primary purpose of TRICARE Prime is to support the effective operation of an MTF, which exists to support the medical readiness of the armed forces and the readiness of medical personnel. TRICARE Prime will be offered in areas where the Director determines that it is appropriate to support the effective operation of one or more MTFs.

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(B) TRICARE Select. "TRICARE Select" is a self-managed, preferred provider organization (PPO) program. It allows beneficiaries to use the TRICARE provider civilian network, with reduced out-of-pocket costs compared to care from non-network providers, as well as military treatment facilities (where they exist and when space is available). TRICARE Select enrollees will not have restrictions on their freedom of choice with respect to authorized health care providers. However, when a TRICARE Select beneficiary receives services covered under the basic program from an authorized health care provider who is not part of the TRICARE provider network that care is covered by TRICARE but is subject to higher cost sharing amounts for "out-of-network" care. Those amounts are the same as under the basic program under § 199.4.

(C) TRICARE for Life. "TRICARE for Life" is the Medicare wraparound coverage plan under 10 U.S.C. 1086(d). Rules applicable to this plan are unaffected by this section; they are generally set forth in §§ 199.3 (Eligibility), 199.4 (Basic Program Benefits), and 199.8 (Double Coverage).

(D) TRICARE Standard. "TRICARE Standard" generally referred to the basic CHAMPUS program of benefits under § 199.4. While the law required termination of TRICARE Standard as a distinct TRICARE plan December 31, 2017, the CHAMPUS basic program benefits under § 199.4 continues as the baseline of benefits common to the TRICARE Prime and TRICARE Select plans.

(iii) Comprehensive enrollment system. The TRICARE program includes a comprehensive enrollment system for all categories of beneficiaries except TRICARE–for–Life beneficiaries. When eligibility for enrollment for TRICARE Prime and/or TRICARE Select exists, a beneficiary must enroll in one of the plans. Refer to paragraph (o) of this section for TRICARE program enrollment procedures.

(7) Preemption of State laws.

(i) Pursuant to 10 U.S.C. 1103 the Department of Defense has determined that in the administration of 10 U.S.C. chapter 55, preemption of State and local laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods is necessary to achieve important Federal interests, including but not limited to the assurance of uniform national health programs for military families and the operation of such programs at the lowest possible cost to the Department of Defense, that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States.

(ii) Based on the determination set forth in paragraph (a)(7)(i) of this section, any State or local law relating to health insurance, prepaid health plans, or other health care delivery or financing methods is preempted and does not apply in connection with TRICARE regional contracts. Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them in relation to the TRICARE regional contracts. (However, the Department of Defense may by contract establish legal obligations of the part of TRICARE contractors to conform with requirements similar or identical to requirements of State or local laws or regulations).

(iii) The preemption of State and local laws set forth in paragraph (a)(7)(ii) of this section includes State and local laws imposing premium taxes on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of the statutes identified in paragraph (a)(7)(i) of this section. Preemption, however, does not

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apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DoD health services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity. For purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DoD health and dental services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

(b) TRICARE Prime and TRICARE Select health plans in general. The two primary plans for beneficiaries in the active duty family category and the retired category (which does not include most Medicare-eligible retirees/dependents) are TRICARE Prime and TRICARE Select. This paragraph (b) further describes the TRICARE Prime and TRICARE Select health plans.

(1) TRICARE Prime. TRICARE Prime is a managed care option that provides enhanced medical services to beneficiaries at reduced cost-sharing amounts for beneficiaries whose care is managed by a designated primary care manager and provided by an MTF or network provider. TRICARE Prime is offered in a location in which an MTF is located (other than a facility limited to members of the armed forces) that has been designated by the Director as a Prime Service Area. In addition, where TRICARE Prime is offered it may be limited to active duty family members if the Director determines it is not practicable to offer TRICARE Prime to retired category beneficiaries. TRICARE Prime is not offered in areas where the Director determines it is impracticable. If TRICARE Prime is not offered in a geographical area, certain active duty family members residing in the area may be eligible to enroll in TRICARE Prime Remote program under paragraph (g) of this section.

(2) TRICARE Select. TRICARE Select is the self-managed option under which beneficiaries may receive authorized basic program benefits from any TRICARE authorized provider. The TRICARE Select health care plan also provides enhanced program benefits to beneficiaries with access to a preferred-provider network with broad geographic availability within the United States at reduced out-of-pocket expenses. However, when a beneficiary receives services from an authorized health care provider who is not part of the TRICARE provider network, only basic program benefits (not enhanced Select care) are covered by TRICARE and the beneficiary is subject to higher cost sharing amounts for “out-of-network” care. Those amounts are the same as under the basic program under § 199.4.

(c) Eligibility for enrollment in TRICARE Prime and TRICARE Select. Beneficiaries in the active duty family category and the retired category are eligible to enroll in TRICARE Prime and/or TRICARE Select as outlined in this paragraph (c). A retiree or retiree family member who becomes eligible for Medicare Part A is not eligible to enroll in TRICARE Select; however, as provided in this paragraph (c), some Medicare eligible retirees/family members may be allowed to enroll in TRICARE Prime where available. In general, when a retiree or retiree family member becomes individually eligible for Medicare Part A and enrolls in Medicare Part B, he/she is automatically eligible for TRICARE–for–Life and is required to enroll in the Defense Enrollment Eligibility Reporting System (DEERS) to verify eligibility. Further, some rules and procedures are different for dependents of active duty members and retirees, dependents, and survivors.

(1) Active duty members. Active duty members are required to enroll in Prime where it is offered. Active duty members shall have first priority for enrollment in Prime.

(2) Dependents of active duty members. Beneficiaries in the active duty family member category are eligible to enroll in Prime (where offered) or Select.

(3) Survivors of deceased members.

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(i) The surviving spouse of a member who dies while on active duty for a period of more than 30 days is eligible to enroll in Prime (where offered) or Select for a 3 year period beginning on the date of the member's death under the same rules and provisions as dependents of active duty members.

(ii) A dependent child or unmarried person (as described in § 199.3(b)(2)(ii) or (iv)) of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001, is eligible to enroll in Prime (where offered) or Select and is subject to the same rules and provisions of dependents of active duty members for a period of three years from the date the active duty sponsor dies or until the surviving eligible dependent:

(A) Attains 21 years of age; or

(B) Attains 23 years of age or ceases to pursue a full-time course of study prior to attaining 23 years of age, if, at 21 years of age, the eligible surviving dependent is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by the Secretary of Defense and was, at the time of the sponsor's death, in fact dependent on the member for over one-half of such dependent's support.

(4) Retirees, dependents of retirees, and survivors (other than survivors of deceased members covered under paragraph (c)(3) of this section). All retirees, dependents of retirees, and survivors who are not eligible for Medicare Part A are eligible to enroll in Select. Additionally, retirees, dependents of retirees, and survivors who are not eligible for Medicare Part A based on age are also eligible to enroll in TRICARE Prime in locations where it is offered and where an MTF has, in the judgment of the Director, a significant number of health care providers, including specialty care providers, and sufficient capability to support the efficient operation of TRICARE Prime for projected retired beneficiary enrollees in that location.

(d) Health benefits under TRICARE Prime—

(1) Military treatment facility (MTF) care—

(i) In general. All participants in Prime are eligible to receive care in military treatment facilities. Participants in Prime will be given priority for such care over other beneficiaries. Among the following beneficiary groups, access priority for care in military treatment facilities where TRICARE is implemented as follows:

(A) Active duty service members;

(B) Active duty service members' dependents and survivors of service members who died on active duty, who are enrolled in TRICARE Prime;

(C) Retirees, their dependents and survivors, who are enrolled in TRICARE Prime;

(D) Active duty service members' dependents and survivors of deceased members, who are not enrolled in TRICARE Prime; and

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(E) Retirees, their dependents and survivors who are not enrolled in TRICARE Prime. For purposes of this paragraph (d)(1), survivors of members who died while on active duty are considered as among dependents of active duty service members.

(ii) Special provisions. Enrollment in Prime does not affect access priority for care in military treatment facilities for several miscellaneous beneficiary groups and special circumstances. Those include Secretarial designees, NATO and other foreign military personnel and dependents authorized care through international agreements, civilian employees under workers' compensation programs or under safety programs, members on the Temporary Disability Retired List (for statutorily required periodic medical examinations), members of the reserve components not on active duty (for covered medical services), military prisoners, active duty dependents unable to enroll in Prime and temporarily away from place of residence, and others as designated by the Assistant Secretary of Defense (Health Affairs). Additional exceptions to the normal Prime enrollment access priority rules may be granted for other categories of individuals, eligible for treatment in the MTF, whose access to care is necessary to provide an adequate clinical case mix to support graduate medical education programs or readiness-related medical skills sustainment activities, to the extent approved by the ASD(HA).

(2) Non–MTF care for active duty members. Under Prime, non–MTF care needed by active duty members continues to be arranged under the supplemental care program and subject to the rules and procedures of that program, including those set forth in § 199.16.

(3) Civilian sector Prime benefits. Health benefits for Prime enrollees for care received from civilian providers are those under § 199.4 and the additional benefits identified in paragraph (f) of this section.

(e) Health benefits under the TRICARE Select plan—

(1) Civilian sector care. The health benefits under TRICARE Select for enrolled beneficiaries received from civilian providers are those under § 199.4, and, in addition, those in paragraph (f) of this section when received from a civilian network provider.

(2) Military treatment facility (MTF) care. All TRICARE Select enrolled beneficiaries continue to be eligible to receive care in military treatment facilities on a space available basis.

(f) Benefits under TRICARE Prime and TRICARE Select—

(1) In general. Except as specifically provided or authorized by this section, all benefits provided, and benefit limitations established, pursuant to this part, shall apply to TRICARE Prime and TRICARE Select.

(2) Preventive care services. Certain preventive care services not normally provided as part of basic program benefits under § 199.4 are covered benefits when provided to Prime or Select enrollees by providers in the civilian provider network. Such additional services are authorized under 10 U.S.C. 1097, including preventive care services not part of the entitlement under 10 U.S.C. 1074d and services that would otherwise be excluded under 10 U.S.C. 1079(a)(10). Other authority for such additional services includes section 706 of the National Defense Authorization Act for Fiscal Year 2017. The specific

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set of such services shall be established by the Director and announced annually before the open season enrollment period. Standards for preventive care services shall be developed based on guidelines from the U.S. Department of Health and Human Services. Such standards shall establish a specific schedule, including frequency or age specifications for services that may include, but are not limited to:

(i) Laboratory and imaging tests, including blood lead, rubella, cholesterol, fecal occult blood testing, and mammography;

(ii) Cancer screenings (including cervical, breast, lung, prostate, and colon cancer screenings);

(iii) Immunizations;

(iv) Periodic health promotion and disease prevention exams;

(v) Blood pressure screening;

(vi) Hearing exams;

(vii) Sigmoidoscopy or colonoscopy;

(viii) Serologic screening; and

(ix) Appropriate education and counseling services. The exact services offered shall be established under uniform standards established by the Director.

(3) Treatment of obesity. Under the authority of 10 U.S.C. 1097 and sections 706 and 729 of the National Defense Authorization Act for Fiscal Year 2017, notwithstanding 10 U.S.C. 1079(a)(10), treatment of obesity is covered under TRICARE Prime and TRICARE Select even if it is the sole or major condition treated. Such services must be provided by a TRICARE network provider and be medically necessary and appropriate in the context of the particular patient's treatment.

(4) High value services. Under the authority of 10 U.S.C. 1097 and other authority, including sections 706 and 729 of the NDAA–17, for purposes of improving population-based health outcomes and incentivizing medical intervention programs to address chronic diseases and other conditions and healthy lifestyle interventions, the Director may waive or reduce cost sharing requirements for TRICARE Prime and TRICARE Select enrollees for care received from network providers for certain health care services designated for this purpose. The specific services designated for this purpose will be those the Director determines provide especially high value in terms of better health outcomes. The specific services affected for any plan year will be announced by the Director prior to the open season enrollment period for that plan year. Services affected by actions of the Director under this paragraph (f)(4) may be associated with actions taken for high value medications under § 199.21(j)(3) for select pharmaceutical agents to be cost-shared at a reduced or zero dollar rate.

(5) Other services. In addition to services provided pursuant to paragraphs (f)(2) through (4) of this section, other benefit enhancements may be added and other benefit restrictions may be waived or relaxed in connection with health care services

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provided to TRICARE Prime and TRICARE Select enrollees. Any such other enhancements or changes must be approved by the Director based on uniform standards.

(g) TRICARE Prime Remote for Active Duty Family Members—

(1) In general. In geographic areas in which TRICARE Prime is not offered and in which eligible family members reside, there is offered under 10 U.S.C. 1079(p) TRICARE Prime Remote for Active Duty Family Members as an enrollment option. TRICARE Prime Remote for Active Duty Family Members (TPRADFM) will generally follow the rules and procedures of TRICARE Prime, except as provided in this paragraph (g) and otherwise except to the extent the Director determines them to be infeasible because of the remote area.

(2) Active duty family member. For purposes of this paragraph (g), the term "active duty family member" means one of the following dependents of an active duty member of the Uniformed Services:

(i) Spouse, child, or unmarried person, as defined in § 199.3(b)(2)(i), (ii), or (iv);

(ii) For a 3–year period, the surviving spouse of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001; and

(iii) The surviving dependent child or unmarried person, as defined in § 199.3(b)(2)(ii) or (iv), of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001. Active duty family member status is for a period of 3 years from the date the active duty sponsor dies or until the surviving eligible dependent:

(A) Attains 21 years of age; or

(B) Attains 23 years of age or ceases to pursue a full-time course of study prior to attaining 23 years of age, if, at 21 years of age, the eligible surviving dependent is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by the Secretary of Defense and was, at the time of the sponsor's death, in fact dependent on the member for over one-half of such dependent's support.

(3) Eligibility.

(i) An active duty family member is eligible for TRICARE Prime Remote for Active Duty Family Members if he or she is eligible for CHAMPUS and, on or after December 2, 2003, meets the criteria of paragraphs (g)(3)(i)(A) and (B) or paragraph (g)(3)(i)(C) of this section or on or after October 7, 2001, meets the criteria of paragraph (g)(3)(i)(D) or (E) of this section:

(A) The family member's active duty sponsor has been assigned permanent duty as a recruiter; as an instructor at an educational institution, an administrator of a program, or to provide administrative services in support of a program of instruction for the Reserve Officers' Training Corps; as a full-time adviser to a unit of a reserve component; or any

other permanent duty designated by the Director that the Director determines is more than 50 miles, or approximately one hour driving time, from the nearest military treatment facility that is adequate to provide care.

(B) The family members and active duty sponsor, pursuant to the assignment of duty described in paragraph (g)(3)(i)(A) of this section, reside at a location designated by the Director, that the Director determines is more than 50 miles, or approximately one hour driving time, from the nearest military medical treatment facility adequate to provide care.

(C) The family member, having resided together with the active duty sponsor while the sponsor served in an assignment described in paragraph (g)(3)(i)(A) of this section, continues to reside at the same location after the sponsor relocates without the family member pursuant to orders for a permanent change of duty station, and the orders do not authorize dependents to accompany the sponsor to the new duty station at the expense of the United States.

(D) For a 3 year period, the surviving spouse of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001.

(E) The surviving dependent child or unmarried person as defined in § 199.3(b)(2)(ii) or (iv), of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001, for three years from the date the active duty sponsor dies or until the surviving eligible dependent:

(1) Attains 21 years of age; or

(2) Attains 23 years of age or ceases to pursue a full-time course of study prior to attaining 23 years of age, if, at 21 years of age, the eligible surviving dependent is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by the Secretary of Defense and was, at the time of the sponsor's death, in fact dependent on the member for over one-half of such dependent's support.

(ii) A family member who is a dependent of a reserve component member is eligible for TRICARE Prime Remote for Active Duty Family Members if he or she is eligible for CHAMPUS and meets all of the following additional criteria:

(A) The reserve component member has been ordered to active duty for a period of more than 30 days.

(B) The family member resides with the member.

(C) The Director, determines the residence of the reserve component member is more than 50 miles, or approximately one hour driving time, from the nearest military medical treatment facility that is adequate to provide care.

(D) “Resides with” is defined as the TRICARE Prime Remote residence address at which the family resides with the activated reservist upon activation.

(4) Enrollment. TRICARE Prime Remote for Active Duty Family Members requires enrollment under procedures set forth in paragraph (o) of this section or as otherwise established by the Director.

(5) Health care management requirements under TRICARE Prime Remote for Active Duty Family Members. The additional health care management requirements applicable to Prime enrollees under paragraph (n) of this section are applicable under TRICARE Prime Remote for Active Duty Family Members unless the Director determines they are infeasible because of the particular remote location. Enrollees will be given notice of the applicable management requirements in their remote location.

(6) Cost sharing. Beneficiary cost sharing requirements under TRICARE Prime Remote for Active Duty Family Members are the same as those under TRICARE Prime under paragraph (m) of this section, except that the higher point-of-service option cost sharing and deductible shall not apply to routine primary health care services in cases in which, because of the remote location, the beneficiary is not assigned a primary care manager or the Director determines that care from a TRICARE network provider is not available within the TRICARE access standards under paragraph (p)(5) of this section. The higher point-of-service option cost sharing and deductible shall apply to specialty health care services received by any TRICARE Prime Remote for Active Duty Family Members enrollee unless an appropriate referral/preauthorization is obtained as required by paragraph (n) of this section under TRICARE Prime. In the case of pharmacy services under § 199.21, where the Director determines that no TRICARE network retail pharmacy has been established within a reasonable distance of the residence of the TRICARE Prime Remote for Active Duty Family Members enrollee, cost sharing applicable to TRICARE network retail pharmacies will be applicable to all CHAMPUS eligible pharmacies in the remote area.

(h) Resource sharing agreements. Under the TRICARE program, any military medical treatment facility (MTF) commander may establish resource sharing agreements with the applicable managed care support contractor for the purpose of providing for the sharing of resources between the two parties. Internal resource sharing and external resource sharing agreements are authorized. The provisions of this paragraph (h) shall apply to resource sharing agreements under the TRICARE program.

(1) In connection with internal resource sharing agreements, beneficiary cost sharing requirements shall be the same as those applicable to health care services provided in facilities of the uniformed services.

(2) Under internal resource sharing agreements, the double coverage requirements of § 199.8 shall be replaced by the Third Party Collection procedures of 32 CFR part 220, to the extent permissible under such part. In such a case, payments made to a resource sharing agreement provider through the TRICARE managed care support contractor shall be deemed to be payments by the MTF concerned.

(3) Under internal or external resource sharing agreements, the commander of the MTF concerned may authorize the provision of services, pursuant to the agreement, to Medicare-eligible beneficiaries, if such services are not reimbursable by Medicare, and if the commander determines that this will promote the most cost-effective provision of services under the TRICARE program.

(4) Under external resource sharing agreements, there is no cost sharing applicable to services provided by military facility personnel. Cost sharing for non–MTF institutional and related ancillary charges shall be as applicable to services provided under TRICARE Prime or TRICARE Select, as appropriate.

(i) General quality assurance, utilization review, and preauthorization requirements under the TRICARE program. All quality assurance, utilization review, and preauthorization requirements for the basic CHAMPUS program, as set forth in this part (see

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especially applicable provisions in §§ 199.4 and 199.15), are applicable to Prime and Select except as provided in this chapter. Pursuant to an agreement between a military medical treatment facility and TRICARE managed care support contractor, quality assurance, utilization review, and preauthorization requirements and procedures applicable to health care services outside the military medical treatment facility may be made applicable, in whole or in part, to health care services inside the military medical treatment facility.

(j) Pharmacy services. Pharmacy services under Prime and Select are as provided in the Pharmacy Benefits Program (see § 199.21).

(k) Design of cost sharing structures under TRICARE Prime and TRICARE Select—

(1) In general. The design of the cost sharing structures under TRICARE Prime and TRICARE Select includes several major factors: beneficiary category (e.g., active duty family member category or retired category, and there are some special rules for survivors of active duty deceased sponsors and medically retired members and their dependents); date of initial military affiliation (i.e., before or on or after January 1, 2018), category of health care service received, and network or non-network status of the provider.

(2) Categories of health care services. This paragraph (k)(2) describes the categories of health care services relevant to determining copayment amounts.

(i) Preventive care visits. These are outpatient visits and related services described in paragraph (f)(2) of this section. There are no cost sharing requirements for preventive care listed under §§ 199.4(e)(28)(i) through (iv) and 199.17(f)(2). Beneficiaries shall not be required to pay any portion of the cost of these preventive services even if the beneficiary has not satisfied any applicable deductible for that year.

(ii) Primary care outpatient visits. These are outpatient visits, not occurring in an ER or urgent care center, with the following provider specialties:

(A) General Practice.

(B) Family Practice.

(C) Internal Medicine.

(D) OB/GYN.

(E) Pediatrics.

(F) Physician's Assistant.

(G) Nurse Practitioner.

(H) Nurse Midwife.

(iii) Specialty care outpatient visits. This category applies to outpatient care provided by provider specialties other than those listed under primary care outpatient visits under paragraph (k)(2)(ii) of this section and not specifically included in one of the other categories of care (e.g., emergency room visits etc.) under paragraph (k)(2) of this section. This category also includes partial hospitalization services, intensive outpatient treatment, and opioid treatment program services. The per visit fee shall be applied on a per day basis on days services are received, with the exception of opioid treatment program services reimbursed in accordance with § 199.14(a)(2)(ix)(A)(3)(i) which per visit fee will apply on a weekly basis.

(iv) Emergency room visits.

(v) Urgent care center visits.

(vi) Ambulance services. This is for ground ambulance services.

(vii) Ambulatory surgery. This is for facility-based outpatient ambulatory surgery services.

(viii) Inpatient hospital admissions.

(ix) Skilled nursing facility or rehabilitation facility admissions. This category includes a residential treatment center, or substance use disorder rehabilitation facility residential treatment program.

(x) Durable medical equipment, prosthetic devices, and other authorized supplies.

(xi) Outpatient prescription pharmaceuticals. These are addressed in § 199.21.

(3) Beneficiary categories further subdivided. For purposes of both TRICARE Prime and TRICARE Select, enrollment fees and cost sharing by beneficiary category (e.g., active duty family member category or retired category) are further differentiated between two groups:

(i) Group A consists of Prime or Select enrollees whose sponsor originally enlisted or was appointed in a uniformed service before January 1, 2018.

(ii) Group B consists of Prime or Select enrollees whose sponsor originally enlisted or was appointed in a uniformed service on or after January 1, 2018.

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(l) Enrollment fees and cost sharing (including deductibles and catastrophic cap) amounts. This paragraph (l) provides enrollment fees and cost sharing requirements applicable to TRICARE Prime and TRICARE Select enrollees.

(1) Enrollment fee and cost sharing under TRICARE Prime.

(i) For Group A enrollees:

(A) There is no enrollment fee for the active duty family member category.

(B) The retired category enrollment fee in calendar year 2018 is equal to the Prime enrollment fee for fiscal year 2017, indexed to calendar year 2018 and thereafter in accordance with 10 U.S.C. 1097. The Assistant Secretary of Defense (Health Affairs) may exempt survivors of active duty deceased sponsors and medically retired Uniformed Services members and their dependents from future increases in enrollment fees. The Assistant Secretary of Defense (Health Affairs) may also waive the enrollment fee requirements for Medicare-eligible beneficiaries.

(C) The cost sharing amounts are established annually in connection with the open season enrollment period. An amount is established for each category of care identified in paragraph (k)(2) of this section, taking into account all applicable statutory provisions, including 10 U.S.C. chapter 55. The amount for each category of care may not exceed the amount for Group B as set forth in 10 U.S.C. 1075a.

(D) The catastrophic cap is $1,000 for active duty families and $3,000 for retired category families.

(ii) For Group B TRICARE Prime enrollees, the enrollment fee, catastrophic cap, and cost sharing amounts are as set forth in 10 U.S.C. 1075a. The cost sharing requirements applicable to services not specifically addressed in the table set forth in 10 U.S.C. 1075a(b)(1) shall be determined by the Director, DHA.

(iii) For both Group A and Group B, for health care services obtained by a Prime enrollee but not obtained in accordance with the rules and procedures of Prime (e.g. failure to obtain a primary care manager referral when such a referral is required or seeing a non-network provider when Prime rules require use of a network provider and one is available) will not be paid under Prime rules but may be covered by the point-of-service option. For services obtained under the point-of-service option, the deductible is $300 per person and $600 per family. The beneficiary cost share is 50 percent of the allowable charges for inpatient and outpatient care, after the deductible. Point-of-service charges do not count against the annual catastrophic cap.

(2) Enrollment fee and cost sharing under TRICARE Select.

(i) For Group A enrollees:

(A) The enrollment fee in calendar years 2018 through 2020 is zero and the catastrophic cap is as provided in 10 U.S.C. 1079 or 1086. The enrollment fee and catastrophic cap in 2021 and thereafter for certain beneficiaries in the retired category is as provided in 10 U.S.C. 1075(e), except the enrollment fee and catastrophic cap adjustment shall

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not apply to survivors of active duty deceased sponsors and medically retired Uniformed Services members and their dependents.

(B) The cost sharing amounts for network care for Group A enrollees are calculated for each category of care described in paragraph (k)(2) of this section by taking into account all applicable statutory provisions, including 10 U.S.C. chapter 55, as if TRICARE Extra and Standard programs were still being implemented. When determined practicable, including efficiency and effectiveness in administration, the amounts established are converted to fixed dollar amounts for each category of care for which a fixed dollar amount is established by 10 U.S.C. 1075. When determined not to be practicable, as in the categories of care including ambulatory surgery, inpatient admissions, and inpatient skilled nursing/rehabilitation admissions, the calculated cost-sharing amounts are not converted to fixed dollar amounts. The fixed dollar amount for each category is set prospectively for each calendar year as the amount (rounded down to the nearest dollar amount) equal to 15% for enrollees in the active duty family beneficiary category or 20% for enrollees in the retired beneficiary category of the projected average allowable payment amount for each category of care during the year, as estimated by the Director. The projected average allowable payment amount for primary care (including urgent care) and specialty care outpatient appointments include payments for ancillary services (e.g., laboratory and radiology services) that are provided in connection with the respective outpatient visit. As such, there is no separate cost sharing for these ancillary services.

(C) The cost share for care received from non-network providers is as provided in § 199.4.

(D) The annual deductible amount is as provided in 10 U.S.C. 1079 or 1086.

(ii) For Group B TRICARE Select enrollees, the enrollment fee, annual deductible for services received while in an outpatient status, catastrophic cap., and cost sharing amounts are as provided in 10 U.S.C. 1075 and as consistent with this section. The cost sharing requirements applicable to services not specifically addressed in 10 U.S.C. 1075 shall be determined by the Director, DHA.

<Text of subsection (l)(3) revised by 85 FR 27927, effective May 12, 2020, through the end of the President's national emergency.>

(3) Special cost-sharing rules.

(i) There is no separate cost-sharing applicable to ancillary health care services obtained in conjunction with an outpatient primary or specialty care visit under TRICARE Prime or from network providers under TRICARE Select.

(ii) Cost-sharing for maternity care services shall be determined in accordance with § 199.4(e)(16).

(iii) Cost-sharing and copayments (including deductibles) shall be waived for in-network telehealth services during the national emergency for the global coronavirus 2019 (COVID–19) pandemic.

<Text of subsection (l)(3) effective upon the end of the President's national emergency.>

(3) Special cost-sharing rules.

(A) There is no separate cost-sharing applicable to ancillary health care services obtained in conjunction with an outpatient primary or specialty care visit under TRICARE Prime or from network providers under TRICARE Select.

(B) Cost-sharing for maternity care services shall be determined in accordance with § 199.4(e)(16).

<Text of subsection (l)(4) revised by 85 FR 27927, effective May 12, 2020, through the end of the President's national emergency.>

(4) Special transition rule for the last quarter of calendar year 2017. In order to transition enrollment fees, deductibles, and catastrophic caps from a fiscal year basis to a calendar year basis, the following special rules apply for the last quarter of calendar year 2017:

(i) A Prime enrollee's enrollment fee for the quarter is one-fourth of the enrollment fee for fiscal year 2017.

(ii) The deductible amount and the catastrophic cap amount for fiscal year 2017 will be applicable to the 15–month period of October 1, 2016 through December 31, 2017.

<Text of subsection (l)(4) effective upon the end of the President's national emergency.>

(4) Special transition rule for the last quarter of calendar year 2017. In order to transition enrollment fees, deductibles, and catastrophic caps from a fiscal year basis to a calendar year basis, the following special rules apply for the last quarter of calendar year 2017:

(A) A Prime enrollee's enrollment fee for the quarter is one-fourth of the enrollment fee for fiscal year 2017.

(B) The deductible amount and the catastrophic cap amount for fiscal year 2017 will be applicable to the 15–month period of October 1, 2016 through December 31, 2017.

(m) Limit on out-of-pocket costs under TRICARE Prime and TRICARE Select. For the purpose of this paragraph (m), out-of-pocket costs means all payments required of beneficiaries under paragraph (l) of this section, including enrollment fees, deductibles, and cost-sharing amounts, with the exception of point-of-service charges. In any case in which a family reaches their applicable catastrophic cap, all remaining payments that would have been required of the beneficiary under paragraph (l) of this section for authorized care, with the exception of applicable point-of-service charges pursuant to paragraph (l)(1)(iii) of this section, will be paid by the program for the remainder of that calendar year.

(n) Additional health care management requirements under TRICARE Prime. Prime has additional, special health care management requirements not applicable under TRICARE Select.

(1) Primary care manager.

(i) All active duty members and Prime enrollees will be assigned a primary care manager pursuant to a system established by the Director, and consistent with the access standards in paragraph (p)(5)(i) of this section. The primary care manager may be an individual, physician, a group practice, a clinic, a treatment site, or other designation. The primary care manager may be part of the MTF or the Prime civilian provider network. The enrollee will be given the opportunity to register a preference for primary care manager from a list of choices provided by the Director. This preference will be entered on a TRICARE Prime enrollment form or similar document. Preference requests will be considered, but primary care manager assignments will be subject to availability under the MTF beneficiary category priority system under paragraph (d) of this section and subject to other operational requirements.

(ii) Prime enrollees who are dependents of active duty members in pay grades E–1 through E–4 shall have priority over other active duty dependents for enrollment with MTF PCMs, subject to MTF capacity.

(2) Referral and preauthorization requirements.

(i) Under TRICARE Prime there are certain procedures for referral and preauthorization.

(A) For the purpose of this paragraph (n)(2), referral addresses the issue of who will provide authorized health care services. In many cases, Prime beneficiaries will be referred by a primary care manager to a medical department of an MTF if the type of care needed is available at the MTF. In such a case, failure to adhere to that referral will result in the care being subject to point-of-service charges. In other cases, a referral may be to the civilian provider network, and again, point-of-service charges would apply to a failure to follow the referral.

(B) In contrast to referral, preauthorization addresses the issue of whether particular services may be covered by TRICARE, including whether they appear necessary and appropriate in the context of the patient's diagnosis and circumstances. A major purpose of preauthorization is to prevent surprises about coverage determinations, which are sometimes dependent on particular details regarding the patient's condition and circumstances. While TRICARE Prime has referral requirements that do not exist for TRICARE Select, TRICARE Select has some preauthorization requirements that do not exist for TRICARE Prime.

(ii) Except as otherwise provided in this paragraph (n)(2), a beneficiary enrolled in TRICARE Prime is required to obtain a referral for care through a designated primary care manager (or other authorized care coordinator) prior to obtaining care under the TRICARE program.

(iii) There is no referral requirement under paragraph (n)(2)(i) of this section in the following circumstances:

(A) In emergencies;

(B) For urgent care services for a certain number of visits per year (zero to unlimited), with the number specified by the Director and notice provided in connection with the open season enrollment period preceding the plan year; and

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(C) In any other special circumstances identified by the Director, generally with notice provided in connection with the open season enrollment period for the plan year.

(iv) A primary care manager who believes a referral to a specialty care provider is medically necessary and appropriate need not obtain pre-authorization from the managed care support contractor before referring a patient to a network specialty care provider. Such preauthorization is only required with respect to a primary care manager's referral for:

(A) Inpatient hospitalization;

(B) Inpatient care at a skilled nursing facility;

(C) Inpatient care at a rehabilitation facility; and

(D) Inpatient care at a residential treatment facility.

(v) The restrictions in paragraph (n)(2)(iv) of this section on preauthorization requirements do not apply to any preauthorization requirements that are generally applicable under TRICARE, independent of TRICARE Prime referrals, such as:

(A) Under the Pharmacy Benefits Program under 10 U.S.C. 1074g and § 199.21.

(B) For laboratory and other ancillary services.

(C) Durable medical equipment.

(vi) The cost-sharing requirement for a beneficiary enrolled in TRICARE Prime who does not obtain a referral for care when it is required, including care from a non-network provider, is as provided in paragraph (l)(1)(iii) of this section concerning point of service care.

(vii) In the case of care for which preauthorization is not required under paragraph (n)(2)(iv) of this section, the Director may authorize a managed care support contractor to offer a voluntary pre-authorization program to enable beneficiaries and providers to confirm covered benefit status and/or medical necessity or to understand the criteria that will be used by the managed care support contractor to adjudicate the claim associated with the proposed care. A network provider may not be required to use such a program with respect to a referral.

(3) Restrictions on the use of providers. The requirements of this paragraph (n)(3) shall be applicable to health care utilization under TRICARE Prime, except in cases of emergency care and under point-of-service option (see paragraph (n)(4) of this section).

(i) Prime enrollees must obtain all primary health care from the primary care manager or from another provider to which the enrollee is referred by the primary care manager or otherwise authorized.

(ii) For any necessary specialty care and non-emergent inpatient care, the primary care manager or other authorized individual will assist in making an appropriate referral.

(iii) Though referrals for specialty care are generally the responsibility of the primary care managers, subject to discretion exercised by the TRICARE Regional Directors, and established in regional policy or memoranda of understanding, specialist providers may be permitted to refer patients for additional specialty consultation appointment services within the TRICARE contractor's network without prior authorization by primary care managers.

(iv)[1] The following procedures will apply to health care referrals under TRICARE Prime:

(A) The first priority for referral for specialty care or inpatient care will be to the local MTF (or to any other MTF in which catchment area the enrollee resides).

(B) If the local MTF(s) are unavailable for the services needed, but there is another MTF at which the needed services can be provided, the enrollee may be required to obtain the services at that MTF. However, this requirement will only apply to the extent that the enrollee was informed at the time of (or prior to) enrollment that mandatory referrals might be made to the MTF involved for the service involved.

(C) If the needed services are available within civilian preferred provider network serving the area, the enrollee may be required to obtain the services from a provider within the network. Subject to availability, the enrollee will have the freedom to choose a provider from among those in the network.

(D) If the needed services are not available within the civilian preferred provider network serving the area, the enrollee may be required to obtain the services from a designated civilian provider outside the area. However, this requirement will only apply to the extent that the enrollee was informed at the time of (or prior to) enrollment that mandatory referrals might be made to the provider involved for the service involved (with the provider and service either identified specifically or in connection with some appropriate classification).

(E) In cases in which the needed health care services cannot be provided pursuant to the procedures identified in paragraphs (n)(3)(iv)(A) through (D) of this section, the enrollee will receive authorization to obtain services from a TRICARE–authorized civilian provider(s) of the enrollee's choice not affiliated with the civilian preferred provider network.

(iv)[1] When Prime is operating in non-catchment areas, the requirements in paragraphs (n)(3)(iv)(B) through (E) of this section shall apply.

(4) Point-of-service option. TRICARE Prime enrollees retain the freedom to obtain services from civilian providers on a point-of service basis. Any health care services obtained by a Prime enrollee, but not obtained in accordance with the

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rules and procedures of Prime, will be covered by the point-of-service option. In such cases, all requirements applicable to health benefits under § 199.4 shall apply, except that there shall be higher deductible and cost sharing requirements (as set forth in paragraph (l)(1)(iii)) of this section). However, Prime rules may cover such services if the enrollee did not know and could not reasonably have been expected to know that the services were not obtained in accordance with the utilization management rules and procedures of Prime.

(5) Prime travel benefit. In accordance with guidelines issues by the Assistant Secretary of Defense (Health Affairs), certain travel expenses may be reimbursed when a TRICARE Prime enrollee is referred by the primary care manager for medically necessary specialty care more than 100 miles away from the primary care manager's office. Such guidelines shall be consistent with appropriate provisions of generally applicable Department of Defense rules and procedures governing travel expenses.

(o) TRICARE program enrollment procedures. There are certain requirements pertaining to procedures for enrollment in TRICARE Prime, TRICARE Select, and TRICARE Prime Remote for Active Duty Family Members. (These procedures do not apply to active duty members, whose enrollment is mandatory and automatic.)

(1) Annual open season enrollment.

(i) As a general rule, enrollment (or a modification to a previous enrollment) must occur during the open season period prior to the plan year, which is on a calendar year basis. The open season enrollment period will be of at least 30 calendar days duration. An enrollment choice will be applicable for the plan year.

(ii) Open season enrollment procedures may include automatic re-enrollment in the same plan for the next plan year for enrollees or sponsors that will occur in the event the enrollee does not take other action during the open season period.

(2) Exceptions to the calendar year enrollment process. The Director will identify certain qualifying events that may be the basis for a change in enrollment status during a plan year, such as a change in eligibility status, marriage, divorce, birth of a new family member, relocation, loss of other health insurance, or other events. In the case of such an event, a beneficiary eligible to enroll in a plan may newly enroll, dis-enroll, or modify a previous enrollment during the plan year. Initial payment of the applicable enrollment fee shall be collected for new enrollments in accordance with established procedures. Any applicable enrollment fee will be pro-rated. A beneficiary who dis-enrolls without enrolling at the same time in another plan is not eligible to enroll in a plan later in the same plan year unless there is another qualifying event. A beneficiary who is dis-enrolled for failure to pay a required enrollment fee installment is not eligible to re-enroll in a plan later in the same plan year unless there is another qualifying event. Generally, the effective date of coverage will coincide with the date of the qualifying event.

(3) Installment payments of enrollment fee. The Director will establish procedures for installment payments of enrollment fees.

(4) Effect of failure to enroll. Beneficiaries eligible to enroll in Prime or Select and who do not enroll will no longer have coverage under the TRICARE program until the next annual open season enrollment or they have a qualifying event, except that they do not lose any statutory eligibility for space-available care in military medical treatment facilities. There

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is a limited grace period exception to this enrollment requirement for calendar year 2018, as provided in section 701(d)(3) of the National Defense Authorization Act for Fiscal Year 2017.

(5) Automatic enrollment for certain dependents. Under 10 U.S.C. 1097a, in the case of dependents of active duty members in the grade of E–1 to E–4, such dependents who reside in a catchment area of a military treatment facility shall be enrolled in TRICARE Prime. The Director may provide for the automatic enrollment in TRICARE Prime for such dependents of active duty members in the grade of E–5 and higher. In any case of automatic enrollment under this paragraph (o)(5), the member will be provided written notice and the automatic enrollment may be cancelled at the election of the member.

(6) Grace periods. The Director may make provisions for grace periods for enrollment-related actions to facilitate effective operation of the enrollment program.

(p) Civilian preferred provider networks. A major feature of the TRICARE program is the civilian preferred provider network.

(1) Status of network providers. Providers in the preferred provider network are not employees or agents of the Department of Defense or the United States Government. Although network providers must follow numerous rules and procedures of the TRICARE program, on matters of professional judgment and professional practice, the network provider is independent and not operating under the direction and control of the Department of Defense.

(2) Utilization management policies. Preferred providers are required to follow the utilization management policies and procedures of the TRICARE program. These policies and procedures are part of discretionary judgments by the Department of Defense regarding the methods of delivering and financing health care services that will best achieve health and economic policy objectives.

(3) Quality assurance requirements. A number of quality assurance requirements and procedures are applicable to preferred network providers. These are for the purpose of assuring that the health care services paid for with government funds meet the standards called for in the contract and provider agreement.

(4) Provider qualifications. All preferred providers must meet the following qualifications:

(i) They must be TRICARE–authorized providers and TRICARE- participating providers. In addition, a network provider may not require payment from the beneficiary for any excluded or excludable services that the beneficiary received from the network provider (i.e., the beneficiary will be held harmless) except as follows:

(A) If the beneficiary did not inform the provider that he or she was a TRICARE beneficiary, the provider may bill the beneficiary for services provided.

(B) If the beneficiary was informed in writing that the specific services were excluded or excludable from TRICARE coverage and the beneficiary agreed in writing, in advance of the services being provided, to pay for the services, the provider may bill the beneficiary.

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(ii) All physicians in the preferred provider network must have staff privileges in a hospital accredited by The Joint Commission (TJC) or other accrediting body determined by the Director. This requirement may be waived in any case in which a physician's practice does not include the need for admitting privileges in such a hospital, or in locations where no accredited facility exists. However, in any case in which the requirement is waived, the physician must comply with alternative qualification standards as are established by the Director.

(iii) All preferred providers must agree to follow all quality assurance, utilization management, and patient referral procedures established pursuant to this section, to make available to designated DoD utilization management or quality monitoring contractors medical records and other pertinent records, and to authorize the release of information to MTF Commanders regarding such quality assurance and utilization management activities.

(iv) All preferred network providers must be Medicare participating providers, unless this requirement is waived based on extraordinary circumstances. This requirement that a provider be a Medicare participating provider does not apply to providers who not eligible to be participating providers under Medicare.

(v) The network provider must be available to all TRICARE beneficiaries.

(vi) The provider must agree to accept the same payment rates negotiated for Prime enrollees for any person whose care is reimbursable by the Department of Defense, including, for example, Select participants, supplemental care cases, and beneficiaries from outside the area.

(vii) All preferred providers must meet all other qualification requirements, and agree to comply with all other rules and procedures established for the preferred provider network.

(viii) In locations where TRICARE Prime is not available, a TRICARE provider network will, to the extent practicable, be available for TRICARE Select enrollees. In these locations, the minimal requirements for network participation are those set forth in paragraph (p)(4)(i) of this section. Other requirements of this paragraph (p) will apply unless waived by the Director.

(5) Access standards. Preferred provider networks will have attributes of size, composition, mix of providers and geographical distribution so that the networks, coupled with the MTF capabilities (when applicable), can adequately address the health care needs of the enrollees. In the event that a Prime enrollee seeks to obtain from the managed care support contractor an appointment for care but is not offered an appointment within the access time standards from a network provider, the enrollee will be authorized to receive care from a non-network provider without incurring the additional fees associated with point-of-service care. The following are the access standards:

(i) Under normal circumstances, enrollee travel time may not exceed 30 minutes from home to primary care delivery site unless a longer time is necessary because of the absence of providers (including providers not part of the network) in the area.

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(ii) The wait time for an appointment for a well-patient visit or a specialty care referral shall not exceed four weeks; for a routine visit, the wait time for an appointment shall not exceed one week; and for an urgent care visit the wait time for an appointment shall generally not exceed 24 hours.

(iii) Emergency services shall be available and accessible to handle emergencies (and urgent care visits if not available from other primary care providers pursuant to paragraph (p)(5)(ii) of this section), within the service area 24 hours a day, seven days a week.

(iv) The network shall include a sufficient number and mix of board certified specialists to meet reasonably the anticipated needs of enrollees. Travel time for specialty care shall not exceed one hour under normal circumstances, unless a longer time is necessary because of the absence of providers (including providers not part of the network) in the area. This requirement does not apply under the Specialized Treatment Services Program.

(v) Office waiting times in nonemergency circumstances shall not exceed 30 minutes, except when emergency care is being provided to patients, and the normal schedule is disrupted.

(6) Special reimbursement methods for network providers. The Director, may establish, for preferred provider networks, reimbursement rates and methods different from those established pursuant to § 199.14. Such provisions may be expressed in terms of percentage discounts off CHAMPUS allowable amounts, or in other terms. In circumstances in which payments are based on hospital-specific rates (or other rates specific to particular institutional providers), special reimbursement methods may permit payments based on discounts off national or regional prevailing payment levels, even if higher than particular institution-specific payment rates.

(q) Preferred provider network establishment.

(1) The any qualified provider method may be used to establish a civilian preferred provider network. Under this method, any TRICARE–authorized provider that meets the qualification standards established by the Director, or designee, may become a part of the preferred provider network. Such standards must be publicly announced and uniformly applied. Also under this method, any provider who meets all applicable qualification standards may not be excluded from the preferred provider network. Qualifications include:

(i) The provider must meet all applicable requirements in paragraph (p)(4) of this section.

(ii) The provider must agree to follow all quality assurance and utilization management procedures established pursuant to this section.

(iii) The provider must be a participating provider under TRICARE for all claims.

(iv) The provider must meet all other qualification requirements, and agree to all other rules and procedures, that are established, publicly announced, and uniformly applies by the Director (or other authorized official).

(v) The provider must sign a preferred provider network agreement covering all applicable requirements. Such agreements will be for a duration of one year, are renewable, and may be canceled by the provider or the Director (or other authorized official) upon appropriate notice to the other party. The Director shall establish an agreement model or other guidelines to promote uniformity in the agreements.

(2) In addition to the above requirements, the Director, or designee, may establish additional categories of preferred providers of high quality/high value that require additional qualifications.

(r) General fraud, abuse, and conflict of interest requirements under TRICARE program. All fraud, abuse, and conflict of interest requirements for the basic CHAMPUS program, as set forth in this part (see especially applicable provisions of § 199.9) are applicable to the TRICARE program.

(s) [Reserved]

(t) Inclusion of Department of Veterans Affairs Medical Centers in TRICARE networks. TRICARE preferred provider networks may include Department of Veterans Affairs health facilities pursuant to arrangements, made with the approval of the Assistant Secretary of Defense (Health Affairs), between those centers and the Director, or designated TRICARE contractor.

(u) Care provided outside the United States. The TRICARE program is not automatically implemented in all respects outside the United States. This paragraph (u) sets forth the provisions of this section applicable to care received outside the United States under the following TRICARE health plans.

(1) TRICARE Prime. The Director may, in conjunction with implementation of the TRICARE program, authorize a special Prime program for command sponsored dependents of active duty members who accompany the members in their assignments in foreign countries. Under this special program, a preferred provider network may be established through contracts or agreements with selected health care providers. Under the network, Prime covered services will be provided to the enrolled covered dependents subject to applicable Prime deductibles, copayments, and point-of-service charges. To the extent practicable, rules and procedures applicable to TRICARE Prime under this section shall apply unless specific exemptions are granted in writing by the Director. The use of this authority by the Director for any particular geographical area will be published on the primary publicly available Internet Web site of the Department and on the publicly available Internet Web site of the managed care support contractor that has established the provider network under the TRICARE program. Published information will include a description of the preferred provider network program and other pertinent information. The Director shall also issue policies, instructions, and guidelines necessary to implement this special program.

(2) TRICARE Select. The TRICARE Select option shall be available outside the United States except that a preferred provider network of providers shall only be established in areas where the Director determines that it is economically in the best interest of the Department of Defense. In such a case, the Director shall establish a preferred provider network through contracts or agreements with selected health care providers for eligible beneficiaries to receive covered benefits subject to the enrollment and cost-sharing amounts applicable to the specific category of beneficiary. When an eligible beneficiary, other than a TRICARE for Life beneficiary, receives covered services from an authorized TRICARE non-network provider, including in areas where a preferred provider network has not been established by the Director, the beneficiary shall be subject to cost-sharing amounts applicable to out-of-network care. To the extent practicable, rules

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and procedures applicable to TRICARE Select under this section shall apply unless specific exemptions are granted in writing by the Director. The use of this authority by the Director to establish a TRICARE preferred provider network for any particular geographical area will be published on the primary publicly available Internet Web site of the Department and on the publicly available Internet Web site of the managed care support contractor that has established the provider network under the TRICARE program. Published information will include a description of the preferred provider network program and other pertinent information. The Director shall also issue policies, instructions, and guidelines necessary to implement this special program.

(3) TRICARE for Life. The TRICARE for Life (TFL) option shall be available outside the United States. Eligible TFL beneficiaries may receive covered services and supplies authorized under § 199.4, subject to the applicable catastrophic cap, deductibles and cost-shares under § 199.4, whether received from a network provider or any authorized TRICARE provider not in a preferred provider network. However, if a TFL beneficiary receives covered services from a PPN provider, the beneficiary's out-of-pocket costs will generally be lower.

(v) Administration of the TRICARE program in the state of Alaska. In view of the unique geographical and environmental characteristics impacting the delivery of health care in the state of Alaska, administration of the TRICARE program in the state of Alaska will not include financial underwriting of the delivery of health care by a TRICARE contractor. All other provisions of this section shall apply to administration of the TRICARE program in the state of Alaska as they apply to the other 49 states and the District of Columbia.

(w) Administrative procedures. The Assistant Secretary of Defense (Health Affairs), the Director, and MTF Commanders (or other authorized officials) are authorized to establish administrative requirements and procedures, consistent with this section, this part, and other applicable DoD Directives or Instructions, for the implementation and operation of the TRICARE program.

Credits

[60 FR 52095, Oct. 5, 1995; 63 FR 9142, Feb. 24, 1998; 64 FR 13913, March 23, 1999; 65 FR 39805, June 28, 2000; 65 FR 45425, July 21, 2000; 66 FR 9655, Feb. 9, 2001; 66 FR 10367, Feb. 15, 2001; 66 FR 40608, Aug. 3, 2001; 67 FR 5479, Feb. 6, 2002; 67 FR 6409, Feb. 12, 2002; 67 FR 15725, April 3, 2002; 68 FR 23033, April 30, 2003; 68 FR 32363, May 30, 2003; 68 FR 44881, 44883, July 31, 2003; 70 FR 19266, April 13, 2005; 71 FR 50348, Aug. 25, 2006; 72 FR 2447, Jan. 19, 2007; 73 FR 30479, May 28, 2008; 75 FR 47713, Aug. 9, 2010; 75 FR 50884, Aug. 18, 2010; 76 FR 81370, Dec. 28, 2011; 82 FR 45448, Sept. 29, 2017; 84 FR 4333, Feb. 15, 2019; 85 FR 27927, May 12, 2020]

SOURCE: 51 FR 24008, July 1, 1986; 53 FR 2020, Jan. 26, 1988; 55 FR 624, Jan. 8, 1990; 56 FR 44006, Sept. 6, 1991; 56 FR 59877, Nov. 26, 1991; 60 FR 12426, March 7, 1995, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. chapter 55.

Notes of Decisions (14)

Current through April 23, 2021; 86 FR 21666.

Footnotes

1 So in original; there are two subsections (n)(3)(iv). See 82 FR 45454.

1 So in original; there are two subsections (n)(3)(iv). See 82 FR 45454.

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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. § 865.4

§ 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.

(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).

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(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 23, 2021; 86 FR 21666.

Footnotes

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

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Department of Defense
INSTRUCTION

NUMBER 1332.18
August 5, 2014

USD(P&R)

SUBJECT: Disability Evaluation System (DES)

References: See Enclosure 1

1. PURPOSE. This instruction:

a. Reissues DoD Directive (DoDD) 1332.18 (Reference (a)) as a DoD instruction (DoDI) in accordance with the authority in DoDD 5124.02 (Reference (b)).

b. Establishes policy, assigns responsibilities, and provides procedures for referral, evaluation, return to duty, separation, or retirement of Service members for disability in accordance with Title 10, United States Code (U.S.C.) (Reference (c)); and related determinations pursuant to sections 3501, 6303, 8332, and 8411 of Title 5, U.S.C. (Reference (d)); section 104 of Title 26, U.S.C. (Reference (e)); and section 2082 of Title 50, U.S.C. (Reference (f)).

c. Incorporates and cancels DoDI 1332.38 (Reference (g)) and the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) Memorandums (References (h) through (o)).

2. APPLICABILITY. This instruction applies to the OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

3. POLICY. It is DoD policy that:

a. The DES will be the mechanism for determining return to duty, separation, or retirement of Service members because of disability in accordance with Reference (c).

b. Service members will proceed through one of three DES processes: the Legacy Disability Evaluation System (LDES), the Integrated Disability Evaluation System (IDES), or the Expedited Disability Evaluation System (EDES). DoD's objective in all DES processes is to collaborate with the Department of Veterans Affairs (VA) to ensure continuity of care, timely

processing, and seamless transition of the Service member from DoD to VA in cases of disability separation or retirement.

c. The standards for all determinations related to disability evaluation will be consistently and equitably applied, in accordance with Reference (c), to all Service members, and be uniform within the components of the Military Departments.

d. Reserve Component (RC) Service members who are not on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions may enter the DES for a determination of fitness and whether the condition is duty related.

e. In determining a Service member's disability rating, the Military Department will consider all medical conditions, whether individually or collectively, that render the Service member unfit to perform the duties of the member's office, grade, rank, or rating.

f. Service members who are pending permanent or temporary disability retirement and who are eligible for a length of service retirement at the time of their disability evaluation may elect to be retired for disability or for length of service. However, when retirement for length of service is elected, the member's retirement date must occur within the time frame that a disability retirement is expected to occur.

g. A Service member may not be discharged or released from active duty because of a disability until he or she has made a claim for compensation, pension, or hospitalization with the VA or has signed a statement that his or her right to make such a claim has been explained, or has refused to sign such a statement. The Secretaries of the Military Departments may not deny a Service member who refuses to sign such a claim any privileges within DES policy as noted in this instruction.

h. RC Service members on active duty orders specifying a period of more than 30 days will, with their consent, be kept on active duty for disability evaluation processing until final disposition by the Secretary of the Military Department concerned.

i. The Secretaries of the Military Departments may authorize separation on the basis of congenital or developmental defects not being compensable under the Veterans Affairs Schedule for Rating Disabilities (VASRD) if defects, circumstances or conditions interfere with assignment to or performance of duty. These Service members will not be referred to the DES.

4. <u>RESPONSIBILITIES</u>. See Enclosure 2.

5. <u>PROCEDURES</u>. See Enclosure 3 of this instruction. Additional procedural guidance for the LDES is included in DoD Manual (DoDM) 1332.18, Volume 1 (Reference (p)). Additional procedural guidance for the IDES is included in DoDM 1332.18, Volume 2 (Reference (q)). Procedural guidance for EDES will be published in a separate DoD issuance.

6. INFORMATION COLLECTION REQUIREMENTS

a. The DES Annual Report, referred to in paragraphs 1d(6)(a), 1d(6)(b), and 1e(4) of Enclosure 2 of this instruction, has been assigned report control symbol DD-HA(A,Q)2547 in accordance with the procedures in Volume 1 of DoD Manual 8910.01 (Reference (r)).

b. The DES quarterly data submission, referred to in paragraphs 1d(6)(b) and 1d(4) of Enclosure 2 of this instruction, has been assigned report control symbol DD-HA(A,Q)2547 in accordance with the procedures in Reference (r).

7. RELEASABILITY. **Cleared for public release**. This instruction is available on the Internet from the DoD Issuances Website at http://www/dtic/mil/whs/directives.

8. EFFECTIVE DATE. This instruction:

a. Is effective August 5, 2014.

b. Will expire effective August 5, 2024 if it hasn't been reissued or cancelled before this date in accordance with DoDI 5025.01 (Reference (s)).

Enclosures
1. References
2. Responsibilities
3. Operational Standards for the DES

Glossary

Department of Defense

INSTRUCTION

NUMBER 1332.38
November 14, 1996
Incorporating Change 1, July 10, 2006

ASD(FMP)

SUBJECT: Physical Disability Evaluation

References:
(a) DoD Directive 1332.18, "Separation or Retirement for Physical Disability," November 4, 1996
(b) Title 10, United States Code
(c) Sections 3502, 5532, 6303, and l8332 of title 5, United States Code
(d) Sections 206 and 502 of title 37, United States Code
(e) through (k), see enclosure 1

1. PURPOSE

This Instruction implements policy, assigns responsibilities, and prescribes procedures under References (a) and (b) for:

1.1. Retiring or separating Service members because of physical disability.

1.2. Making administrative determinations under references (c) and (d) for Service members with Service-incurred or Service aggravated conditions.

1.3. Authorizing a fitness determination for members of the Ready Reserve who are ineligible for benefits under reference (b) because the condition is unrelated to military status and duty.

2. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense (OSD), the Military Departments (including the Coast Guard when it is operating as a Military Service in the Navy), the Chairman of the Joint Chiefs of Staff, and the Combatant Commands (hereafter referred to collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force and the Marine Corps.

3. DEFINITIONS

Terms used in this Instruction are defined at enclosure 2.

4. POLICY

It is DoD policy under reference (a) that:

4.1. The DoD Disability Evaluation System (DES) shall be established to conduct physical disability evaluation in a consistent and timely manner.

4.2. Members of the Reserve components who are not on a call to active duty of more than 30 days and who are medically disqualified for impairments unrelated to the member's military status and performance of duty shall be referred into the DES solely for a fitness determination upon the request of the member or when directed by the Secretary concerned.

4.3. The applicable standards for all determinations related to physical disability evaluation shall be consistently and equitably applied, in accordance with 10 U.S.C. (reference (b)), to Active component and Ready Reserve members.

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Personnel and Readiness shall:

5.1.1. Exercise cognizance and oversight of the DoD DES.

5.1.2. Make the final decision on requests from the Military Departments for exceptions to the standards of this Instruction.

5.2. The Assistant Secretary of Defense for Force Management Policy, under the Under Secretary of Defense for Personnel and Readiness, shall:

5.2.1. Exercise cognizance of laws, policies, and regulations that affect the DES.

5.2.2. Issue guidance, as required, to further interpret, implement, and govern the policy and procedures for the four elements of the DES.

5.2.3. Establish necessary reporting requirements to monitor and assess the performance of the DES and compliance of the Military Departments with this Instruction and DoD Directive 1332.18 (reference (a)).

5.2.4. Coordinate with the Assistant Secretary of Defense for Reserve Affairs concerning the impact of laws and DoD policy on Reserve members who have conditions that are cause for medical disqualification.

5.2.5. Coordinate with the Assistant Secretary of Defense for Health Affairs in developing procedures for medical issues pertaining to physical disability evaluation.

5.2.6. Review substantive changes proposed by the Military Departments to Departmental policies and procedures for physical disability evaluation that affect the uniformity of standards for separation or retirement for unfitness because of physical disability or separation of Ready Reserve members for medical disqualification.

5.2.7. Develop quality assurance procedures to ensure that policies are applied in a fair and consistent manner.

5.3. The Assistant Secretary of Defense for Health Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall:

5.3.1. Make recommendations for a final decision by the Secretary of Defense on the unfit findings on all officers in pay grade 0-7 or higher and medical officers in any grade who are pending nondisability retirement for age or length of service at the time of their referral into the DES.

5.3.2. Review substantive changes proposed by the Military Departments in their supplemental medical standards to enclosure 4 of this Instruction concerning medical conditions that are cause for referral of a member into the DES.

5.4. The Assistant Secretary of Defense for Reserve Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall coordinate as necessary to ensure that procedures for the DES apply consistently and uniformly to members of the Reserve components.

5.5. The Secretaries of the Military Departments shall:

5.5.1. Ensure that members with conditions that may be cause for referral into the DES are counseled at appropriate stages on the DES process and the member's rights, entitlements, and benefits.

5.5.2. Establish a quality assurance process to ensure that policies and procedures established by DoD Directive 1332.18 (reference (a)) and this Instruction are interpreted uniformly.

5.5.3. Make determinations on unfitness because of medical disqualification or physical disability; entitlement to assignment of percentage of disability at the time of retirement or separation because of physical disability; and, except as limited by 10 U.S.C. 1216(d) (reference (b)), entitlement to and payment of disability retired and severance pay.

5.5.4. Ensure that the record of proceedings for physical disability cases supports the findings and recommendations made.

5.5.5. Ensure the Temporary Disability Retired List (TDRL) is managed to meet the requirements of 10 U.S.C. 1210 (reference (b)) for timely periodic physical examinations, suspension of retired pay, and removal from the TDRL.

5.5.6. Designate a Military Department representative to serve as the Department representative for the Disability Evaluation System.

5.5.7. Ensure all matters raising issues of fraud on the DES by members are investigated and resolved as appropriate.

6. PROCEDURES

See enclosure 3.

7. EFFECTIVE DATE

This Instruction is effective for all MEBs 120 days after the date of this Instruction.

Edwin Dorn
Under Secretary of Defense for
Personnel and Readiness

Enclosures - 5
1. References
2. Definitions
3. Procedures
4. Guidelines Regarding Medical Conditions and Physical Defects That Are Cause for Referral into the Disability Evaluation System
5. Conditions *and Circumstances* Not Constituting a Physical Disability

E3.P3. ENCLOSURE 3 PART 3

STANDARDS FOR DETERMINING UNFITNESS DUE TO PHYSICAL DISABILITY OR MEDICAL DISQUALIFICATION

E3.P3.1. Uniformity of Standards.

The standards listed within this instruction for determining unfitness due to physical disability shall be strictly adhered to, unless exceptions are approved by the Under Secretary of Defense for Personnel and Readiness based upon the unique needs of the respective Military Department.

E3.P3.2. General Criteria for Making Unfitness Determinations

E3.P3.2.1. A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties) to include duties during a remaining period of Reserve obligation.

E3.P3.2.2. In making a determination of a member's ability to so perform his/her duties, the following criteria may be included in the assessment:

E3.P3.2.2.1. The medical condition represents a decided medical risk to the health of the member or to the welfare of other members were the member to continue on active duty or in an Active Reserve status.

E3.P3.2.2.2. The medical condition imposes unreasonable requirements on the military to maintain or protect the member.

E3.P3.2.2.3. The Service member's established duties during any remaining period of reserve obligation.

E3.P3.3. Relevant Evidence.

All relevant evidence will be considered in assessing Service member fitness, including the circumstances of referral. To reach a finding of unfit, the PEB must be satisfied that the information it has before it supports a finding of unfitness.

E3.P3.3.1. Referral Following Illness or Injury. When referral for physical disability evaluation immediately follows acute, grave illness or injury, the medical evaluation may stand alone, particularly if medical evidence establishes that continued service would be deleterious to the Service member's health or is not in the best interests of the respective Service.

E3.P3.3.2. Referral For Chronic Impairment. When a Service member is referred for physical disability evaluation under circumstances other than as described in subsection E3.P3.3.1., above, evaluation of the member's performance of duty by supervisors as indicated, for example, by letters, efficiency reports, credential reports, status of physician medical

privileges, or personal testimony may provide better evidence than a clinical estimate by a physician of the Service member's ability to perform his or her duties. Particularly in cases of chronic illness, these documents may be expected to reflect accurately a member's capacity to perform.

E3.P3.3.3. Adequate Performance Until Referral. If the evidence establishes that the Service member adequately performed his or her duties until the time the Service member was referred for physical evaluation, the member may be considered fit for duty even though medical evidence indicates questionable physical ability to continue to perform duty.

E3.P3.3.4. Cause and Effect Relationship. Regardless of the presence of illness or injury, inadequate performance of duty, by itself, shall not be considered as evidence of unfitness due to physical disability unless it is established that there is a cause and effect relationship between the two factors.

E3.P3.4. Reasonable Performance of Duties

E3.P3.4.1. Considerations. Determining whether a member can reasonably perform his or her duties includes consideration of:

E3.P3.4.1.1. Common Military Tasks. The member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties) to include during a remaining period of Reserve obligation. For example, whether the member is routinely required to fire his or her weapon, perform field duty, or to wear load bearing equipment or protective gear.

E3.P3.4.1.2. Physical Fitness Test. Whether the member is medically prohibited from taking the respective Service's required physical fitness test. When an individual has been found fit by a PEB for a condition which prevents the member from taking the Service physical fitness test, the inability to take the physical fitness test shall not form the basis for an adverse personnel action against the member.

E3.P3.4.1.3. Deployability. When a Service member's office, grade, rank or rating requires deployability, whether a member's medical condition(s) prevents positioning the member individually or as part of a unit with or without prior notification to a location outside the Continental United States. Inability to perform the duties of his or her office, grade, rank, or rating in every geographic location and under every conceivable circumstance will not be the sole basis for a finding of unfitness. When deployability is used by a Service as a consideration to determine fitness, the standard must be applied uniformly to both the Active and Reserve components of that Service.

E3.P3.4.1.4. Special Qualifications. For members whose medical condition causes loss of qualification for specialized duties, whether the specialized duties comprise the member's current duty assignment; or the member has an alternate branch or specialty; or whether reclassification or reassignment is feasible.

E3.P3.4.2. General, Flag, and Medical Officers. An officer in pay grade 0-7 or higher or a medical officer in any grade shall not be determined unfit because of physical disability if the member can be expected to perform satisfactorily in an assignment appropriate to his or her grade, qualifications, and experience. Thus, the inability to perform specialized duties or the fact the member has a condition which is cause for referral to a PEB is not justification for a finding of unfitness.

E3.P3.4.3. Members on Permanent Limited Duty. A member previously determined unfit and continued in a permanent limited duty status or otherwise continued on active duty, will normally be found unfit at the expiration of his or her period of continuation. However, the member may be determined fit when the member's condition has healed or improved so that the member would be capable of performing his or her duties in other than a limited duty status.

E3.P3.4.4. Overall Effect. A member may be determined unfit as a result of the overall effect of two or more impairments even though each of them, standing alone, would not cause the member to be referred into the DES or be found unfit because of physical disability.

E3.P3.5. Presumption of Fitness

E3.P3.5.1. Application. Except for Service members previously determined unfit and continued in a permanent limited duty status, Service members who are pending retirement at the time they are referred for physical disability evaluation enter the DES under a rebuttable presumption that they are physically fit. The DES compensates disabilities when they cause or contribute to career termination. Continued performance of duty until a Service member is approved for length of service retirement creates a rebuttable presumption that a Service member's medical conditions have not caused career termination.

E3.P3.5.2. Presumptive Period. Service members shall be considered to be pending retirement when the dictation of the member's MEB occurs after any of the circumstances designated in paragraphs E3.P3.5.2.1. through E3.P3.5.2.4., below.

E3.P3.5.2.1. When a member's request for voluntary retirement has been approved. Revocation of voluntary retirement orders for purposes of referral into the DES does not negate application of the presumption.

E3.P3.5.2.2. An officer has been approved for Selective Early Retirement.

E3.P3.5.2.3. An officer is within 12 months of mandatory retirement due to age or length of service.

E3.P3.5.2.4. An enlisted member is within 12 months of his or her retention control point (RCP) or expiration of active obligated service (EAOS) but will be eligible for retirement at his or her RCP/EAOS.

E3.P3.5.3. Overcoming the Presumption. The presumption of fitness rule shall be overcome when:

E3.P3.5.3.1. Within the presumptive period an acute, grave illness or injury occurs that would prevent the member from performing further duty if he or she were not retiring; or

E3.P3.5.3.2. Within the presumptive period a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the member were not retiring; or

E3.P3.5.3.3. The condition for which the member is referred is a chronic condition and a preponderance of evidence establishes that the member was not performing duties befitting either his or her experience in the office, grade, rank, or rating before entering the presumptive period. When there has been no serious deterioration within the presumptive period, the ability to perform duty in the future shall not be a consideration.

E3.P3.6. Evidentiary Standards for Determining UnfitnessBecause of Physical Disability

E3.P3.6.1. Factual Finding. A factual finding that a Service member is unfit because of physical disability depends on the evidence that is available to support that finding. The quality of evidence is usually more important than quantity. All relevant evidence must be weighted in relation to all known facts and circumstances which prompted referral for disability evaluation. Findings will be made on the basis of objective evidence in the record as distinguished from personal opinion, speculation, or conjecture. When the evidence is not clear concerning a Service member's fitness, an attempt will be made to resolve doubt on the basis of further objective investigation, observation, and evidence. Benefit of unresolved doubt shall be resolved in favor of the fitness of the Service member under the rebuttable presumption that the member desires to be found fit for duty.

E3.P3.6.2. Preponderance of Evidence. Findings about fitness or unfitness for Military Service shall be made on the basis of preponderance of the evidence. Thus, if a preponderance (that is, more than 50 percent) of the evidence indicates unfitness, a finding to that effect will be made. If, on the other hand, a preponderance of the evidence indicates fitness, the Service member may not be separated or retired by reason of physical disability.

DoD INSTRUCTION 1332.45

RETENTION DETERMINATIONS FOR NON-DEPLOYABLE SERVICE MEMBERS

Originating Component: Office of the Under Secretary of Defense for Personnel and Readiness

Effective: July 30, 2018

Releasability: Cleared for public release. Available on the Directives Division Website at http://www.esd.whs.mil/DD/.

Incorporates and Cancels: Office of the Under Secretary of Defense for Personnel and Readiness Memorandum, "DoD Retention Policy for Non-Deployable Service Members," February 14, 2018

Approved by: Robert L. Wilkie, Under Secretary of Defense for Personnel and Readiness

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Purpose: In accordance with the authority in DoD Directive 5124.02, this issuance:

- Establishes policy, assigns responsibilities, and provides direction for retention determinations for non-deployable Service members.
- Provides guidance and instructions for reporting deployability data for the Total Force.

TABLE OF CONTENTS

SECTION 1: GENERAL ISSUANCE INFORMATION 4
1.1. Applicability. 4
1.2. Policy. 4
1.3. Information Collections. 4
SECTION 2: RESPONSIBILITIES 5
2.1. Under Secretary of Defense for Personnel and Readiness (USD(P&R)). 5
2.2. Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)). 5
2.3. Assistant Secretary of Defense for Health Affairs. 5
2.4. Secretaries of the Military Departments. 5
SECTION 3: PROCEDURES FOR TRACKING AND REPORTING SERVICE MEMBERS 7
3.1. Tracking. 7
3.2. Reporting. 7
3.3. Deployable with Limitations. 8
3.4. Training and Transient. 8
a. Initial Entry Training. 8
b. Cadets and Midshipman. 9
c. All Other Training. 9
d. Transient. 9
3.5. Temporary Non-Deployable Categories. 9
a. Medical. 9
b. Legal. 9
c. Administrative. 10
3.6. Permanent Non-Deployable Categories. 11
a. Medical. 11
b. Administrative. 11
c. Approved for Retention. 11
3.7. IMR Deficits. 12
a. Overdue PHA. 12
b. Dental Readiness (Dental Class 3). 12
c. Overdue Dental Screening (Dental Class 4). 12
d. Additional IMR Categories. 12
3.8. Prioritization of Service Members by Category. 12
a. Deployed. 12
b. Deployable with Limitations. 12
c. Approved for Retention. 12
d. Permanent Non-Deployable. 12
e. Training and Transient. 13
f. Temporary Non-Deployable. 13
g. IMR Deficits. 14
SECTION 4: RETENTION DETERMINATION 15
4.1. Retention Authority for Non-Deployable Service Members. 15
4.2. Retention Determination. 15
4.3. Special Categories. 16

SECTION 5: AUTHORITIES FOR SEPARATIONS AND RETIREMENTS 17
GLOSSARY 18
G.1. Acronyms. 18
G.2. Definitions. 18
REFERENCES 20

SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY. This issuance applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the "DoD Components").

1.2. POLICY. It is DoD policy that:

a. To maximize the lethality and readiness of the joint force, all Service members are expected to be deployable.

b. Service members who are considered non-deployable for more than 12 consecutive months will be evaluated for:

(1) A retention determination by their respective Military Departments.

(2) As appropriate, referral into the Disability Evaluation System (DES) in accordance with DoD Instruction (DoDI) 1332.18 or initiation of processing for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30. This policy on retention determinations for non-deployable Service members does not supersede the policies and processes concerning referral to the DES or the initiation of administrative separation proceedings found in these issuances.

c. Implementation for this policy is October 1, 2018.

1.3. INFORMATION COLLECTIONS. The Monthly Non-deployable Report, referred to in Paragraph 3.2. of this issuance, has been assigned report control symbol DD-P&R(M)2671 in accordance with the procedures in Volume 1 of DoD Manual 8910.01. The expiration date of this information collection is listed in the DoD Information Collections System at https://apps.sp.pentagon.mil/sites/dodiic/Pages/default.aspx.