NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL G. POHL,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2022-2080

Appeal from the United States Court of Federal Claims in No. 1:21-cv-01482-CNL, Judge Carolyn N. Lerner.

Decided: April 18, 2023

MICHAEL POHL, Liberty Hill, TX, pro se.

SONIA W. MURPHY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by Brian M. Boynton, Patricia M. McCarthy, Loren Misha Preheim.

Before REYNA, MAYER, and HUGHES, *Circuit Judges.*

REYNA, *Circuit Judge.*

Pro se Appellant Michael G. Pohl is a retired United States Air Force Reserve flight engineer. In 1999, the Air Force informed Mr. Pohl that he would be discharged for physical disqualification based on his back problems. He applied for transfer to the Retired Reserve in lieu of the discharge and was placed on the "Retired Reserve List." In 2018, Mr. Pohl, in an effort to obtain disability retirement pay, petitioned the Air Force Board for the Correction of Military Records ("Record Corrections Board") to change his records to reflect that he had been discharged for medical disqualification for a back disability stemming from an alleged 1991 Air Force training accident. On July 5, 2020, the Record Corrections Board denied the petition.

Mr. Pohl sued the government in 2021 in the United States Court of Federal Claims claiming he was entitled to military disability retirement pay under 10 U.S.C. § 1204. The government moved to dismiss on grounds that Mr. Pohl's claim was barred by the applicable six-year statute of limitations under 28 U.S.C. § 2501. According to the government, Mr. Pohl's claim accrued when he was discharged in 1999. Mr. Pohl argued that his claim accrued on July 5, 2020—the date the Record Corrections Board denied his request to correct his records. The Court of Federal Claims agreed with the government and dismissed the case for lack of subject matter jurisdiction. *Pohl v. United States*, No. 21-1482, 2022 WL 2232302, at *1 (Fed. Cl. Jun. 21, 2022) ("*Decision*"). Mr. Pohl appeals. We affirm.

BACKGROUND

Mr. Pohl joined the Army in 1982. *Decision*, at *2. He served three years on active duty before joining the Air Force Reserve as a flight engineer. *Id.* Mr. Pohl alleges that in April 1991, he sustained a back injury after falling 100 feet into a ravine during an Air Force training program. *Id.* After returning home from the training, he went to an on-base hospital where the flight surgeon suggested that if Mr. Pohl were examined "further," the surgeon would find an injury and that injury might "possibly end" his military career. *Id.* at *3 (quoting Complaint at ¶ 12, *Pohl v. United States*, No. 21-1482 (Fed. Cl. Jun. 16, 2021), ECF No. 1 ("Complaint")).[1] Mr. Pohl left the hospital without further testing. *Id.*

Medical records reflect that Mr. Pohl was injured in 1995 in a motor vehicle accident. *Id.* In 1996, he aggravated the 1991 injury by lifting a heavy object at his civilian commercial-airline job and became "incapacitated." *Id.* (quoting Complaint at ¶ 13). In 1997, he reinjured his back while lifting his son at home. *Id.* In November 1997, the Air Force placed Mr. Pohl on a profile that rendered him "not qualified for deployment" and "not qualified for reassignment." *Id.* at *4 (quoting Administrative Record at 146, *Pohl* ECF No. 7).

In December 1997, Mr. Pohl's civilian doctor, Dr. Coscia, identified several issues with Mr. Pohl's L5

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[1] For brevity, other materials from the Court of Federal Claims' docket that are cited here will be referred to as "*Pohl* ECF No. **."

vertebrae. *Id.* The doctor determined that an x-ray "revealed the extent of the 1991 injury" because they showed a "copious amount of fragmented bony overgrowth." *Id.* (quoting Complaint at ¶ 17). Mr. Pohl was diagnosed with additional spinal injuries and had surgery for a 360-degree fusion of his L5-S1 vertebrae. *Id.*

In June 1998, an Air Force doctor evaluated Mr. Pohl. *Id.*; Complaint at ¶ 14. The doctor noted that, to return to duty, Mr. Pohl needed to provide documentation from his primary care provider stating that he had "no limitations," but further noted that, "[i]n the probable event that the patient's provider recommends long term disability, the patient will need to return for reevaluation" by a "MedicalEB"—a Medical Evaluation Board. Administrative Record at 106, *Pohl* ECF No. 7; *see also Decision*, at *4; Complaint at ¶ 14. A Medical Evaluation Board or MEB determines whether a service member meets the service's standards for retention under its regulations. *Chambers v. United States*, 417 F.3d 1218, 1225 n.2 (Fed. Cir. 2005). If the MEB finds that the service member does not meet the standards for retention, a Physical Evaluation Board or "PEB" then "determines a service member's fitness for duty and entitlement to disability retirement." *Id.* Mr. Pohl never obtained any documentation from his primary care provider. *Decision*, at *4.

On December 21, 1998, the Air Force mailed Mr. Pohl two memoranda: a "Required Medical Documentation Update" (which asked him to provide medical documentation related to his condition) and a "Selection of Rights to Physical Evaluation Board (PEB)." *Id.*

(citing Administrative Record at 102 and 136–137, Pohl ECF No. 7). In the PEB-related document, the Air Force advised Mr. Pohl "that [he] ha[d] been identified as having a medical condition that may be medically disqualifying for worldwide duty and [that may] subsequently result in [his] involuntary separation." Appx100. The Air Force further referenced Department of Defense Directive 1332.18 (Separation or Retirement for Physical Disability), and Department of Defense Instruction 1332.38 (Physical Disability Evaluation), and stated that those provisions require that "a member of the Ready Reserve who is pending separation for a nonduty related impairment or condition shall be afforded the opportunity to have his/her case reviewed by the PEB solely for a fitness determination." *Id.* The Air Force then stated that Mr. Pohl "may elect to have [his] case reviewed by the PEB by completing and returning the attached form evidencing [his] election" and that "[f]ailure to comply will constitute a waiver of this right and discharge proceedings will continue." *Id.*

The government asserts that Mr. Pohl did not respond. *Decision*, at *4. Mr. Pohl claims that he never received the documents and that the Air Force never gave him a fitness determination or otherwise gave him the option to go before a medical evaluation board to begin the process of determining his right to obtain disability benefits. *Id.*

In June 1999, the Air Force declared Mr. Pohl medically disqualified for service based on his back surgery and inability to perform his duties. *Id.* at *5; Complaint

at ¶ 15. In September 1999, the Air Force notified him of his pending discharge. *Decision*, at *5. Mr. Pohl returned a signed acknowledgement of receipt for the discharge notification, and, in lieu of accepting a discharge, he submitted an application to transfer to the Retired Reserve on September 24, 1999. *Id.* He was placed on "Reserve Retired List" effective October 1, 1999. *Id.*

Mr. Pohl asserts that he had additional back surgeries in 2001 and 2003. *Id.* at *4. In 2016, Mr. Pohl petitioned the U.S. Department of Veterans Affairs for veteran's disability benefits, citing his injuries from the 1991 training incident. *Id.* at *3. In October 2018, the VA found that Mr. Pohl's lower back condition was "service-connected" based on the 1991 incident and assigned him a disability rating of 40%. *Id.*

In November 2018, to obtain disability retirement benefits through the Department of Defense, Mr. Pohl sought to correct his military record with the Records Corrections Board. *Id.* at *5; Complaint at ¶ 21. He requested that the Records Correction Board correct his discharge records to show that that he was "medically discharged" for a service-connected injury that rendered him permanently disabled. *Decision*, at *5. He contended that he had not applied for disability retirement earlier because he did not know that he was eligible to do so until after he received the VA's 40% disability determination. *Id.*

On July 5, 2020, the Record Corrections Board denied his request to correct the record. Appx19. It

determined that Mr. Pohl's application was untimely filed after the three-year filing deadline under 10 U.S.C. § 1552. Appx23. It also determined that Mr. Pohl failed to establish an error or injustice in his military record. *Id.*

In June 2021, Mr. Pohl filed suit against the government in the U.S. Court of Federal Claims seeking military pay, disability retirement pay, reimbursement of expenses, and other benefits under 10 U.S.C. § 1204. *Decision*, at *1, *6. He also asserted due process violations under the Constitution. *Id.*

The government moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. *Id.* at *1. In its motion to dismiss, the government argued that Mr. Pohl's § 1204 claim was barred by the six-year statute of limitations under 28 U.S.C. § 2501. Def. Mot. at 9–11, *Pohl* ECF No. 11. Section 2501 provides in relevant part: "Every claim of which the . . . Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. According to the government, Mr. Pohl's claims accrued in 1999, the date of discharge, because Mr. Pohl knew at the time of discharge that his disability was permanent. Def. Mot. at 9–11, *Pohl* ECF No. 11.

Mr. Pohl did not challenge that he knew that he was permanently disabled as of discharge, Pl. Resp. Br. at 4–6, *Pohl* ECF No. 12, and he "readily admits he was unfit for flight duty" and that "all parties agree that [he] was retired with a permanent disability," *id.* at 5.

He argued instead that the Air Force erred by failing to give him a board medical evaluation review and failing to process him correctly before discharge. *Id.* As a result, Mr. Pohl asserts that his claim did not accrue until July 5, 2020, when the Record Correction Board denied his request for a record correction. *Id.*

The Court of Federal Claims granted the motion to dismiss, finding that Mr. Pohl's claim was barred by the statute of limitations and that the court thus lacked subject matter jurisdiction over the claims. *Decision*, at *1, *7–9. The court determined that, under Federal Circuit case law, Mr. Pohl's claim accrued at the time of discharge, in 1999. The Court of Federal Claims found that Mr. Pohl waived his right to board review in 1999 because Mr. Pohl "knew he was permanently disabled" at the time of discharge, April 1991, *id.* at *8, and "[e]ven if [he] did not have the requisite knowledge," he voluntarily transferred to the Retired Reserve, *id.* at *9.

The court explained that Mr. Pohl's "counsel admitted at oral argument, and the Complaint makes clear, that Mr. Pohl knew he was permanently disabled" at the time of discharge. *Id.* at *8 (citing Hr'g Tr. at 19:1–6, *Pohl* ECF No. 18; Complaint at ¶ 13). The court noted that Mr. Pohl's assertion that he was unaware of the service-connected disability until the VA's 2018 rating was "incredulous" because Mr. Pohl was the one who self-reported the 1991 incident to the VA. *Id.* The court determined that the statute of limitations could not be equitably tolled or waived, and that

the court was further divested of jurisdiction over his lawsuit. *Id.* at *9.

Mr. Pohl appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

Whether the Court of Federal Claims has jurisdiction over a claim is a question of law that we review de novo. *Jones v. United States*, 30 F.4th 1094, 1100 (Fed. Cir. 2022). The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *Diaz v. United States*, 853 F.3d 1355, 1357 (Fed. Cir. 2017). We review the court's findings of fact relating to jurisdictional issues for clear error. *Jones*, 30 F.4th at 1100. "If the Court of Federal Claims' findings of fact are plausible in light of the record viewed in its entirety, this court may not reverse them even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Bernard v. United States*, 98 F. App'x 860, 861 (Fed. Cir. 2004) (cleaned up).

"To fall within the jurisdiction of the Court of Federal Claims, a claim against the United States filed in that court must be 'filed within six years after such claim first accrues.'" *Jones*, 30 F.4th at 1100 (quoting 28 U.S.C. § 2501 (1988)). This deadline requirement is jurisdictional and cannot be equitably tolled or waived. *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1264 (Fed. Cir. 2017).

Generally, "claims of entitlement to disability retirement pay do not accrue until the appropriate board either finally denies such a claim or refuses to hear it." *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990). "The decision by the first statutorily authorized board which hears or refuses to hear the claim is the triggering event." *Id.* Where the service member has "neither requested nor been offered consideration by a retiring board prior to discharge," a corrections board's later denial of his petition is generally the "triggering event." *Id.*[2]

But there is an exception to that general rule. Under certain circumstances, a service member's failure to request a review by a retiring board before discharge may have the same effect as a refusal by the service to provide board review. *Id.* That failure can trigger the statute of limitations when the service member has sufficient "knowledge of the existence and extent of his condition at the time of his discharge . . . to justify concluding that he waived the right to board review of the service's finding of fitness by failing to demand a board prior to his discharge." *Id.* at 1562 (footnote omitted). In a footnote, the *Real* court added: "This assumes that the service member has been informed that the failure to demand a board prior to discharge will result in his being ineligible for disability benefits from the service." *Id.* at 1562 n.6.

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[2] The "retiring board" is now the PEB. *Chambers*, 417 F.3d at 1225 n.2.

This footnote suggests that, before the statute of limitations is triggered, the service member must be both (1) aware of his condition *and* (2) made aware that his failure to demand a board review before discharge will result in potentially missing out on disability benefits. Later cases from this court, however, have not referenced *Real*'s footnote 6. A 2003 nonprecedential case did allude to this two-part framework—but without citing *Real*'s footnote 6—stating: "[W]hen a service member is sufficiently alerted to the possible existence of a disability to ask for or appear before a Retiring Board, the awareness of the disability *coupled with* awareness of the review board process causes the disability claim to accrue at that time." *Purvis v. United States*, 77 F. App'x 512, 514 (Fed. Cir. 2003) (emphasis added) (cleaned up). Yet other cases have discussed only the first issue—awareness of the condition. *See, e.g.*, *Ullmann v. United States*, 123 F. App'x 970, 973 (Fed. Cir. 2004) (focusing on the service member's knowledge of the permanent disability). In the 2005 precedential *Chambers* case, this court appeared to interpret *Real* as requiring only awareness of the condition—essentially *equating* awareness of the condition *with* awareness of entitlement to disability retirement pay. Indeed, the *Chambers* court stated—without mentioning *Real*'s footnote 6—that the service member's failure to demand a Board Review "can invoke the statute of limitations when the service member has sufficient actual or constructive notice of his disability, *and hence*, of his entitlement to disability retirement pay." *Chambers*, 417 F.3d at 1226 (emphasis added) (citing *Real*, 906 F.2d at 1562).

As the foregoing indicates, applicable case law is not clear whether the exception requires satisfaction of: (1) an awareness of the condition, and (2) an awareness that the failure to demand a board review before discharge will result in potentially losing disability benefits. For its part, the Court of Federal Claims here did not expressly consider the issue, but it appears to have concluded that the second element, awareness to demand a board review, was not a requirement under *Real* or *Chambers*. *Decision*, at *8 and n.5. In any event, the court also appears to have concluded that Mr. Pohl was aware through the December 1998 communications that he needed to seek a PEB as part of the retirement disability process. *Id.* at *8.

We need not resolve the legal issue here, because the record shows that Mr. Pohl was made aware of the board review process and potential loss of entitlement to disability benefits pay. In June 1998, the Air Force doctor that evaluated Mr. Pohl noted that, if Mr. Pohl's primary care doctor recommended long term disability, Mr. Pohl would need to return for reevaluation by an MEB. Administrative Record at 106, Pohl ECF No. 7; Decision, at *4; Complaint at ¶ 14. And shortly thereafter, the Air Force informed Mr. Pohl of his right to a PEB; referred to Department of Defense Directive 1332.18 (Separation or Retirement for Physical Disability) and Department of Defense Instruction 1332.38 (Physical Disability Evaluation); and warned him that a failure to elect to have his case reviewed by a PEB would "constitute a waiver of this right." Appx100.

We also agree with the Court of Federal Claims that Mr. Pohl had "sufficient actual or constructive notice of his disability." *Chambers*, 417 F.3d at 1226. The issue is whether the service member's "knowledge of the existence and extent of his condition at the time of his discharge was sufficient to justify concluding that he waived the right to board review of the service's finding of fitness by failing to demand a board prior to his discharge." *Id.* (quoting *Real*, 906 F.2d at 1562). To determine if the service member had such knowledge, we look to the relevant statutory requirements for disability retirement—here, 10 U.S.C. § 1204. *Id.* Under § 1204, a service member may be retired with disability retirement pay if, among other things, the disability is permanent and stable; is the proximate result of performing active duty or inactive-duty training or is the result of an injury incurred or aggravated in the line of duty while performing active duty or inactive-duty training; and is not a result of his intentional misconduct. 10 U.S.C. § 1204. The inquiry here is whether Mr. Pohl knew that he had a permanent disability that was service-connected and not a result of his intentional misconduct. *Cf. Chambers*, 417 F.3d at 1226 (explaining that the inquiry under the similar requirements of § 1201 was whether "Chambers knew that he was entitled to disability retirement due to a permanent disability that was not a result of his intentional misconduct and was service-connected").

Mr. Pohl argues in his informal brief that in 1999 he was unaware of a disability that would entitle him to disability retirement benefits because his "condition

was not medically permanent and stable in 1999," noting that he had additional surgeries and that he was still under the care of his doctor at that time. Appellant's Br. 2. He also appears to argue that he had no reason to believe in 1999 that his back issues were tied to his injury from the 1991 training incident. *Id.* at 6. The record does not support these arguments.

Mr. Pohl's Complaint alleged that he was "in constant pain" after his 1991 accident; that in 1997, he was rendered "incapacitated" after further injuring his back; and that his doctor identified significant issues with his back and diagnosed several back injuries. Complaint at ¶ 13. Mr. Pohl's counsel also stated at oral argument that Mr. Pohl knew that he was disabled at the time of his discharge. Hr'g Tr. at 19:1–6, *Pohl* ECF No. 18. Mr. Pohl also admitted that "he was unfit for flight duty" and that "all parties agree that Mr. Pohl was retired with a permanent disability." Pl. Resp. Br. at 5, Pohl ECF No. 12. And as for knowledge of service-connection, as the Court of Federal Claims explained, Mr. Pohl himself suggested below that he understood his doctor's 1997 "finding of a 'copious amount of fragmented bony overgrowth' on his vertebrae . . . to be evidence of 'the extent of the 1991 injury,'" and Mr. Pohl himself pointed to the 1991 accident before the VA to obtain a service-connected disability rating. *Decision*, at *8 (citing Complaint at ¶ 17; Pl.'s Mot. at 3, 8, *Pohl* ECF No. 8; Hr'g Tr. at 11:16–12:1 and 43:4–12, *Pohl* ECF No. 18). We conclude that the Court of Federal Claims did not clearly err in finding that Mr. Pohl was

sufficiently aware of his permanent, service-connected disability in 1999, the date of his discharge.[3]

We hold that the Mr. Pohl's claim for disability retirement rights accrued in 1999, at which time he had actual and constructive knowledge of his § 1204 benefits, and the statutory six-year statute of limitations began to run. Based on the foregoing, we affirm the judgment of the Court of Federal Claims that it lacked jurisdiction over Mr. Pohl's claims. We have considered Mr. Pohl's other arguments and find them unpersuasive.

AFFIRMED

COSTS

No costs.

[3] Mr. Pohl also argues that the Court of Federal Claims erred by not focusing on whether the Air Force was aware that Mr. Pohl was permanently disabled. Appellant's Br. 3. But "[i]t is a *plaintiff's* knowledge of the facts of the claim that determines the accrual date." *Young v. United States*, 529 F.3d 1380, 1385 (Fed Cir. 2008) (emphasis added).

United States Court of Appeals
for the Federal Circuit

MICHAEL G. POHL,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2022-2080

Appeal from the United States Court of Federal Claims in No. 1:21-cv-01482-CNL, Judge Carolyn N. Lerner.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

April 18, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

In the United States Court of Federal Claims

MICHAEL G. POHL, *Plaintiff*, v. THE UNITED STATES OF AMERICA, *Defendant*.	No. 21-1482C (Filed: June 21, 2022)

Sean Timmons, Houston, TX, for Plaintiff.

Sonia Williams Murphy, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, for Defendant. With her on the briefs was Ryan V. Haslam, Of Counsel.

OPINION AND ORDER

LERNER, *Judge*.

This is an action for military pay, disability retirement pay, reimbursement of expenses, and other benefits that Plaintiff, Michael G. Pohl, alleges the U.S. Air Force Board for the Correction of Military Records ("AFBCMR") improperly denied given the injuries he suffered while on military duty. Compl. ¶ 1, ECF No. 1. The case is before the Court on the Government's Motion to Dismiss pursuant to Rule 12(b)(1) of the U.S. Court of Federal Claims ("RCFC") and the parties' Cross-Motions for Judgment on the Administrative Record. *See* Def.'s Mot. to Dismiss and Cross Mot. for J. on the Admin. R., ECF No. 11 ("Def.'s Mots."); Pl.'s Mot

for J. on the Admin R., ECF No. 8 ("Pl.'s Mot."). On February 28, 2022, the case was transferred to the undersigned. Order, ECF No. 14. The Court held oral argument on the parties' motions on April 20, 2022. *See* Hr'g Tr., ECF No. 18. Subsequently, on May 11, 2022, Plaintiff filed a "Motion for Leave to File Supplemental Affidavit from Plaintiff in Support for Plaintiff's Motion for Judgment on the Administrative Record" ("Plaintiff's Motion to Supplement"). Pl.'s Mot. to Suppl., ECF No. 19.

Plaintiff moves for judgment on the administrative record, arguing that the AFBCMR unlawfully denied him disability retirement pay under 10 U.S.C. § 1204. *See* Pl.'s Mot. Specifically, Plaintiff contends that the AFBCMR's actions were arbitrary and capricious when it ruled that (1) Mr. Pohl failed to show error in the Air Force's decision that required a medical retirement; and (2) Plaintiff was not eligible for a Defense Department Form 214, *Certificate of Release or Discharge from Active Duty* ("DD-214") at the time of his retirement or a correction to his narrative reason for separation. *Id.* at 14–16. Plaintiff further argues that the AFBCMR's denial of disability retirement benefits amounted to substantive and procedural due process violations under the Fifth Amendment to the U.S. Constitution. Compl. ¶¶ 34–41. Mr. Pohl seeks various forms of relief, including declaratory and injunctive relief with respect to all claims in his Complaint, as well as back pay, allowances, out-of-pocket medical expenses, other medical benefits to which he

claims entitlement under the law, and reasonable attorney's fees. *Id.* at 11.

The Government moves to dismiss Plaintiff's claims for lack of subject matter jurisdiction. *See* Def.'s Mots. at 8–12. It argues that the Court should dismiss the action because the statute of limitations has run on Plaintiff's claims and because the Court does not have jurisdiction over constitutional due process claims. *Id.* at 7–12. Alternatively, the Government moves for judgment on the administrative record. *See id.* at 12.

The Court is sympathetic to Mr. Pohl's situation and recognizes the role that stigmas surrounding disabilities in the military may have played in his case. However, for the reasons set forth below, the Court finds that the statute of limitations has lapsed, and therefore it lacks subject matter jurisdiction over Plaintiff's claims. Accordingly, the Government's Motion to Dismiss is **GRANTED**, and the parties' Cross-Motions for Judgment on the Administrative Record are **DENIED** as moot. Plaintiff's Motion to Supplement is also **DENIED**.

I. Background

A. Statutory and Regulatory Framework

This case involves the application of several military policies and regulations associated with determining servicemembers' entitlement to disability retirement pay under 10 U.S.C. § 1204. Section 1204

allows members of the armed forces who were on active duty for 30 days or less, or on inactive-duty training, to retire with retired pay if the member "is unfit to perform the duties of his office, grade, rank, or rating because of physical disability." 10 U.S.C. § 1204 (2018). In relevant part, the statute provides that the Secretary of Defense may retire a servicemember with retired pay if the Secretary determines that: (1) the disability is permanent and stable; (2) the disability is the result of an injury "incurred or aggravated in [the] line of duty . . . while performing active duty or inactive-duty training"; (3) "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 (4) "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." § 1204(1)–(4).

The Integrated Disability Evaluation System ("IDES") is the military's "mechanism for implementing retirement or separation because of physical disability." Department of Defense Directive ("DoD Directive") 1332.18, Separation *or Retirement for Physical Disability*, part 3.1 (Nov. 4, 1996); Def.'s Mots. at 5; Def.'s Mots. at App. 2. It consists of four elements: (1) medical evaluation, including by a medical evaluation board ("MEB"); (2) a physical disability evaluation, including by a physical evaluation board ("PEB") and appellate review; (3) counseling; and (4) final disposition. *See* DoD Directive 1332.18, part 3.2. The standard for determining unfitness due to physical disability is

"unfitness to perform the duties of the member's office, grade, rank or rating because of disease or injury." *Id.* at part 3.3. Servicemembers found to be unfit are allowed an honorable discharge. *See* Air Force Instruction ("AFI") 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, part 3.14 (Aug. 15, 1994); Def.'s Mots. at App. 109. Servicemembers having at least 15 years of experience can also elect to transfer to the Retired Reserve as an alternative to being separated due to a physical disqualification. 10 U.S.C. § 12731a(a) (2022); *see also* AFI 36-3209, part 5.8.2.7; Def.'s Mots. at App. 154.

The Air Force uses line of duty determinations to evaluate eligibility for physical disability retirement or separation. AFI 36-2910, *Line of Duty (Misconduct) Determination*, ¶ 1.1.1.1; Def.'s Mots. at App. 11. A member's commander makes a line of duty determination at the time of injury when (1) the member is unable to perform military duties for more than twenty-four hours; (2) there is a likelihood of a permanent disability; (3) the member dies; or (4) the Reserve member, regardless of the ability to perform military duties, obtains medical treatment. AFI 36-2910, part 1.3; Def.'s Mots. at App. 11.

The Air Force issues a DD-214 in certain cases of separation from active service. The DD-214 informs military personnel and government agencies about the circumstances of a servicemember's separation in order to properly process their discharge. AFI 36-3202, 2.2 (May 20, 1994); AR 164. The Air Force relies on AFI

36-3202, Table 2, to determine whether to issue a DD-214 and what narrative reason for the member's separation to list on the form. AFI 36-3202, Table 2; AR 163.

B. Facts

1. Plaintiff's Medical History

Mr. Pohl joined the Army in 1982, serving three years on active duty before joining the Air Force Reserve as a flight engineer in 1985. Compl. ¶ 8. In April 1991, Plaintiff allegedly fell 100 feet into a ravine and sustained a back injury during an Air Force training program; course leaders and on-site medical technicians treated him at the time. *Id.* ¶ 10. He did not receive or request further treatment, and he continued and completed the 17-day training course. *Id.*

After returning home from the course, Plaintiff's wife noted that he had significant bruising. *Id.* ¶ 11. The next day, he visited the on-base hospital where the flight surgeon on duty examined him and allegedly stated that "he [the surgeon] was sure that he would find something wrong if Mr. Pohl was examined further," and that such further examination "would put Mr. Pohl on Duties Not Including Flying ("DNIF") status and possibly end Mr. Pohl's military career." *Id.* ¶ 12. Fearing the loss of his career, Mr. Pohl opted to leave the hospital without further testing. *Id.* He treated his injuries on his own with pain medication and heat therapy per his doctor's suggestion. *Id.*

No diagnosis was made regarding a back or other injury attributed to the April 1991 training incident. *Id.* ¶ 13. Indeed, the record is completely devoid of any contemporaneous medical documentation of the April 1991 incident beyond Plaintiff's representation that he visited the on-base hospital but left without a diagnosis or treatment. Plaintiff's counsel explained at oral argument that Mr. Pohl's decision not to seek treatment was influenced by a severe stigma against reporting injuries that was pervasive in the military in the 1990s, and which remains today. Hr'g Tr. at 28:4–14. Counsel also noted that servicemembers in the 1990s were "actively encouraged not to report deficiencies in their medical condition because that was the philosophy of the military at the time." *Id.* at 28:10–12.

In 2016, well over two decades later, Mr. Pohl self-reported to the Department of Veterans Affairs (VA) that he was disabled as a result of the April 1991 incident. Compl. ¶¶ 17, 19. He did so to obtain documentation connecting that incident to his disability. *See id.* ¶¶ 18–20; Pl.'s Mot. at 3; Hr'g Tr. at 12:2–25; 43:4–12. There is no evidence that independently verifies this claim. Mr. Pohl's self-report that the April 1991 injury caused his back condition was the sole basis upon which the VA made its determination in his case. *See* AR 8–14; Hr'g Tr. at 43:4–12. As counsel conceded at oral argument, "the VA considered the 1991 injury alone for the assessment of the 100 percent disability rating that formed the basis" for his application to the AFBCMR and did not consider other relevant injuries that appear in the record. Hr'g Tr. at 43:4–12.

On October 25, 2018, based on Plaintiff's own representations, the VA found that Mr. Pohl's lower back condition was "service-connected" as a result of the April 1991 incident and assigned him a disability rating of 40%. AR 8–14. Plaintiff alleges, without providing any supporting documentation, that the VA performed a medical examination in March 2017, and the doctor noted in the medical history that Mr. Pohl's lower back condition began during training in 1991 when he fell into a ravine. Pl.'s Mot. at 3–4. Additionally, Plaintiff points to a separate October 25, 2018 Deferred Rating Decision from the VA—also not contained in the administrative record before the AFBCMR—which states that "[t]he preponderance of the evidence supports an injury during/on [the April 1991] active duty for training period." Pl.'s Reply and Resp. at Ex. A. Plaintiff further alleges, again failing to identify any documentation in the record, that "Mr. Pohl's rating was re-examined and increased to 70% with 100% unemployability effective December 2018." Compl. ¶ 19.

After the April 1991 incident, Plaintiff continued as a reservist with the Air Force while working at a civilian job with a commercial airline. *Id.* ¶ 13. Nearly six years later, in December 1996, Plaintiff claims he "aggravated the injury" he allegedly sustained in April 1991 by lifting a heavy object at his civilian job and became "incapacitated." *Id.* Mr. Pohl's Standard Form 502—an Air Force medical record completed by Plaintiff's medical provider, Dr. Michael F. Coscia, M.D.—states that he "apparently sustained an

on-the-job-injury while working for his civilian employer on 4 Dec 96," and "[a]fter apparent reinjury while lifting his son at home on 5 May 97, he was placed in DNIF on 17 May 97 for lower back sprain." AR 105. Medical records also reflect that Plaintiff was injured in a motor vehicle accident in 1995. E.g., AR 113. Despite these other injuries in his medical record, Mr. Pohl only reported the April 1991 incident for the VA's consideration. *See* Hr'g Tr. at 43:4–12.

On December 3, 1997, Plaintiff's civilian medical provider, Dr. Coscia, identified a number of issues with his L5 vertebrae. *See* AR 113–121. Plaintiff also alleges, though the documentation does not appear to support, that Dr. Coscia determined that his x-rays "revealed the extent of the 1991 injury," Compl. ¶ 17, because they showed a "copious amount of fragmented bony overgrowth," AR 120. Plaintiff contends this indicates an earlier injury. Hr'g Tr. at 11:16–25, 12:1.[1] Mr. Pohl subsequently had surgery in 1997 for a 360-degree fusion of his L5-S1 vertebrae and was diagnosed with additional spinal injuries. Compl. ¶ 13. He underwent additional back surgeries in 2001 and 2003. *Id.*

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[1] Dr. Coscia's comment that Mr. Pohl's vertebrae showed a "copious amount of fragmented bony overgrowth" was made in response to observing the vertebrae during surgery, and not in connection with his review of Plaintiff's x-rays, as Plaintiff states in his Complaint. AR 120; *see also* AR 114-15; Compl. ¶ 17.

2. Plaintiffs Retirement

On November 6, 1997, Plaintiff was placed on a profile that rendered him "not qualified for deployment" and "not qualified for reassignment." AR 146. On June 27, 1998, Captain Peter K. Tiernan, a U.S. Air Force doctor, reviewed Mr. Pohl's medical file and noted that in order to begin the process to return to duty, Mr. Pohl needed to provide documentation from his primary care provider. Compl. ¶ 14; *see* AR 106. Dr. Tiernan noted that "Mil the probable event that the patient's provider recommends long-term disability, the patient will need to return for reevaluation" by a medical evaluation board ("MEB"). Compl. ¶ 14; *see* AR 106. Mr. Pohl never obtained documentation from his primary care provider or a reevaluation from a MEB. Compl. ¶ 14. He claims that he was never offered such an opportunity. Pl.'s Reply and Resp. at 5.

The profile that established Mr. Pohl as "not qualified for deployment" expired one year later, on November 6, 1998. *See* AR 102, 144–46. On December 8, 1998, the Air Force sent Plaintiff via certified mail "all necessary paperwork for world wide duty determination." AR 102. On December 14, 1998, his wife signed a receipt for the certified mail. AR 102–03. The record also shows that later that week, his wife called the Air Force to discuss the paperwork. AR 102. On December 21, 1998, the Air Force mailed Mr. Pohl two memoranda: a "Required Medical Documentation Update," and "Selection of Rights to Physical Evaluation Board (PEB)" (collectively, "the December 21 communications"). AR 136–37. The "Required Medical

Documentation Update" memorandum requested additional medical documentation regarding Mr. Pohl's prognosis, limitations, complications, treatments, and medications. AR 136.

The Government claims that despite multiple communications with Mr. Pohl and extensions of time, he failed to produce the documentation. Def.'s Mots. at 3; *see* AR 102. Plaintiff claims that "he did not receive any additional communications from the Air Force for his medical documentation" and instead "was jettisoned out of the Air Force with no line of duty determination and no opportunity to go before a medical evaluation board." Pl.'s Reply and Resp. at 5. The record shows that the Air Force sent the December 21 communications via regular mail rather than certified mail, so there is nothing in the record to show whether Mr. Pohl actually received the December 21 communications. *See* AR 102.

The December 21 communications contained information about the right to a PEB and attached the forms necessary to request one. AR 102, 136–37. In particular, the "Selection of Rights to a PEB" memorandum stated that failing to return the "Selection of Rights to PEB" form constitutes a waiver of that right and triggers discharge proceedings. AR 137. Another Air Force memorandum (with an unclear date) stated that Mr. Pohl "did not make an election to have the case reviewed by the [informal PEB]," and therefore recommended "non-retention." AR 97.

On June 22, 1999, the Air Force declared Plaintiff medically disqualified for service due to his inability to be deployed or perform his duties as a flight engineer. AR 213. On September 9, 1999, Plaintiff received notification of his pending administrative discharge under AFI 36-3209, paragraph 3.14, *Physical Disqualification.* AR 89. The record reflects that Plaintiff returned a signed acknowledgement of having received the discharge notification, AR 94, and submitted Air Force Form 131, *Application for Transfer to the Retired Reserve*, on September 24, 1999, AR 91. A separate memorandum from Air Force Reserve Command, dated September 3, 1999, states that Mr. Pohl was eligible for retirement with benefits upon being separated due to his physical disqualification. AR 93. An October 27, 1999 Reserve Order EK-0612 made Mr. Pohl's "Reserve Retired List" status effective October 1, 1999. AR 15.[2]

Plaintiff alleges that his DD-214 did not reflect a medical disability rating, and that he did not go through any disability processing prior to retirement or turn in his military flight gear.[3] Compl. ¶ 15. Further, medical personnel never physically evaluated

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[2] Plaintiff claims, inconsistent with the record, that Reserve Order EK-0612 "involuntarily" retired him and transferred him to the Retired Reserve. Compl. ¶ 15; Pl.'s Mot. at 3; AR 15.

[3] It is not clear when Plaintiff was issued a DD-214. The pleadings and the record seem to focus on the issue that Plaintiff was not issued a DD-214 "at the time of retirement." E.g., Compl. ¶ 22. Plaintiff seems to have been issued the form at some point after his retirement, but the exact date cannot be determined because relevant pages in the record are largely illegible photocopies. AR 76–77.

him or placed him on the Temporary Disability Retired List ("TDRL"). *Id.* He states that his out-processing was done entirely remotely and did not allow for the PEB to review his condition. *Id.*

C. AFBCMR Decision

On November 16, 2018, after being advised by fellow veterans that his DD-214 "did not reflect the true reason the military released [him] from service obligation as reflected in the 'Reason' section of the driving authority of Reserve Order EK-0612 [sic]," AR 17, Plaintiff applied for correction of his military record with the AFBCMR, AR 2, 7. He requested a DD-214 to indicate that he was "medically discharged" for a service-connected injury that rendered him permanently disabled. AR 2, 7. The issue, according to Plaintiff, was that his DD-214 did not reflect the actual reason for his discharge as shown on the October 27, 1999 Reserve Order EK-0612. AR 2, 15. Instead, his DD-214 listed the narrative reason for his separation as "Completion of Required Active Duty Training." AR 3. Plaintiff claims that he waited until 2018 to apply for disability retirement with the AFBCMR because he did not know he was eligible to do so until he received the VA's determination that he was disabled through a service-connected injury, namely, the April 1991 incident. *See, e.g.*, Hr'g Tr. at 12:2–25. This despite the fact that it was Plaintiff who self-reported to the VA that his back injury was the sole result of the 1991 incident.

Plaintiff made three main arguments before the AFBCMR. First, Mr. Pohl claimed that "[t]he Air Force failed to follow proper IDES processing procedures" at discharge because he "was forced into a medical retirement with no medical examination, no chance to request a waiver [via AFI 48-123, *Medical Examinations and Standards]*, and no opportunity to review his DD Form 214 to ensure it was accurate prior to being generated" and that the Air Force failed to comply with AFI 48-123 by ignoring the "Presumption of Fitness," "Disability Information," and "Mandatory Examinations." AR 2, 5. Second, Plaintiff alleged that he "did not receive his mandatory medical examination; thus, he was never properly evaluated for the injury he suffered in 1991." AR 5. Finally, he contended that the AFBCMR Medical Advisor erred by failing to consider the proper rule in Table 2 of AFI 36-3202, which mandates the issuance of a DD-214, and applying the wrong rule (Rule 3), which Plaintiff alleged did not apply to his case. AR 5.

In July 2020, the AFBCMR determined that Plaintiff did not establish by a preponderance of the evidence his claim that he discovered the "alleged error or injustice" within the three-year filing requirement under 10 U.S.C. § 1552 and AFI 36-260. AR 4–5. Therefore, his filing with the AFBCMR was untimely. *Id.* The AFBCMR further found that Plaintiff was "not the victim of an error or injustice" because "a preponderance of the evidence [did] not substantiate [Plaintiff's] contentions," and it disagreed with his argument that the Medical Advisor applied the wrong rule of AFI

36-3202. AR 2–7. The AFBCMR concurred with and relied upon an advisory opinion submitted by the AFBCMR Medical Advisor, who found that Plaintiff "chose to apply for early retirement in lieu of discharge for physical disability," which was the reason his case was "never processed through the disability evaluation system to determine his physical disability." AR 166.

In her January 13, 2020 advisory opinion for the AFBCMR, the Medical Advisor determined that there was (1) "no error or evidence to warrant a change to the narrative reason of the DD 214"; (2) "insufficient evidence to support a medical retirement"; and (3) "insufficient evidence to find the service member's back issue was a result of a service connected injury." AR 165. The Medical Advisor found "no medical documentation of any injury that occurred in April 1991." AR 166–67. She noted that Plaintiff's medical records showed he injured his back in a motor vehicle accident in the mid-1990s and when he lifted a seventy-pound aircraft battery during his civilian job, both of which occurred while he was not on active-duty military orders, and that he "denied any military accidents or injury." *Id.* Therefore, the Medical Advisor "found no evidence to support a medical retirement or a change in [Plaintiff's] narrative reasoning [on his DD-214] to reflect a physical disability." AR 167.

The Medical Advisor attached a December 26, 2019 letter from the Air Force Reserve Personnel Center, to which the AFBCMR also referred in making its decision. AR 4, 161. The letter explained that Plaintiff was ineligible for a DD-214 at the time of his

retirement because he was not on active-duty orders for ninety continuous calendar days leading up to his retirement, and it recommended that the AFBCMR deny Plaintiff's request for a DD-214. AR 161. The letter cites AFI 36-3202, *Certificate of Release or Discharge from Active Duty*, Table 2. *Id.*

D. The Present Complaint

On June 16, 2021, Mr. Pohl filed a Complaint in this Court. Compl. He alleges that he met the elements of 10 U.S.C. § 1204 for disability retirement pay, and therefore the AFBCMR's decision that he was not entitled to a medical retirement was arbitrary and capricious. Compl. ¶ 30–32; Pl.'s Mot. at 7, 8–17. He further alleges that the AFBCMR acted arbitrarily and capriciously in determining that the Air Force did not err when issuing his DD-214 because the AFBCMR cited the wrong rules of the applicable Air Force regulation in its decision. Compl. ¶ 39; Pl.'s Mot. at 16–17. Finally, Mr. Pohl asserts that he had liberty and property rights in his disability retirement, rendering the denial of his retirement and medical benefits a violation of his constitutional substantive and procedural due process rights. Compl. ¶ 33–35, 38, 40.

II. Discussion

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Government moves to dismiss the Complaint pursuant to RCFC 12(b)(1), arguing that the Court

lacks jurisdiction to hear any of Plaintiff's claims because they are untimely and because the Court generally does not have jurisdiction to hear Plaintiff's due process claims. Def's Mots. at 7–12.

"Jurisdiction is a threshold matter and a case can proceed no further if the court lacks jurisdiction to hear it." *Schmidt v. United States*, 89 Fed. Cl. 111, 118 (2009) (*citing Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). Therefore, the Court has the duty "to examine its jurisdiction over every claim before it assumes jurisdiction over the claim." *RHI Hldgs., Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998). The Tucker Act, 28 U.S.C. § 1491, is the primary source of this Court's jurisdiction. It waives the United States' sovereign immunity for claims against the United States that are founded upon the Constitution, an Act of Congress, an executive department regulation, or an express or implied contract with the United States. *See* 28 U.S.C. § 1491(a)(1) (2018). The Tucker Act is a purely jurisdictional statute that does not itself provide a cause of action. *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005). Accordingly, for a claim to fall within the scope of the Tucker Act, "a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (first citing *United States v. Mitchell*, 463 U.S. 206, 216–17 (1983); and then citing *United States v. Testan*, 424 U.S. 394, 398 (1976)). In other words, the plaintiff must identify a "money mandating" source of law. *Id.*

When considering a motion to dismiss for lack of subject matter jurisdiction, the Court treats all factual allegations in the complaint as true and construes those allegations in the light most favorable to the plaintiff. *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993)); *see Schmidt*, 89 Fed. Cl. at 119. However, the plaintiff still bears the burden to prove by a preponderance of the evidence that the Court has jurisdiction over his claims. *Schmidt*, 89 Fed. Cl. at 118 (citing *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)); *see also Montiel v. United States*, 118 Fed. Cl. 283, 287 (2014) ("The plaintiff . . . must prove any disputed jurisdictional facts by a preponderance of the evidence."). When a party challenges the jurisdictional facts alleged in the complaint, as is the case here, the Court may engage in fact finding to resolve factual disputes and determine whether the plaintiff has established jurisdictional facts by a preponderance of the evidence. *Reynolds*, 846 F.2d at 747; *see Carter v. United States*, 62 Fed. Cl. 66, 69 (2004) (citing *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1383 (Fed. Cir. 2002)). When this occurs, the Court may consider other relevant evidence to resolve factual disputes. *Reynolds*, 846 F.2d at 747; *see also The George Fam. Tr. ex rel. George v. United States*, 91 Fed. Cl. 177, 190 (2009).

1. Statute of Limitations

a. When the statute of limitations began to run

The Court lacks subject matter jurisdiction in this case because the statute of limitations has expired. Under 28 U.S.C. § 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." A claim under the Tucker Act accrues when "all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue [in this Court] for his money." *Chambers*, 417 F.3d at 1223 (quoting *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc)). In general, military disability retirement pay claims "do not accrue until the appropriate military board either finally denies such a claim or refuses to hear it." *Id.* at 1224 (citing *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990)).

However, the Federal Circuit in *Real* held:

> If at the time of discharge an appropriate board was requested by the service member and the request was refused or if the board heard the service member's claim but denied it, the limitations period begins to run upon discharge. A subsequent petition to the corrections board does not toll the running of the limitations period, nor does a new claim accrue upon denial of the petition by the Corrections Board. However, "where the Correction Board is not a reviewing tribunal but is the

> first board to consider or determine finally the claimant's eligibility for disability retirement, the single cause of action accrues upon the Correction Board's final decision." Thus, under *Friedman* if the service member had neither requested nor been offered consideration by a retiring board prior to discharge, the later denial of his petition by the Corrections Board was the triggering event, not his discharge. However, there are circumstances under which the service member's failure to request a hearing board prior to discharge has been held to have the same effect as a refusal by the service to provide board review.

906 F.2d at 1560 (cleaned up) (first citing *Friedman v. United States*, 310 F.2d 381, 390, 396–98 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963); then citing *Miller v. United States*, 361 F.2d 245 (Ct. Cl. 1966); and then citing *Huffaker v. United States*, 2 Cl. Ct. 662 (1983)).

Under *Chambers*, "such failure can invoke the statute of limitations when the service member has sufficient actual or constructive notice of his disability, and hence, of his entitlement to disability retirement pay, at the time of discharge." 417 F.3d at 1226. Specifically, the question is whether Plaintiff's knowledge at the time of discharge "was sufficient to justify concluding that he waived the right to board review of the service's finding of fitness by failing to demand a board prior to his discharge." *Real*, 906 F.2d at 1562. Moreover, that knowledge must be determined by reference to the statutory requirements for disability retirement, which are the four elements of 10 U.S.C. § 1204 in this

case. *See Chambers*, 417 F.3d at 1226. The question under *Real*, according to *Chambers*, focuses on "whether at the time of his separation . . . [the servicemember] knew that he was entitled to disability retirement due to a permanent disability that was not a result of his intentional misconduct and was service-connected." *Chambers*, 417 F.3d at 1226.

After reviewing all facts in the Complaint and consulting the administrative record to assess relevant jurisdictional facts, the Court finds that Plaintiff has not proven subject matter jurisdiction by a preponderance of the evidence. Specifically, the Court holds that the statute of limitations began to run at the time of Mr. Pohl's discharge in 1999 and has long since expired. Plaintiff's counsel admitted at oral argument, and the Complaint makes clear, that Mr. Pohl knew he was permanently disabled at the time of discharge and that the incident in 1996 at his civilian job aggravated the alleged service-connected back injury from April 1991. *See, e.g.*, Hr'g Tr. at 12:14–16, 19:1–6; Compl. ¶ 13. Plaintiff even emphasizes in his Complaint and briefings, and his counsel reiterated at oral argument, that he understood Dr. Coscia's 1997 finding of a "copious amount of fragmented bony overgrowth" on his vertebrae, AR 120, to be evidence of "the extent of the 1991 injury," Compl. ¶ 17; *see also* Pl.'s Mot. at 3, 8; Hr'g Tr. at 11:16–12:1. This indicates that Mr. Pohl knew since at least 1997 of the possibility that he had a permanent, service-connected disability.

Furthermore, it was Plaintiff himself who provided information to the VA about the April 1991

incident, and this self-report formed the basis for the VA's finding that he had a service-connected disability. Hr'g Tr. at 43:4–12. The fact that Mr. Pohl went to the VA specifically to obtain a determination that his disability was connected to the April 1991 incident indicates that Mr. Pohl believed that he had a qualifying disability. Thus, Plaintiff's argument that he was unaware of a service-connected disability until the VA's 2018 finding—because he was not given a line of duty determination after the April 1991 incident—is incredulous. *See* Pl.'s Mot. at 4; Hr'g Tr. at 12:2–25.

Under *Friedman*, if the servicemember neither requested nor was offered consideration by a disability board prior to discharge, the later denial of his petition by a corrections board, not his discharge, triggers the statute of limitations. 310 F.2d 390, 395–98. However, because Plaintiff knew about his service-connected disability when he was discharged, the statute of limitations began to run at that time. *See Real*, 906 F.2d at 1561–63 (describing the relevant inquiry as "[w]hether the veteran's knowledge of the existence and extent of his condition at the time of his discharge was sufficient to justify concluding that he waived the right to board review of the service's finding of fitness by failing to demand a board prior to discharge."); *Chambers*, 417 F.3d at 1226; *see also Miller*, 361 F.2d at 249–50; *Huffaker*, 2 Cl. Ct. 662.

Plaintiff also claims, based on the apparently incomplete and remote manner of his discharge processing, that the Air Force never offered him the

opportunity for a MEB.[4] *See* Compl. ¶¶ 14–15. Plaintiff's position is that Dr. Tiernan's note in his medical file put the Air Force on notice that Mr. Pohl needed a MEB, but the Air Force failed to follow through. *See id.* However, because Plaintiff had knowledge of his entitlement to disability benefits per the elements of 10 U.S.C. § 1204 when discharge proceedings began, his failure to request a board prior to discharge has the same effect as a refusal by the service to provide board review. *See Real*, 906 F.2d at 1560; Hr'g Tr. at 12:14–16, 19:1–6; Compl. ¶ 13. In other words, Mr. Pohl's failure to demand a hearing board when he knew he required one constituted a waiver of that right and triggered the statute of limitations at the time of discharge. *See id.* Moreover, the December 1998 communications show both that it is the servicemember's burden to affirmatively request a PEB, and that "[f]ailure to [timely submit the paperwork requesting a PEB] will constitute a waiver of this right and discharge proceedings will continue." AR 137.[5]

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[4] It is irrelevant to a statute of limitations analysis which specific medical boards, such as a MEB or formal or informal PEB, that Plaintiff obtained. The relevant inquiry for determining when the statute of limitations began to run in this case is whether and when Plaintiff requested, obtained, or was denied review of his case by *any* statutorily authorized board prior to obtaining a decision from the AFBCMR. *See Chambers*, 417 F.3d at 1223; *Real*, 906 F.2d at 1560.

[5] Plaintiff alleges that he did not receive these communications. Even if true, that fact would be irrelevant to the Court's analysis because he still had the requisite knowledge under *Real* and *Chambers* that he was entitled to disability benefits, at which point the law makes it the servicemember's responsibility to

Finally, the fact that Mr. Pohl opted to voluntarily transfer to the Retired Reserve negates his statute of limitations argument. As the *Real* decision holds, a servicemember's waiver of an evaluation board triggers the statute of limitations at the time of discharge. 906 F.2d at 1560–62. Even if Plaintiff did not have the requisite knowledge to conclude that he waived his right to a PEB under a "failure to request" analysis per *Real* and *Chambers*, his claims still fail. Applying to transfer to the Retired Reserve in lieu of separation due to a physical disqualification undoubtedly constitutes a waiver of his right to a PEB and any processing under the IDES. *See Moyer v. United States*, 190 F.3d 1314, 1319 (Fed. Cir. 1999) (stating the "common sense notion that one who voluntarily gives up any right to compensation and benefits cannot later claim entitlement to such"). Thus, Mr. Pohl waived his right to an evaluation board on two grounds: first, because he had the requisite knowledge to request one, and second, because he applied to voluntarily transfer to the Retired Reserve instead of going through the IDES. Accordingly, the statute of limitations on any potential claim Mr. Pohl could have under 10 U.S.C. § 1204 began at the time of discharge in 1999. And, as explained below, his voluntary transfer to the Retired Reserve also defeats the merits of such a claim.

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affirmatively request an evaluation board. *See Real*, 906 F.2d at 1561–63; *Chambers*, 417 F.3d at 1226. Additionally, the December 1998 communications only refer to a PEB; Mr. Pohl still could have requested a MEB or other type of evaluation board available to him under the IDES. *See* AR 136–39.

b. Plaintiff's request to toll or waive the statute of limitations

Plaintiff argues in the alternative that the Court should waive the statute of limitations based on the doctrine of equitable tolling because he "was on heavy narcotics from his post-operation recovery following his medical retirement." Pl.'s Reply and Resp. at 6. It is well established that the statute of limitations under the Tucker Act "cannot be waived or extended by equitable considerations," and therefore, the Court cannot toll the statute of limitations on these grounds. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008).

To the extent that Plaintiff is actually requesting a waiver of the statute of limitations based on the doctrine of legal disability—versus the doctrine of equitable tolling—the Court cannot grant a waiver on these grounds either. Plaintiff does not meet the "heavy burden" to establish legal disability, which requires that a "plaintiff's mental illness . . . be acute and extreme" such that it renders him "incapable of caring for his property, of transacting business, of understanding the nature and effect of his acts, and of comprehending his legal rights and liabilities." *Schmidt*, 89 Fed. Cl. at 123 (quoting *Ware v. United States, 57* Fed. Cl. 782, 788 (2003)). Plaintiff must also show that the "failure to file was the direct result of a mental illness that rendered him incapable of rational thought or deliberate decision making, or incapable of handling his own affairs or unable to function in society." *Id.* (quoting *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004)). Moreover, a "narcotic addiction does not in itself constitute a

statute-tolling legal disability unless the claimant alleges and shows that he was 'incapable of understanding the nature of his discharge,' which he sought unsuccessfully to change." *Goewey v. United States*, 612 F.2d 539, 544 (Ct. Cl. 1979) (quoting *Cochran v. United States*, 506 F.2d 1406 (Ct. Cl. 1974) (table)). Plaintiff has not made that showing.

2. Due Process Claims

The Government argues that this Court does not have jurisdiction over Plaintiff's Fifth Amendment due process claims because such claims are not money mandating. Def.'s Mots. at 12; *see, e.g.*, *Mullenberg v. United States*, 857 F.2d 770, 773 (Fed. Cir. 1988) (stating "it is firmly settled that [the Due Process Clause] do[es] not obligate the United States to pay money damages" and therefore, cannot trigger jurisdiction under the Tucker Act) (first citing *United States v. Testan*, 424 U.S. 392, 401–02 (1976)); then citing *Inupiat Cmty. v. United States*, 680 F.2d 122, 132 (Fed. Cl. 1982); and then citing *Carruth v. United States*, 627 F.2d 1068, 1081 (Fed. Cl. 1980)).

While the Government is correct that this is the general rule, the Court may consider the due process violations implicated by procedural deficiencies in military separation procedures because they are connected to money-mandating claims. *Cf. Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) ("The determination of [a plaintiff's] entitlement to remedy under [the Military Pay Act] may include consideration of

whether his removal violated constitutional rights."). However, while the Court may have subject matter jurisdiction over Plaintiff's due process claims on these grounds, it is nonetheless divested of jurisdiction by the untimeliness of Plaintiff's Complaint. Accordingly, the Government's Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction is **GRANTED**.

B. Cross-Motions for Judgment on the Administrative Record

Given this Court's lack of subject matter jurisdiction, it need not address the parties' Cross-Motions for Judgment on the Administrative Record. However, it offers the following explanation as to why Plaintiff's claims would nevertheless not succeed on the merits.

1. Standard of Review

a. RCFC 52.1

The standard of review governing a decision to render judgment on the administrative record pursuant to RCFC 52.1 is "whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." *Peterson v. United States*, 104 Fed. Cl. 196, 204 (2012) (quoting *A & D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 131 (2006)); *see also Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005). Unlike summary judgment, when ruling on a motion for judgment on the administrative record, courts can make "factual findings

. . . from the record evidence as if it were conducting a trial on the record." *Bannum*, 404 F.3d at 1357. "The existence of a question of fact thus neither precludes the granting of a motion for judgment on the administrative record nor requires this court to conduct a full blown evidentiary proceeding." *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698, 710 (2011) (first citing *Bannum, Inc.*, 404 F.3d at 1356; and then citing *Int'l Outsourcing Servs., LLC v. United States*, 69 Fed. Cl. 40, 45–46 (2005)).

b. Scope of review and justiciability of AFBCMR decisions

Courts have historically extended significant deference to the military's routine personnel decisions. *See Bond v. United States*, 47 Fed. Cl. 641, 647 (2000); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) ("Strong policies compel the court to allow the widest possible latitude to the armed services in their administration of personnel matters."). Thus, courts review military correction board decisions only "for failure to correct plain legal error committed by the military." *Dodson v. Dep't of the Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993) (first citing *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); then citing *Grieg v. United States*, 640 F.2d 1261, 1266 (Ct. Cl. 1981); and then citing *Sanders*, 594 F.2d at 813). "Such legal error includes the military's 'violation of statute, or regulation, or published mandatory procedure, or unauthorized act.'" *Id.* (quoting *Skinner v. United States*, 594 F.2d 824, 830 (Ct. Cl. 1979)).

The standard of review is whether a military correction board's final agency action was "arbitrary or capricious, unsupported by substantial evidence, or otherwise not in accordance with law." *Fisher*, 402 F.3d at 1180. That review is particularly narrow and may only include consideration of "the administrative record before the deciding official or officials." *Wyatt v. United States*, 23 Cl. Ct. 314, 319 (1991). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Importantly, courts may not "substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence." *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 2010). The agency's decision must only reflect a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

2. The AFBCMR's Ruling that Plaintiff's Application was Untimely

Were this Court to rule on the merits of the Cross-Motions for Judgment on the Administrative Record, its analysis could end here. The AFBCMR clearly articulated the primary reason for denying Mr. Pohl's application:

> [T]he applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. While the applicant asserts a date of discovery within the three-year limit, the Board does not find the assertion supported by a preponderance of the evidence. The Board does not find it in the interest of justice to waive the three-year filing requirement. Therefore, the Board finds the application untimely and recommends against correcting the applicant's records.

AR 5–6. As the Government noted at oral argument, Plaintiff waived this issue. *See* Hr'g Tr. at 45:13–24. In his Motion for Judgment on the Administrative Record, Plaintiff did not dispute the AFBCMR's finding that his application was untimely. Nor did Mr. Pohl provide evidence that he filed his application within three years of discovering the alleged error or injustice. *See* Pl.'s Mot.; Pl.'s Reply and Resp. Therefore, the Court could uphold the AFBCMR's decision and deny Plaintiff's Motion for Judgment on the Administrative record on these grounds alone.

3. The AFBCMR's Decision that Plaintiff Failed to Demonstrate Error Requiring a Medical Retirement or a Correction to His Narrative Reason for Separation

The AFBCMR found that Plaintiff failed to prove, by a preponderance of the evidence, that the Air Force erred by denying him disability retirement under 10 U.S.C. § 1204. AR 5. This finding was based on the lack of evidence that he was rendered disabled through an injury incurred or aggravated in the line of duty and his transfer to the Retired Reserve in lieu of discharge due to a physical disability. AR 5–6,166. For the same reasons, the AFBCMR found no support for correcting the narrative reason for separation on Plaintiff's DD-214. AR 5–6. Plaintiff alleges that this decision was arbitrary and capricious because the AFBCMR failed to recognize that he met the requirements of 10 U.S.C. § 1204. Pl.'s Mot. at 8. Specifically, Mr. Pohl contends that (1) he "suffered a permanent disabling condition not the result of intentional misconduct or willful neglect"; (2) his condition was the result of an injury that "occurred during inactive duty training"; (3) "he was entitled to but denied a Line of Duty determination"; and (4) "his VA disability rating meets the . . . threshold requirement of 30%." *Id.*

The record provides substantial evidence to support the AFBCMR's decision, particularly in light of the lenience and deference courts extend to military personnel decisions. Due to the complete absence of contemporaneous medical documentation of the April

1991 incident in the record before the AFBCMR—which is the only alleged injury in Mr. Pohl's medical history that could be service-connected—the Board's finding that Plaintiff was not entitled to disability retirement pay was well-founded. AR 5–6. Indeed, the only medical documentation of Plaintiff's disability before the AFBCMR related to incidents where Plaintiff injured or aggravated his back condition while he was not on active-duty orders. This included evidence of a 1995 motor vehicle accident, a 1996 injury from lifting a heavy object at his civilian job, and a 1997 injury from lifting his son in his home. AR 105, 113. Most notably, Plaintiff's civilian medical records reflect that he reported *"no previous accidents in the military."* AR 113, 166–67 (emphasis added).

The record also shows that Plaintiff signed and submitted an application for transfer to the Retired Reserve after receiving notice of his pending discharge due to physical disqualification and multiple requests to provide the Air Force additional documentation. AR 94. In this application, he specifically opted out of disability retirement. *See id.;* 10 U.S.C. § 12731a(a). Therefore, the AFBCMR relied on substantial evidence when it determined that Mr. Pohl did not qualify for medical retirement or a correction to the narrative reason for separation, which was "Completion of Required Active Duty Training." AR 76.

Plaintiff claims that he would have established his entitlement to disability retirement had he not been improperly denied a line of duty determination after the 1991 incident. Pl.'s Mot. at 12. However, the

AFBCMR's decision was not in error because the record before it was completely devoid of any contemporaneous medical documentation suggesting that Mr. Pohl sustained an injury requiring a line of duty determination. The alleged 1991 incident did not impact his ability to perform military duties within twenty-four hours of his injury. *See* Compl. ¶ 10; AFI 36-2910, part 1.3; Def.'s Mots. at App. 11. In fact, he continued participating in and completed the 17-day training course after his fall. Compl. ¶ 10. There is no medical documentation indicating a likelihood of permanent disability because no injury from the fall was ever formally diagnosed. *Id.* ¶ 13; AFI 36-2910, part 1.3; Def.'s Mots. at App. 11. The record similarly does not reflect that Plaintiff received medical treatment for the 1991 injury because he declined any additional testing or treatment beyond at-home pain medication and heat therapy. Compl. ¶ 12.

Finally, the VA's finding that Mr. Pohl's disability was service-connected would not have been a reliable basis for the AFBCMR to grant him relief. *See* AR 8–14, 181; Hr'g Tr. at 43:4–12. The VA's determination was based entirely on Mr. Pohl's self-representation that his back injury resulted from the 1991 incident. AR 8–14; Hr'g Tr. at 43:4–12.

4. The AFBCMR's Decision that Plaintiff was not Eligible for a DD-214

Plaintiff claims that the AFBCMR acted arbitrarily and capriciously by concluding that he was not

entitled to a DD-214 because he (1) was not on continuous active duty for ninety days leading up to his retirement and (2) was removed from the Temporary Disability Retired List ("TDRL"). Compl. ¶ 39; Pl.'s Mot. at 16–17. Mr. Pohl argues that the AFBCMR improperly relied on AFI 36-3202, Table 2, Rules 3 and 18, in reaching these respective decisions. Pl.'s Mot. at 14–17. However, the AFBCMR's decision to apply Rule 3 was supported by substantial evidence, and the Board did not base its decision on Rule 18 as Plaintiff contends. *See* AR 3–5.

Plaintiff asserts that the AFBCMR should not have relied on Rule 3 when it determined that he would not have been eligible for medical retirement or a correction to the narrative on his DD-214. Pl.'s Mot. at 14–17. Rule 3 mandates issuing a DD-214 upon an Air Force Reserve member completing ninety continuous calendar days or more of active duty. AFI 36-3202, Table 2; AR 163. Mr. Pohl argues that Rule 3 did not apply to him and that the AFBCMR instead should have applied Rule 2, which provides for issuance of a DD-214 when a member is separated because of a disability. Pl.'s Mot. at 14–17. Mr. Pohl alleges he "was in fact separated due to his disability." *Id.* at 16. This argument is unpersuasive.

The record supports the AFBCMR's decision that Mr. Pohl was not separated "due to his disability" because there was no medical documentation of an injury sustained in the line of duty and he opted into the Retired Reserve. AR 5–6. Thus, Rule 2 would not have applied. Based on a common sense reading of Table 2,

Rule 3 was the only other category for which Table 2 requires the issuance of a DD-214 that could have applied to Plaintiff's situation. *See* AFI 36-3202, Table 2; AR 163. Because Plaintiff did not meet the ninety-day requirement under Rule 3, the record supports the AFBCMR's decision to deny his claim for a DD-214 on those grounds.

Plaintiff's argument that the AFBCMR erred in applying Rule 18 is also unpersuasive. Rule 18 provides that the Air Force should not issue a DD-214 when a servicemember is removed from the TDRL. AFI 36-3202, Table 2; AR 163. Plaintiff asserts that he could not be TDRL-eligible because he never went through a PEB (the entity responsible for placing members on the TDRL). Plaintiff is correct that the record shows he was never placed on the TDRL and that Rule 18 does not apply. However, Plaintiff misinterprets the AFBCMR's reference to Rule 18, which appears only under the "Applicable Authority" section of the AFBCMR's decision, and not in any analysis. AR 3. Thus, the AFBCMR did not deny Plaintiff's request for a DD-214 based on his removal from the TDRL pursuant to Rule 18. It is not clear why the AFBCMR listed Rule 18 at all, but it does not amount to an arbitrary or capricious action. Even if the AFBCMR had also included an erroneous analysis and conclusion based on Rule 18, its decision with respect to Rule 3 would still stand, and therefore, so would its ultimate decision to deny the DD-214 and change of narrative description.

C. Motion for Leave to File Supplemental Affidavit

Mr. Pohl's Motion to Supplement requests leave of the Court to file an affidavit "seek[ing] to address questions posed by the Court during oral arguments and to respond to positions espoused by Defendant." *See* Pl.'s Mot. to Suppl. at 1–2. It is unclear whether Plaintiff's Motion to Supplement should be treated as a motion to amend the Complaint pursuant to RCFC 15, or a motion to supplement the administrative record. However, under either interpretation, the Motion is denied because it would be unduly prejudicial to the Government, is futile, and is unnecessary to permit meaningful and effective judicial review.

It is within the Court's discretion to grant leave to amend a pleading. *See Tamerlane, Ltd. v. United States*, 550 F.3d 1135,1147 (Fed. Cir. 2008); *Husband v. United States*, 90 Fed. Cl. 29, 38 (2009). RCFC 15(a) instructs that courts "should freely give leave [to amend] when justice so requires," and the Supreme Court has held that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). However, futility of an amendment or undue prejudice to the non-moving party justifies denying a motion to amend the complaint. *Spalding & Son, Inc. v. United States*, 22 Cl. Ct. 678, 680 (1991) ("The existence of any one of these criteria is sufficient to deny a motion to amend, the theory being that the amendment would not be necessary to serve the interests of justice under such circumstances."); *see also A & D Auto Sales, Inc*, 748 F.3d at

1158; *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403–04 (Fed. Cir. 1989).

In ruling on a motion for judgment on the administrative record, a court "may consider 'extra-record' evidence in limited circumstances," which requires "showing that the 'additional evidence is necessary' to supplement the administrative record. *Hirsch v. United States*, 144 Fed. Cl. 55, 58 (2019) (first quoting *Metz v. United States*, 466 F. 3d 991, 998 (Fed. Cir. 2006); and then quoting *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009)). "If the administrative record is sufficient to permit meaningful and effective judicial review, supplementation of that record is not appropriate." *Id.*

Permitting Mr. Pohl to amend his Complaint at this stage to add an affidavit addressing "what [he] knew and when [he] knew it" in response to the Government's Motion to Dismiss would be unduly prejudicial to the Government. Aff. of Michael Pohl 1, ECF No. 19-1; *Spalding & Son*, 22 Cl. Ct. at 680. The relevant inquiry for adjudicating the Government's Motion to Dismiss Plaintiff's claim as barred by the statute of limitations is "whether at the time of his separation . . . [the servicemember] knew that he was entitled to disability retirement due to a permanent disability that was not a result of his intentional misconduct and was service-connected." *Chambers*, 417 F.3d at 1226. Mr. Pohl had ample opportunity to respond to the Government's Motion to Dismiss and was ably represented by counsel both in a Response to the Government's

Motion and at oral argument. *See generally* Pl.'s Reply and Resp.; Hr'g Tr.

Furthermore, filing the affidavit would be futile here because the Court does not reach the merits in this case. *See Spalding & Son*, 22 Cl. Ct. at 680. Even if the Court were to rule on the merits, its review would be limited to the record before the AFBCMR. *See Wyatt*, 23 Cl. Ct. at 319. Moreover, the fact that Plaintiff "did not seek to offer the additional material he seeks now to include in the administrative record" before the AFBCMR is "highly probative" that the affidavit would not be necessary to permit meaningful and effective judicial review. *Hirsch*, 144 Fed. Cl. at 58.

III. Conclusion

For the foregoing reasons, the Government's Motion to Dismiss is **GRANTED**, and the case is **DISMISSED** with prejudice. The parties' Cross-Motions for Judgment on the Administrative Record are **DENIED** as moot. Plaintiff's Motion for Leave to File Supplemental Affidavit is also **DENIED**. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ Carolyn N. Lerner
CAROLYN N. LERNER
Judge

[SEAL] **FOR OFFICIAL USE ONLY – PRIVACY ACT OF 1974 APPLIES**

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF: MICHAEL G. POHL

DOCKET NUMBER: BC-2019-01037

COUNSEL: MR. STEPHEN M. JEWELL

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His DD Form 214, *Certificate of Discharge from Active Duty*, Block 28, *Narrative Reason for Separation*, be corrected to reflect that he was discharged for medical disqualification.

He be placed on the Permanent Disabled Retired List (PDRL) with a 70% disability rating.

In the alternative, he be processed through the Integrated Disability Evaluation System (IDES).

APPLICANT'S CONTENTIONS

He believes his DD Form 214 should reflect that he was "medically discharged" for a service-connected injury that resulted in. him being permanently disabled. If his injury was so severe that he could not continue to

serve, it does not make sense why it would not be annotated on his DD Form 214. Had his injury been listed on the form, it would have identified him as a service-connected disabled veteran.

A fellow veteran told him his DD Form 214 did not reflect the actual reason for his discharge as reflected on Reserve Order EK-0612, dated 27 Oct 99. The order states that his service obligation was waived due to being "Med Disq," which means medically disqualified for service. However, he was never identified as being medically disqualified due to a service-connected injury and this has prevented him from receiving full Federal and State benefits that he has earned.

The Department of Veterans Affairs (DVA) rated him with a 40% disability rating for his service-connected back injury. AFI 48-123, *Medical Examinations and Standards*, allows a member to request a waiver. However, he was forced into a medical retirement with no medical examination, no, chance to request a waiver, and no opportunity to review his DD Form 214 to ensure it was accurate prior to being generated. AFI 48-123 was not complied with when the "Presumption of Fitness," "Disability Information," and "Mandatory Examinations," were ignored. Additionally, he was denied the right to seek a medical waiver as allowed in the AFI for flying duties.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force Reserve (AFR) technical sergeant.

The applicant's DD Form 214 issued in conjunction with his 17 Apr 95 separation reflects his narrative reason for separation as "COMPLETION OF REQUIRED ACTIVE DUTY TRAINING." He served 4 months and 20 days of active service and over 13 years of total service for pay.

On 6 Nov 97, according to the applicant's AF Form 422, *Physical Profile Serial Report*, he was placed on a profile that rendered him "not qualified for deployment" and "not qualified for reassignment." His profile expired on 6 Nov 98.

On 8 Dec 98, the 349th MDS/SGP notified the applicant that his Physical Profile had expired. SGP granted a 90-day extension in order for him to provide additional medical documentation regarding his prognosis, limitation, complications, treatments, medication and sequelae.

On 21 Dec 98, SGP sent another memorandum notifying the applicant that he must complete and return the acknowledgement of receipt of the SGP memorandum within 24-hours. The memorandum noted that failure to comply would constitute as a waiver of this right and discharge proceedings would continue.

On 9 Sep 99, according to the AFRC/DPM memorandum, the applicant was notified of his pending administrative discharge under AFI 36-3209, paragraph

3.14, *Physical Disqualification.* On 17 Sep 99, the applicant acknowledged receipt of the discharge notification and on 24 Sep 99, according to AF Form 131, *Application for Transfer to the Retired Reserve*, the applicant applied for transfer to the Retired Reserve, effective 1 Oct 99.

On 27 Oct 99, according to Reserve Order EK-0612, the applicant was relieved from his current assignment and assigned to the Retired Reserve Section and placed on the Reserve Retired List, effective 1 Oct 99, by reason of medical disqualification, awaiting pay at age 60 (DOB: 26 Feb 64).

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C and D.

APPLICABLE AUTHORITY

The military DES, established to maintain a fit and vital fighting force, can by law, under Title 10, United States Code (USC), only offer compensation for those service incurred diseases or injuries which specifically rendered a member *unfit* for continued service and were the cause for career termination; and, then only for the degree of impairment present at the time of separation and not based on future occurrences. DoDI 1332.32, *Physical Disability Evaluation*, reads "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."

The Department of Defense and the DVA disability evaluation systems operate under two separate laws. Under Title 10, United States Code, Physical Evaluation Boards must determine if a member's condition renders them unfit for continued military service relating to their office, grade, rank or rating. The fact that a person may have a medical condition does not mean the condition is unfitting for continued military service. To be unfitting, the condition must bq such that it alone precludes the member from fulfilling their military duties. If the board renders a finding of unfit, the law provides appropriate compensation due to the premature termination of their career. Further, it must be noted the AF disability boards must rate disabilities based on the member's condition at the time of evaluation; in essence a snapshot of their condition at that time. It is the charge of the DVA to pick up where the AF must, by law, leave off. Under Title 38, the DVA may rate any service-connected condition based upon future employability or reevaluate based on changes in the severity of a condition. This often results in different ratings by the two agencies.

IAW AFI 36-3202, *Separation Documents*, Table 2, Rule 18, a DD Form 214 is not issued when a service member is removed from the TDRL. AFI 36-3212, *Personnel Physical Evaluation for Retention, Retirement and Separation*, paragraph 7.22 states, HQ AFPC/DPPD announces the final disposition on a Retirement Special Order. These orders are the official notice to TDRL members of final disposition action.

AIR FORCE EVALUATION

ARPC/DPTS recommends denying the application. There is no error or injustice within the applicant's military record. He was not eligible for a DD Form 214 at the time of his retirement because he was not on continuous active duty orders of 90 continuous calendar days leading up to his retirement. Although he now has a 40% rating from the DVA, it does not change his eligibility and receipt of a retirement DD Form 214. Per Air Force Instruction 36-3202, Table 2, a member (ANGUS or USAFR) has to serve 90 continuous calendar days or snore of active duty to qualify for a DD Form 214.

The complete advisory opinion is at Exhibit C.

The BCMR Medical Advisor recommends denying the application. There is no evidence to support a medical retirement or a change in the applicant's narrative reason for separation. Although the DVA granted compensation for his medical condition, it was based upon a non-duty related back condition, which the applicant elected to retire in lieu of a discharge for a physical disability.

On 17 May 97, the applicant was placed in a duties not including flying (DNIF) status due to chronic narcotic use and permanent physical limitations, and was found to be disqualified for continued military service.

On 21 Dec 98, the applicant was notified that additional medical documentation was needed in order to further evaluate his medical condition. Despite several

attempts, he did not comply nor did he elect to have his case further reviewed by the Physical Evaluation Board (PEB). He was placed on "no pay no points" status prior to his medical case being submitted for further review. Medical documentation notes the applicant received several phone calls and letters via certified mail explaining the process and requesting additional information. The applicant states he was not notified of a possible disqualification from the military. Because the applicant did not respond, his case was referred to AFRC/SGP with no updated medical treatment notes.

On 22 Jun 99, AFRC/SGP found the. applicant disqualified for continued military duty and recommended administrative action for being diagnosed with Bilateral L4 spondylosis and L5 + S1 herniation, status post-spinal instrumentation and history of chronic pain with work limitation and narcotic requirement. The applicant's commander reviewed SGP's recommendation and non-recommended him for retention based on his inability to deploy or perform the duties of a flight engineer.

The Medical Advisor found no medical documentation of any injury that occurred in April 1991 while attending survival school. In fact, the applicant's medical records noted he injured his back in a motor vehicle accident in 1995 and again in 1996 when he lifted a 70-pound aircraft battery. However, neither of the events occurred while the applicant was on active duty orders; thus, the injury was not found to be in line of duty. Furthermore, it was noted in the applicant's medical

records from St. Vincent Hospital and Health Services that he denied any military accidents or injury.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 31 Jan 20 for comment (Exhibit D), and the applicant's counsel replied on 2 Mar 20. In counsel's 6-page response, he reiterates the applicant's original contentions and makes the following comments in rebuttal:

While on active duty for training in January 1991, he fell approximately 100 feet into a ravine. After the fall, on-site medical technicians saw him; however, he remained at the training site until he returned home then his wife took him to the hospital for treatment. The physician explained that his injury could result in him being discharged. Fearing he would lose his career, he opted to leave the hospital. He continued to drill with his unit after the AFR failed to properly diagnose his pre-existing injury as being severely aggravated.

The Air Force failed to follow proper IDES processing procedures when the applicant was discharged. He did not receive his mandatory medical examination; thus, he was never properly evaluated for the injury he suffered in 1991.

The BCMR Medical Advisor applied the wrong rule of the governing instructions and did not consider any of

the evidence provided by the applicant. Specifically, the Medical Advisor did not consider the proper Rule in Table 2 of AFI 36-3202. Rule 2 mandates the issuance of a DD Form 214 and Rule 3 does not apply to the applicant's case. The applicant's spouse provided an affidavit that notes she observed and knows the extent of his injury from 1991.

He worked for United Airlines in his civilian job when he aggravated his back injury causing him to be incapacitated requiring him to have surgery. He underwent three (3) surgeries for his back injury. Due to the surgeries, he was involuntarily retired from the AFR. In February 2006, he was no longer able to work for the airlines, he placed a claim with the Social Security Administration (SSA). After appealing the SSA's decision, he presented his case to an administrative judge in 2007 who found him disabled and granted him SSA benefits, effective 15 Jan 03.

His initial service-connected disability rating was 40%; however, he filed an appeal and the rating was increased to 70% with 100% un-employability, effective May 2016. His application was timely filed as he petitioned the Board once he received the DVA decision on 25 Oct 18.

The applicant's complete response is at Exhibit E.

FINDINGS AND CONCLUSION

1. The application was not timely filed.

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of ARPC/DPTS and the BCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. While counsel believes the Medical Advisor used the wrong rule of AFI 36-3202, we do not agree. The Board also notes the applicant did not file the application within three-years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR).* While the applicant asserts a date of discovery within the three-year limit, the Board does not find the assertion supported by a preponderance of the evidence. The Board does not find it in the interest of justice to waive the three-year filing requirement. Therefore, the Board finds the application untimely and recommends against correcting the applicant's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only

upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2019-01037 in Executive Session on 20 May 20:

Mr. Clifford D. Tompkins, Panel Chair
Mr. Gregory E. Johnson, Panel Member
Ms. Phyllis M. Joyner, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 16 Nov 18.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory opinion, ARPC/DPTS, dated 26 Dec 19.

Exhibit D: Advisory opinion, BCMR Medical Advisor, 13 Jan 20.

Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 31 Jan 20.

Exhibit F: Applicant's response, w/atchs, dated 2 Mar 20.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

5/25/2020

X Charlie T. Alston
Board Operations Manager, AFBCMR
Signed by: ALSTON.CHARLIE.T.1053540860

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL G. POHL,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2022-2080

Appeal from the United States Court of Federal Claims in No. 1:21-cv-01482-CNL, Judge Carolyn N. Lerner.

ON PETITION FOR PANEL REHEARING

Before REYNA, MAYER, and HUGHES, *Circuit Judges*.
PER CURIAM.

ORDER

Michael G. Pohl filed a petition for panel rehearing [ECF No. 24] and subsequently filed a document which the court construed as a supplement to the petition [ECF No. 25].

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT

May 12, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL G. POHL,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2022-2080

Appeal from the United States Court of Federal Claims in No. 1:21-cv-01482-CNL, Judge Carolyn N. Lerner.

ON MOTION

Before MOORE, *Chief Judge*, NEWMAN, MAYER[1], LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

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[1] Circuit Judge Mayer participated only in the decision on the petition for panel rehearing.

ORDER

Michael G. Pohl filed a petition for rehearing en banc.[2] The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en Banc is denied.

FOR THE COURT

June 1, 2023
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

[2] Mr. Pohl filed a petition for panel rehearing on April 27, 2023, which the court denied on May 12, 2023.

APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552 *(Please read Privacy Act Statement and instructions on back BEFORE completing this application.)*	*OMB No. 0704-0003 OMB approval expires Dec 31, 2017*

The public reporting burden for this collection of information, 0704-0003, is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx.dd-dod-information-collections @mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

1. APPLICANT DATA *(The person whose record you are requesting to be corrected.)*

a. BRANCH OF SERVICE *(X one)*

	ARMY		**NAVY**	✓	**AIR FORCE**
	MARINE CORPS			**COAST GUARD**	

b. NAME *(Print - Last, First, Middle Initial)* **Pohl, Michael G.**
c. PRESENT OR LAST PAY GRADE **E6**
d. SERVICE NUMBER *(If applicable)* **1093585433**
e. SSN [redacted]
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES *(Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)* **Retired**
3. TYPE OF DISCHARGE*(If by court-martial, state the type of court.)* **Honorable**
4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY *(YYYYMMDD)* **19991001**
5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED AS FOLLOWS: *(Entry required)* **1 – Member requests that his DD-214 be corrected to reflect the true reason for his retirement which was due to his being found medically disqualified for service per Reserve Order EK-0612 dated October 27, 1999 with an effective date of October 01, 1999 resulting from a service connected injury rated at a 40% disability.** **2 – DD-214 must reflect the order driving it and why the member is released from his commitment of service.** **3 – Failure to accurately reflect the reason for medical retirement prevents member from**

receiving all benefits he is legally entitled to and has earned.
6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: *(Entry required)* **1 – Member's DD-214 does not reflect the fact for his early retirement in either Block 26 or Block 27.** **2 – As of October 25, 2018 the VA issued a finding that the member was medically separated in 1999 due to a service connected injury. That injury was rated by the VA at 40% disabled which is not stated in the remarks section of the member's DD-214.** **3 – Member seeks to have his DD-214 reflect the order for retirement as being "Medically Disqualified" for a service connected injury with an effective date of October 01, 1999 that rated a 40% disability.**
a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL? YES ✓ NO
b. IF YES, WHAT WAS THE DOCKET NUMBER?
c. DATE OF THE DECISION
7. ORGANIZATION AND APPROXIMATE DATE *(YYYYMMDD)* **AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED** *(Entry required)* **1999 / 10 / 01**
8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE **Not until the VA Decision of October 2018 confirming the error**

a. DATE OF DISCOVERY *(YYYYMMDD)*	20181025
b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.	
Member is entitled by law to have his DD-214 accurately reflect the true reason for separation so all benefits he is entitled to are in-fact made available to him.	
9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: *(If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)* **1 – VA Decision dated October 25, 2018, and;** **2 – Reserve Order EK-0612 dated October 27, 1999 => ref: "Reason"**	
10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. *(At no expense to the Government) (X one)* **YES. THE BOARD WILL DETERMINE IF WARRANTED.** ✓ **NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE**	
11.a. COUNSEL *(If any)* **NAME** *(Last, First, Middle Initial)* **and ADDRESS** *(Include ZIP Code)*	
b. TELEPHONE *(Include Area Code)*	**c. E-MAIL ADDRESS**

d. FAX NUMBER *(Include Area Code)*
e. I WOULD LIKE ALL CORRESPONDENCE/ DOCUMENTS SENT TO ME ELECTRONICALLY. YES NO
12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name *(print)* _____ **and relationship by marking one box below.**

	SPOUSE		**WIDOW**		**WIDOWER**
	NEXT OF KIN		**LEGAL REPRESENTATIVE**		
	OTHER *(Specify)*				

13.a. COMPLETE CURRENT ADDRESS *(Include ZIP Code)* **OF APPLICANT OR PERSON IN ITEM 12 ABOVE** *(Forward notification of all changes of address.)* **3355 De Coronado Trl** **Round Rock, TX 78665**
b. TELEPHONE *(Include Area Code)* **(317) 281-4452**
c. E-MAIL ADDRESS indyflyer64@icloud.com
d. FAX NUMBER *(Include Area Code)*
14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. *(U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined*

under this title or imprisoned not more than 5 years, or both.)
15. SIGNATURE *(Applicant must sign here.)*
~~/s/ [Illegible]~~
16. DATE SIGNED *(YYYYMMDD)* **20181116**
CASE NUMBER *(Do not write in this space.)*

DD FORM 149, DEC 2014
PREVIOUS EDITION IS OBSOLETE.
Adobe Designer 9.0

[SEAL]

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office

MICHAEL POHL

VA File Number
[redacted]

Represented By:
VETERANS OF FOREIGN WARS OF THE US
Decision Review Officer Decision
10/25/2018

INTRODUCTION

The records reflect that you are a veteran of the Peacetime. You served in the Army from September 15, 1982, to September 14, 1985. We received a Notice of Disagreement from you on April 27, 2017 about one or more of our earlier decisions. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Service connection for status post L4-L5 fusion with fusion hardware and STIM unit (claimed as low back condition) is granted with an evaluation of 20 percent effective May 25, 2016.

2. Service connection for left lower extremity radiculopathy is granted with an evaluation of 20 percent effective May 25, 2016.

3. Service connection for scars, status post L4-L5 fusion is granted with an evaluation of 0 percent effective May 25, 2016.

4. Service connection for scar, anterior think, status post L4-L5 fusion is granted with an evaluation of 0 percent effective August 13, 2018.

5. Service connection for scar, posterior trunk, status post L4-L5 fusion is granted with an evaluation of 0 percent effective August 13, 2018.

EVIDENCE

- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, May 25, 2016
- Service Treatment Records, from September 15, 1982 through September 14, 1985
- Service Treatment Records (reserve), from September 16, 1985 through October 1, 1999
- Statement from your spouse, received February 28, 2017
- Phone coversation with you on February 9, 2017
- VA contract examination, QTC contract provider, dated March 1, 2017
- Rating Decision, dated March 22, 2017
- VA Form 21-0958, Notice of Disagreement, received April 27, 2017
- VAMC (Veterans Affairs Medical Center) treatment records, Indianapolis VA Medical Center, from July 15, 2014 through December 19, 2016
- VAMC (Veterans Affairs Medical Center) treatment records, Central Texas VA Healthcare System, from April 28, 2017 through August 31, 2017

REASONS FOR DECISION

1. Service connection for status post L4-L5 fusion with fusion hardware and STIM unit (claimed as low back condition).

Service connection for status post L4-L5 fusion with fusion hardware and STIM unit has been established as directly related to military service. You initially reported that this incident occurred in March 1990 while you were on active duty training. Your spouse had pointed out that the injury happened following survival school training in 1991. She testifies that back issues were not present prior to this training and when you returned she witnessed severe bruising across your entire mid to lower back. She notes that she took you to Travis AFB for treatment shortly after returning and that you have had episodes of back pain since that time.

We requested a medical opinion and noted to the examiner the incident happened in March 1990 using your statements instead of your spouse's credible statements and your ADT discharge document which showed the combat survival school was in April 1991. The evidence is consistent between your spouse's statements and she is considered a credible historian. The VA examiner reviewed all the records and provided the opinion that it is at least as likely as not that the condition was incurred due to a fall during survival school that went undiagnosed and untreated. He states this led to weakened vertebral lumbar area that when a separate injury occurred later at the same location, the damage was much greater. He states while the

claimant's current condition can't be considered wholly due to the event in service, it is likely that his initial injury on military duty made him more susceptible to further injury resulting in your current condition. Based on the testimony from your spouse and the positive medical opinion, the evidence supports an injury to the back did occur on your ADT period in 1991 and that your current back condition is at least in part due to this event. All reasonable doubt is resovled in your favor.

An evaluation of 20 percent is assigned from May 25, 2016, the date we received your claim for this condition.

We have assigned a 20 percent evaluation for your status post L4-L5 fusion with fusion hardware and STIM unit based on:

- Combined range of motion of the thoracolumbar spine not greater than 120 degrees
- Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees
- Guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis

Additional symptom(s) include:

- X-ray evidence of traumatic arthritis
- With no incapacitating episodes during the past 12 months
- Combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees
- Painful motion upon examination

The provisions of 38 CFR §4.40 and §4.45 concerning functional loss due to pain, fatigue, weakness, or lack of endurance, incoordination, and flare-ups, as cited in DeLuca v. Brown and Mitchell v. Shinseki, have been considered and applied under 38 CFR §4.59.

This is the highest schedular evaluation allowed under the law for traumatic arthritis.

Additionally, a higher evaluation of 40 percent is not warranted for intervertebral disc syndrome (ivds) unless the evidence shows:

- Favorable ankylosis of the entire thoracolumbar spine; or,
- Forward flexion of the thoracolumbar spine 30 degrees or less.

Additionally, a higher evaluation of 40 percent is not warranted for intervertebral disc syndrome (ivds) unless the evidence shows:

- Intervertebral disc syndrome (IVDS) with incapacitating episodes having a total duration of at least four weeks but less than six weeks during the past 12 months.

Our decision represents a grant of the benefit sought on appeal based on a denovo review. The portion of the appeal concerning service connection for low back condition is considered withdrawn.

2. Service connection for left lower extremity radiculopathy as secondary to the service-connected disability of status post L4-L5 fusion with fusion hardware and STIM unit.

Service connection for left lower extremity radiculopathy has been established as related to the service-connected disability of status post L4-L5 fusion with fusion hardware and STIM unit.

An evaluation of 20 percent is assigned from May 25, 2016, the date we received your claim for low back condition because radiculopathy is a known complication of a back disability. The 20 percent evaluation is being assigned based on moderate subjective complaints with decreased reflexes noted in the left knee and ankle on examination. The examiner noted the impairment is of a moderate level.

We have assigned a 20 percent evaluation for your left lower extremity radiculopathy based on:

- Moderate incomplete paralysis

A higher evaluation of 40 percent is not warranted for paralysis of the sciatic nerve unless the evidence shows nerve damage is moderately severe.

3. Service connection for scars, status post L4-L5 fusion as secondary to the service-connected disability of status post L4-L5 fusion with fusion hardware and STIM unit.

Service connection for scars, status post L4-L5 fusion has been established as related to the service-connected

disability of status post L4-L5 fusion with fusion hardware and STIM unit.

A noncompensable evaluation is assigned from May 25, 2016, the date we received your claim for your back condition because your scars were determined to be a result of this condition which has found to be service-connected. We sympathetically read your claim for your back condition to include the scars of your surgery.

We have assigned a 0 percent evaluation for your scars, status post L4-L5 fusion based on:

- Other areas of disfigurement not considered under another appropriate diagnostic code

Note: In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met. {38 CFR §4.31}

An additional, separate compensable evaluation under Diagnostic Code 7804 is not warranted unless there is at least one scar that is painful or unstable.

This is the highest schedular evaluation allowed under the law for scars, other (including linear scars) and other effects of scars evaluated under diagnostic codes 7800, 7801, 7802, and 7804.

The code used to assign this evaluation is being closed out August 13, 2018, the date of the law change pertaining to scars. See our decisions about scars of the anterior and posterior trunk respectively to see how

these scars will be evaluated after the date of the law change.

4. Service connection for scar, anterior trunk, status post L4-L5 fusion as secondary to the service-connected disability of status post L4-L5 fusion with fusion hardware and STIM unit.

Service connection for scar, anterior trunk, status post L4-L5 fusion has been established as related to the service-connected disability of status post L4-L5 fusion with fusion hardware and STIM unit.

The schedule for rating disability has changed for this condition. An evaluation of 0 percent assigned effective August 13, 2018, the date of the law change.

We have assigned a 0 percent evaluation for your scars, status post L4-L5 fusion based on:

- Anterior trunk: area or areas less than 144 square inches (929 sq. cm.) (Not associated with underlying soft tissue damage)

Additional symptom(s) include:
- Scar 1 Location: Anterior trunk
- Scar 1 type: scar

Note: In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met. {38 CFR §4.31}

Your first scar/area has a length of 13 cm and a width of 1 cm for a total area of 13 sq. cm.

An additional, separate compensable evaluation under Diagnostic Code 7804 is not warranted unless there is at least one scar that is painful or unstable.

A higher evaluation of 10 percent is not warranted for burn scar(s) or scar(s) due to other causes, not of the head, face, or neck, that are not associated with underlying soft tissue damage (anterior trunk) unless the evidence shows:

- Area or areas of 144 square inches (929 sq. cm.) or greater.

Additionally, a higher evaluation of 10 percent is not warranted for burn scar(s) or scar(s) due to other causes, not of the head, face, or neck that are associated with underlying soft tissue damage (entire body) unless the evidence shows:

- Area or areas of at least 6 square inches (39 sq. cm.) but less than 12 square inches (77 sq. cm.).

Additionally, a higher evaluation of 10 percent is not warranted for burn scar(s) or scar(s) due to other causes, not of the head, face, or neck, that are not associated with underlying soft tissue damage (entire body) unless the evidence shows:

- Area or areas of 144 square inches (929 sq. cm.) or greater.

5. Service connection for scar, posterior trunk, status post L4-L5 fusion as secondary to the service-connected disability of status post L4-L5 fusion with fusion hardware and STIM unit

Service connection for scar, posterior trunk, status post L4-L5 fusion has been established as related to the service-connected disability of status post L4-L5 fusion with fusion hardware and STIM unit.

The schedule for rating disability has changed for this condition. An evaluation of 0 percent assigned effective August 13, 2018, the date of the law change.

We have assigned a 0 percent evaluation for your scars, status post L4-L5 fusion based on:

- Posterior trunk: area or areas less than 144 square inches (929 sq. cm.) (Not associated with underlying soft tissue damage)

Additional symptom(s) include:

- Scar 2 Location: Posterior trunk
- Scar 2 type: scar
- Scar 3 Location: Posterior trunk
- Scar 3 type: scar
- Scar 4 Location: Posterior trunk
- Scar 4 type: scar
- Scar 5 Location: Posterior trunk
- Scar 5 type: scar

Note: In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met. {38 CFR §4.31}

Your second scar/area has a length of 18 cm and a width of 0.25 cm for a total area of 4.5 sq. cm.

Your third scar/area has a length of 9 cm and a width of 0.1 cm for a total area of 0.9 sq. cm.

Your fourth scar/area has a length of 6 cm and a width of 0.1 cm for a total area of 0.6 sq. cm.

Your fifth scar/area has a length of 7 cm and a width of 0.25 cm for a total area of 1.75 sq. cm.

An additional, separate compensable evaluation under Diagnostic Code 7804 is not warranted unless there is at least one scar that is painful or unstable.

A higher evaluation of 10 percent is not warranted for burn scar(s) or scar(s) due to other causes, not of the head, face, or neck, that are not associated with underlying soft tissue damage (posterior trunk) unless the evidence shows:

- Area or areas of 144 square inches (929 sq. cm.) or greater.

Additionally, a higher evaluation of 10 percent is not warranted for burn scar(s) or scar(s) due to other causes, not of the head, face, or neck that are associated with underlying soft tissue damage (entire body) unless the evidence shows:

- Area or areas of at least 6 square inches (39 sq. cm.) but less than 12 square inches (77 sq.cm.).

Additionally, a higher evaluation of 10 percent is not warranted for burn scar(s) or scar(s) due to other causes, not of the head, face, or neck, that are not

associated with underlying soft tissue damage (entire body) unless the evidence shows:

- Area or areas of 144 square inches (929 sq. cm.) or greater.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

[SEAL]

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office

MICHAEL POHL

VA File Number
[redacted]

Represented By:
VETERANS OF FOREIGN WARS OF THE US
Decision Review Officer Decision
11/13/2019

INTRODUCTION

The records reflect that you are a veteran of the Gulf War Era and Peacetime. You served in the Army from September 15, 1982 to September 14, 1985 and the Air Force from July 27, 1990 to December 4, 1991 and from November 28, 1994 to April 17, 1995. We received a Notice of Disagreement from you on November 9, 2018 about one or more of our earlier decisions. Based on a review of the evidence listed below, we have made the following decisions on your claim.

DECISION

1. Entitlement to individual unemployability is granted effective May 25, 2016.

2. Basic eligibility to Dependents' Educational Assistance is established from May 25, 2016.

EVIDENCE

- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, May 25, 2016
- VA contract examination dated March 1, 2017
- Notice of Disagreement received November 9, 2018
- VA Form 21-8940, Veteran's Application For Increased Compensation Based On Unemployability, received December 5, 2018
- Social Security Administration records received on December 18, 2018, March 20, 2019, and March 28, 2019
- VA contact examination, dated December 26, 2018
- Statement from United Airline dated January 31, 2006, received February 8, 2019
- Veteran's written statement, received Mach 29, 2019
- VA Form 27-0820, Report of General Information, documenting phone call with Veteran confirming employment dates, dated October 18, 2019
- Advisory Opinion Extra-Schedular Consideration from the Director of Compensation Service dated November 7, 2019
- VAMC (Veterans Affairs Medical Center) treatment records, Indianapolis VA Medical Center, from July 15, 2014 through December 19, 2016
- VAMC (Veterans Affairs Medical Center) treatment records, Central Texas Healthcare System, from April 28, 2017 to October 18, 2019

REASONS FOR DECISION

1. Entitlement to individual unemployability.

Entitlement to individual unemployability is granted because you are unable to secure or follow a substantially gainful occupation as a result of service-connected disability. (38 CFR 4.16)

The Director of Compensation Services has provided a decision that you are entitled to individual unemployability on an extra-schedular basis for the period from May 25, 2016 to December 26, 2018. You met the schedular criteria for individual unemployability effective December 26, 2018.

Entitlement to individual unemployability is granted from May 25, 2016.(38 CFR 3.400).

This is considered a total grant of your appeal for this condition and your appeal of this condition is closed out.

2. Eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35.

Eligibility to Dependents' Educational Assistance is derived from a veteran who was discharged under other than dishonorable conditions; and, has a permanent and total service-connected disability; or a permanent and total disability was inexistence at the time of death; or the veteran died as a result of a service-connected disability. Also, eligibility exists for a serviceperson who died in service. Finally, eligibility can be derived from a service member who, as a member of

the armed forces on active duty, has been listed for more than 90 days as: missing inaction; captured in line of duty by a hostile force; or forcibly detained or interned inline of duty by a foreign government or power.(38 USC Ch. 35, 38 CFR 3.807)

Basic eligibility to Dependents' Education Assistance is granted as the evidence shows you currently have a total service-connected disability, permanent in nature. (38 USC Chapter 35, 38 CFR 3.807)

Basic eligibility to Dependents' Educational Assistance is established from May 25, 2016 the date you were granted entitlement to Individual Unemployability.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website www.va.gov.