No. 23-113

ORIGINAL

In The

Supreme Court of the United States

MICHAEL POHL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

1. Is the proper standard of review for an appeal to correct a military record 10 U.S.C. § 1552 as stated in both the statute and Respondents DD Form 149, or is it 28 U.S.C. § 1491 known as the Tucker Act?

PARTIES TO THE PROCEEDING

Petitioner Michael Pohl was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondent United States was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

RELATED CASES

1. *Pohl v. US* Court of Appeals Federal Circuit case: 22-2080 (Decided April 18, 2023)

2. *Pohl v. US* Court of Federal Claims case: 21-1482C (Decided June 21, 2022)

3. *Pohl v. US Air Force Board for Correction of Military Records* docket BC-2019-01037 (Decided May 25, 2020)

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INTRODUCTION

Petitioner (Pohl) believes this is a case of first impression for this court[1] in that he had appealed to the court the decision by Respondent's Air Force Board for Correction of Military Records (Board) not to correct an error found in his military record; an appeal under the controlling statute of 10 U.S.C. § 1552 which is in the title of Respondents DD Form 149[2] and submitted to them by the Petitioner. In 1990 the Appellate Court for the Federal District stated in Real v. US[3] that the trial court there erred by using 28 U.S.C. § 1491 (the Tucker Act) as the statute for review. However some 33-years later in 2023, that same appellate court has now ruled in Pohl[4] that the Tucker Act is the proper statute for such a review. These are conflicting decisions by the same legal body regarding what law is to be used as a standard for reviewing a veterans appeal to correct their military record.

This now requires The United States Supreme Court to resolve these opposing rulings made by the same appellate court. Only by granting certiorari may

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[1] Supreme Court Rule 10(c) states, " . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . "

[2] App. 71 DD Form 149 titled "Application to Correct Military Record Under 10 USC §1552"

[3] There the court stated, " . . . we conclude that the trial court erred in applying an incorrect legal standard in sustaining defendant's motion to dismiss, we reverse and remand for further proceedings." Real v. US decided 1990

[4] App. 1 Pohl v. US decided 2023

this court establish a single standard of review that the lower courts will be compelled to apply for all veterans seeking to correct errors of their service record.

OPINIONS BELOW

The Appellate Court's denial of petitioner's motion for reconsideration and rehearing en banc is reproduced at App. 69 to 70. The Appellate Court's opinion is reproduced at App. 1 to 15. The opinion of the District Court for the Federal District is reproduced at App. 17 to 54. The United States Air Force Board for Correction of Military Records record of proceedings is reproduced at App. 55 to 66.

JURISDICTION

The Court of Appeals denied petition for rehearing en banc on June 01, 2023 and rehearing on May 12, 2023. The Court of Appeals entered judgment on April 18, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Amendment XIV " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In April 1991 Pohl graduated from Air Force Combat Survival Training School as part of his requirement to become an Air Force flight engineer. This is an enlisted position. During his time there he ended up suffering an injury when he fell down the side of a mountain. That injury visually left his back severely bruised as well as the inside of his left leg and right forearm. Upon his return home his wife, who at the time was an active-duty Air Force officer and pilot, saw the bruising and took him to the base hospital to see the flight surgeon. The extent of the medical exam by the flight surgeon was a visual look at the bruised areas to which he told Pohl to use a heating pad to increase blood flow to the areas for healing as well as taking Tylenol for pain. No further examination was made or follow-up exam ordered. Pohl reported his injury to his immediate supervisor as well as his visit to the hospital as is required by Air Force Instructions (AFI). Pohl completed the training and as a reservist he could avoid flying duties whenever there was an increase in his back pain as testified[5] to by his former wife.

[5] Petitioner's former wife, who holds a medical doctorate in pharmacology, wrote an affidavit to the effect of what she

In 1995 Pohl completed KC-10 flight engineer school due to the retirement of the C-141 aircraft he was initially assigned to and the subsequent deactivation of his unit. Upon completion of school he received a DD Form 214. This was the last DD Form 214 Pohl received and it could not have anticipated his medical retirement due to a disability in 1999 which happened some 4-1/2 years into the future.

In November 1996 while working for his civilian employer, Pohl suffered a work injury at United Airlines while lifting an aircraft battery. Thanks to the California workers compensation laws it took until 1997 for him to be properly examined by an orthopedic surgeon. That examination resulted in finding a bi-lateral fracture of his L5 vertebrae and the total loss of his L5-S1 disk. Surgery was immediately scheduled. While in the hospital recovering from surgery the surgeon met with Pohl in his room and told him there was excessive boney overgrowth which is indicative of an old injury[6]. He also stated that the fracture was unlikely caused by lifting. As to his ruptured disk, a lifting injury definitely could have caused that due to the failure of the structural integrity of the L5 vertebral body.

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personally witnessed and the fact she had taken the Petitioner to the military hospital where he was seen by a flight surgeon of the Respondent.

[6] The Department of Veterans Affairs concluded that the excessive bony overgrowth could not be formed in 1997 by a 1996 injury, whereas a 1991 survival school injury would allow sufficient time for the body to produce such overgrowth.

For his part Pohl never connected his 1996 work injury to an undiagnosed pre-existing 1991 survival school injury and his concern at the time was focused on healing and being able to return to both careers. Pohl never knew that there was such a thing as an undiagnosed pre-existing injury.

In 1999 the Respondent used Pohl's injury as a pretext to force him to accept an early retirement. Their reasoning was after being absent for 2-1/2 years, Pohl was no longer fit to serve. It should be noted that their decision was reached without so much as calling and talking to Pohl or his doctor. Respondent also failed to conduct a medical examination of Pohl before retiring him. The absence of evidence in the record supports this.

In 2006 Pohl's civilian employer, United Airlines, terminated him due to his injury. By not declaring Pohl a disabled veteran in 1999 the Respondent harmed Pohl by keeping from him access to the reasonable accommodation for a disabled employee. Had the Respondent done so, the door to the reasonable accommodation process was opened for Pohl to use with his civilian employer so that he could have continued to remain employed versus being terminated. Once again, Respondent's failure to perform its duty with due diligence has caused severe personal and professional harm to Pohl.

In 2007 Pohl was approved for Social Security Disability benefits for what he and his attorney believed was strictly for a worker's compensation injury

stemming from a 1996 injury at United Airlines. Again, neither Pohl, his attorney or the judge for social security suspected Pohl had a pre-existing military injury. There simply was no evidence[7] to suggest Pohl's injury was the result of anything more than a civilian work related injury.

It wasn't until the fall of 2016 when he met a fellow veteran who informed Pohl that there appeared to be mistakes to his retirement. Upon showing this fellow veteran his DD Form 214 and retirement order was Pohl then informed it appeared he was medically retired due to being "medically disqualified" (aka having a physical disability) and that he was in-fact entitled to a new DD Form 214. Pohl was also told that he was wrongfully assigned to the retired reserve list[8] versus the permanent disability retirement list (PDRL) due to the fact the Air Force determined he could no longer serve in any position or capacity back then or ever.

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[7] Pohl would not be made aware of evidence of a pre-existing military injury until June 08, 2021 when Respondent mailed a copy of his service and medical records to Pohl's attorney as part of a response to a FOIA request for them. That evidence showed that due to his lack of participation the Respondent believed Pohl had a disability and took action in May 1997 by placing him on the temporary disability retirement list.

[8] Under 10 U.S.C. § 10154(2) states, "Reserves who have been transferred to the Retired Reserve, retain their status as Reserves, and are otherwise qualified." Pohl could not, by law, be transferred to this list because he was found medically unqualified as stated in the reason section of his retirement order (App. 107).

He then recommended that Pohl first file a claim with the Department of Veterans Affairs (DVA) because they have all of his military service and medical records; and if he received a favorable decision, to then use that as a supporting document to seek a correction of his DD Form 214 because the integrated disability evaluation system[9] (IDES) requires the military to accept the findings and ratings of the DVA. This is when Pohl first became aware that his medical separation may have been done incorrectly[10] (the initial discovery of an "error or injustice").

On October 25, 2018 Pohl received a favorable decision by the DVA and on November 16, 2018 he filed a DD Form 149 for a correction of his military DD Form 214 record with the Respondent. This filing took place well within 3-years of his 2016 initial discovery or suspicion that an error of injustice had occurred. This not only met the statutory requirement of 10 U.S.C. § 1552(b) sentence 1, but follows the ruling that the time to file does not always begin at the time of separation from service (Real v. US[11]).

Congress has allowed an exception to the 3-year rule and it is found in sentence 3 of 10 U.S.C. § 1552(b).

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[9] App. 111 to 116 IDES Short Brief

[10] 10 U.S.C. § 1552(b) sentence 1 states, "No correction may be made under subsection (a)(1) unless the claimant (or the claimants' heir or legal representative) or the Secretary concerned files a request for the correction within three years after discovering the error or injustice" (emphasis added)

[11] In Real the court held, " . . . denial of his petition by the corrections board was the triggering event, not his discharge."

The essence of that sentence must be read in favor of the veteran receiving justice as stated in this court's 1991 decision in King v. St. Vincent's Hospital as well as its 1994 decision in Brown v. Gardner given it would be in the veterans interest to have their service record corrected to accurately reflect not only their service as a whole, but the real reason for their separation at the time of separation. That sentence reads as follows:

> *"A board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice."*

As previously stated, on November 16, 2018 Pohl filed a DD Form 149 with the Respondent to correct his DD Form 214 so that it would show he was medically retired on October 01, 1999 due to an aggravation of a previously unknown service-connected injury; an injury the DVA concluded was in-fact service-connected and initially rated it at 40% disabled and upon re-evaluation rated it to be 100% unemployable.

By law the DVA cannot approve benefits for a disabling injury that is not service-connected which contradicts the Respondent's Board claim that the DVA approved disability pay and medical benefits for a non-service-connected injury[12]. The Air Force Board has no

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[12] If legal counsel for the Respondent believed this was the case, it had a duty to take steps to correct such an error. However, Respondent's attorney has taken no such steps thereby implying it believes the statement by the Board regarding the DVA approving a non-service injury are both inaccurate and without merit.

authority to speak for the DVA[13] regarding its investigation and findings. This especially holds true given the Air Force conducted no line of duty investigation or medical examination of Pohl that would go against the investigative findings of the DVA. In essence, the Respondent offers no evidence, medical or otherwise, that is dated before or on the Petitioner's retirement date that his injury was not service related. The Board's decision also shows that it refuses to comply with the IDES program by refusing to not only accept, but to apply the DVA disability rating of Pohl.

On May 25,2020 Respondent's Board reviewed Pohl's application under 10 U.S.C. § 1552 and denied it based on the application not being timely filed beginning from the time of his separation[14].

Also found within the Board's decision was a finding that Pohl was removed from the Temporary

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This disagreement between Respondent's agencies must now be resolved by this court.

[13] The Department of Veterans Affairs is a Cabinet Level position within every Administration whereas the Board of any military branch is not.

[14] App. 64 item 1 of Findings and Conclusion for 2020-05-25 Decision – Board. Here the Board ignores Real v. US citing Harper v. US in that, " . . . court held that the limitations period did not begin to run upon the service member's discharge because of the lack of sufficient knowledge of the member's condition at that time. See e.g. Harper v. United States . . . "

Disability Retirement List[15] [16] (TDRL) and as such was not entitled to a new DD Form 214 per Air Force Instruction (AFI) 36-3203 Table 2 specifically Rule 18 (App. 110). Pohl agrees with this conclusion if, and only if, Rule 18 applied – which it does not. However, Pohl rightfully argues that Rule 2 (App. 108) applied given he was separated for having a disability that Respondent's Board clearly stated he had[17]. The trial court ignored this finding of the Board and dismissed it[18].

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[15] Before a member can be removed from TDRL under 10 U.S.C. § 1210, the Respondent must first place them there as required by 10 U.S.C. § 1205. Respondent's 1999 Memorandum from Lt Col Lynott suggests a decision was made to place Pohl on TDRL in May 1997 (App. 101 to 102). It is clear the Board also came to the same conclusion in its decision. Pohl was never informed that he was placed on TDRL by the Respondent thereby establishing Pohl had no knowledge the Respondent ever considered him disabled.

[16] The decision of the Board in May 2020 comes after the October 2018 DVA finding that Pohl suffered a service-connected disability. If the Board disagreed with the DVA, it should have stated Pohl was never placed in a disability status prior to retirement. However, stating Pohl was in-fact placed in a disability status only supports the DVA's conclusion that Pohl suffered a service-connected injury that left him disabled prior to retirement. This also shows the Board consciously refused to comply with the IDES program that requires the military to accept the findings and disability rating of the DVA.

[17] Because Pohl was retired and entitled to retirement pay, Rule 17 would apply thereby causing Respondent to issue Pohl a new DD Form 214 to reflect as much. Conversely, if Pohl was not entitled to retirement pay, Rule 17 would not apply (App. 110).

[18] The trial court dismissed the Board's finding based on the lack of evidence showing Pohl was placed on TDRL. However, it appears the Board determined the Air Force complied with 10 U.S.C. § 1205 resulting in Pohl being placed on TDRL due to his

By the Board using the word "disability" and assigning Pohl to the TDRL prior to retirement, the Respondent openly admits Pohl had a disability prior to and at the time of his separation. It was also the first time Pohl was alerted to the fact the Respondent's Air Force had placed him on TDRL for having a physical disability prior to retiring him. As such, Pohl effectively became a protected class of person under The Americans with Disabilities Act of 1990 who was entitled to a reasonable accommodation[19] [20] to a different position so his employment with the Respondent could continue along with receiving advancements in rank. (Friedman v. US[21]) Once again the Respondent

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non-participation for almost 2-1/2 years prior to retirement. During this time the Respondent violated 10 U.S.C. § 1210(a) by not conducting a medical exam of the disabled Petitioner every 18-months as required. Another example of a clear violation of law for which the courts failed to address or question Respondent about.

[19] 42 U.S.C. § 12111(9)(B) defines a reasonable accommodation as, "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." (emphasis added)

[20] 42 U.S.C. § 12112 define the acts of employment discrimination Pohl experienced at the hands of the Respondent by their failing to offer him access to the reasonable accommodation process.

[21] Per Friedman v. US, " . . . veterans who never applied for a Retiring Board because they did not know they were ill or did not appreciate the progressive or serious character of their disease or disability will not be cut off by limitations from pursuing their late-discovered claim before the Correction Board and this court". Here Pohl neither requested, nor could he physically attend, a retiring board because he was still being medically treated

withheld this critical information from Pohl and the trial court never once asked the Respondent why it was withheld.

It has taken Pohl's petition to correct his military record to expose the 20-year secret that the Respondent's Air Force knew Pohl had a disability not only at the time they medically retired him in October 1999, but well before then (May 1997). Yet Respondent still denies doing anything wrong in how they processed his retirement back then or their refusing to correct his military DD Form 214 record so that it now reflects Pohl became disabled due to a service-connected injury when he was retired.

Per 10 U.S.C. § 1210(b) the removal of any member from TDRL requires Respondent to make a final determination of the disability to the extent it is either permanent and if so, the member is to be retired under 10 U.S.C. § 1204 if the DVA rates the disability at 30 percent or more as stated in § 1210(c). Or if the disability has resolved itself, the member may return to duty under 10 U.S.C. § 1211. Either way a final medical determination, by law, must be made by the Respondent upon Petitioners removal from said disability list[22].

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and was not released from care to attend such a medical examination.

[22] Both the trial court and the appellate court failed to ensure the Respondent complied with its duty to perform under 10 U.S.C. § 1210(b) to issue a final determination on the disability status of Petitioner at the time of retirement. As such Petitioner's right to a final determination by the Respondent was violated by the courts. This is a clear and convincing error and under Rule

Here the Respondent has done neither for Pohl and in doing so has caused him great financial harm by keeping from him receiving earned military disability retirement benefits or allowing him to continue to serve where Pohl would receive additional promotions and pay towards his retirement.

On June 08, 2021 actual evidence of Respondent's knowledge regarding Pohl's permanent and disabling injury was finally disclosed to Pohl's counsel after Respondent responded to a FOIA request. That response showed Respondent's own internal memorandums[23] from 1999 admitted that they determined Pohl had a permanent physical work restrictions (ie a physical disability) that prevented him further or future military service dating as far back as May 1997.

This evidence contradicts the trial court's finding that there was no evidence Pohl was retired due to a disability. Adding more confusion and contradicting itself, the court then stated Pohl alone knew he was disabled at the time of separation. It is incredulous to believe that neither Pohl's doctor nor any of the medical doctors or lawyers of the Respondent did not know, or suspect, Pohl was still disabled at the time of separation given their own memorandums and action of placing Pohl on TDRL suggest otherwise. This is another example of a clear and convincing example that

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52(a)(6) that the setting aside of the courts decision is not only appropriate but necessary.

[23] App. 100 to 102 of the 1999-06-22 Memorandum by Col Boersma and the 1999-08-09 Memorandum by Lt Col Lynott

an error has been made; an error that must be corrected.

Also contained within Pohl's medical records was a June 28, 1998 medical entry[24] made by Respondent's own Flight Surgeon Captain Peter Tiernan, MD who was assigned to Travis AFB, CA. Dr Tiernan stated,

> *"In the probable event that the patient's provider recommends long term disability, the patient will need to return for reevaluation for a medical EB".*

Against their own medical doctor's entry, the Respondent never conducted a medical evaluation of Pohl and never explained why it ignored this order or why it kept this information from Pohl at the time of his separation. Pohl's doctor never made such a recommendation in 1999 or earlier due to Pohl still remaining under his care and still receiving ongoing treatment (surgery) for his injury. Yet it was Respondent's actions that determined Pohl had a long term disability the moment they decided to not only retire him because of his injury, but that injury kept him from future service.

This paper-trail of Respondent's memorandums and medical entry forms the basis for Pohl being placed on the temporary disability retirement list in May 1997 and of his being recognized as having a disability as of that date.

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[24] App. 98 to 99 Medical Entry by Cap Peter Tiernan, MD, MC, FS

What any of the Respondent's military medical doctors or Board failed to opine with specificity is what those permanent restrictions were that prevented Pohl from continued service, given Pohl was still being medically treated and not released from care[25] [26].

Respondent further failed to conduct any investigation of Pohl's injury to determine its origin even though such investigations are required by their own Air Force Instruction[27] [28], and Department of Defense Directive[29] and Department of Defense Instruction[30].

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[25] There was no way for the Respondent to know in 1999 if Pohl's temporary disability would have resolved itself to the point he could have been returned to duty under 10 U.S.C. § 1211. Evidence supports that the Respondent took action to use Pohl's temporary disability to prematurely retire him as if that disability was permanent, but then denied him the benefits of such a retirement. This is a text book example of employment discrimination.

[26] Citing Real v. US, " . . . court held that the limitations period did not begin to run upon the service member's discharge because of the lack of sufficient knowledge of the member's condition at that time. See e.g. Harper v. United States, 310 F.2d 405, 159 Ct.Cl. 135 (1962); Proper v. United States, 154 F.Supp. 317, 139 Ct.Cl. 511 (1957); Dzialo v. United States, 677 F.2d 873, 230 Ct.Cl. 506 (1982)"

[27] AFI 36-2910 Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay

[28] 10 U.S.C. § 12301(h)(1)(B) authorizes the Respondent, with the consent of the individual, back to active duty for the purpose of being medically evaluated for a disability. Respondent fails to explain why they did not attempt to exercise this authority to evaluate Pohl's disability before medically retiring him.

[29] DoDD 1332.18 Separation from the Military Service by Reason of Physical Disability

[30] DoDI1332.28 Physical Disability Evaluation

Had Respondent complied with any one of these required instructions it may have concluded that Petitioner's disability was in-fact the result of the aggravation of a prior service injury. Such a conclusion would have matched the same findings and conclusion of the DVA and Pohl would have been issued a new DD Form 214 that would have reflected such.

There is no evidence that sentence 3 of 10 U.S.C. § 1552(b) was properly read and then applied because the courts ruled they lacked jurisdiction under the Tucker Act. Had § 1552 been used as the reviewing standard, again as stated in Respondent's own DD Form 149, the lower courts were required to interpret such language in the favor of the veteran as established by this court for over 75-years beginning with Fishgold v. Sullivan Dry Dock (1946), and then reinforced in the King v. St. Vincent's Hospitals (1991) and the Brown v. Gardner (1994) cases.

Respondent for their part has attempted to deflect responsibility by claiming Pohl's injury was the result of a car accident. However, there is no supporting medical evidence to establish that the accident was anything other than a simple a non-injury accident that required no medical treatment of Pohl. Again, the trial court and appellate court both refused to allow Pohl to testify to this fact given he was there and it involved him (ie Pohl was a witness). This allowed an error of fact to be introduced despite Pohl's efforts to correct such an error both at trial and before the court issued its decision.

Respondent further attempts to avoid responsibility of their unorthodox retiring of Pohl by claiming he requested a transfer to the Retired Reserve List (RRL) but the Respondent itself never officially approved that transfer[31]. The trial court failed to ask the Respondent how Pohl was transferred to the RRL if it never approved it. Again, this establishes a clear mistake has been made which must be corrected.

The trial court then went on to claim,

> *"It is not clear when Plaintiff* [Pohl] *was issued a DD-214. 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".*[32]

This claim falls apart because the Respondent's Board stated Pohl was not entitled to a DD Form 214 after retirement. Conversely, Pohl's appeal would have ended had the Board issued him a DD Form 214 post-retirement that identified the reason he was retired in 1999. However, the trial court could have ordered the Respondent to issue a legible copy of a post-retirement DD Form 214 that showed Pohl was retired due to being medically disqualified due to a disability, but didn't. The court also fails to identify where in the

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[31] App. 104 Block IV of the Application to Transfer to the Retired Reserves

[32] App. 28 footnote 3 of 2022-06-21 Decision – United States Court of Federal Claims

record such an illegible document exists[33]. Again, this is another example that a clear and unmistakeable error has been made by the trial court; an error upheld by the appellate court[34].

ANALYSIS
of
HARPER v. US
(1963)
to
POHL v. US
(2023)

Even a cursory review of the 1963 Harper v. US case as applied to the 2023 Pohl v. US case reveals an almost identical set of facts which are:

1) Like Harper, Pohl was also found physically disqualified for duty.

2) Like Harper, Pohl was also under constant medical care at the time of separation.

3) Like Harper, neither Pohl's doctor or Respondent's doctors knew the full extent of his injury at the time of retirement given

[33] If such a document actually existed, Pohl's petition for a review would have ended before it began simply by the Court producing that document or referencing where in the record its was located.

[34] Federal Rule of Civil Procedure 52(a)(6) Setting Aside the Findings states, "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . ". Pohl has shown several examples of clear erroneous errors committed by the lower courts where the findings of fact must now be set aside and a new trial ordered.

Pohl underwent several more surgeries years after being separated.

4) Like Harper, Pohl's condition would suffer future graver conditions that were unknown to both him and the Respondent in 1999.

5) Like Harper, the Board denied Harper's claim for the same reasons it denied Pohl's claim. But, that defense in Harper was reversed by the court whereas in Pohl it was not.

There is little room for doubt that a review of the entire evidence would leave anyone with the definite and firm conviction that grievous mistakes were committed and that settled law for 60-years was simply ignored.

APPLICATION
of
US v. GYPSUM
(1948)

The trial court not only denied hearing the witness testimony of Pohl but also rejected his affidavit to correct errors introduced at trial on the grounds it was an amendment to his complaint versus Pohl attempting to clarify the record of what he knew and when he knew it. Ironically, Pohl's counsel was allowed to testify by answering the trial courts questions of what Pohl knew but refused to allow Pohl to answer for himself of what he knew.

In doing so, the trial court violated US v. Gypsum in that, "*due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*"[35]. The trial court took extraordinary steps to actively silence the voice of witness Pohl by denying his testimony and rejecting his affidavit prior to issuing its decision.

The appellate court also violated US v. Gypsum by not allowing the weighing of, "*oral testimony* [of Petitioner] *where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court*" by denying an oral argument from Petitioner who requested such in his filing for an en banc hearing.

REASONS FOR GRANTING THE WRIT

The conflicting decisions by the appellate court regarding whether or not the substitution of the jurisdictional statute is appropriate regarding the reviewing of a denial to the correction of a military record must now be resolved by a superior court so that a single standard of review is used; and Congress intended the statute to be used for review is 10 U.S.C. § 1552 and not 28 U.S.C. § 1491 as was used in Pohl.

[35] Pohl's attorney was not a witness to any of the events the court asked. Additionally, asking an attorney what their client knew appears to violate attorney-client privilege. No such violation occurs if Pohl himself testified.

There is also an inconsistency with the trial court properly applying its own 1963 case of Harper v. US regarding when the time begins to file on a claim. The trial court further failed to correctly apply the appellate court's 1990 decision in Real v. US regarding what statute is to be applied for review when it specifically stated 28 U.S.C. § 1491 is the wrong legal statute.

As previously stated, federal law requires the Respondent to issue a final determination to the disability of any service member who is removed from the TDRL. Because this never happened to Pohl, the reviewing courts should have ordered the Respondent issue a final determination on his temporary disability before any trial or review took place.

Not having a final determination made about his disability has the effect of eliminating evidence favorable to support Pohl's application to correct his military record. Conversely, a final determination that showed the disability had resolved itself and was no longer present would be favorable to the Respondent and would aid in supporting their denial under Rule 18 of Table 2 found in AFI 36-3202.

CONCLUSION

It is clear that 10 U.S.C. § 1552 was never used as the reviewing standard as Congress intended it to be. It is also clear that there were gross errors made by the lower courts in both the application of law as well as not complying with this courts previous decisions.

The record shows the lower courts ignored of key points of evidence. There is also evidence that both of the reviewing courts did not want to hear directly from witness Pohl.

There is clear evidence that there is a disagreement between the Respondent's DVA and its Board regarding Pohl's injury. Neither the trial court nor the court of appeals has settled this dispute regarding which agency is right. It is a question for the trial court to explore by having Respondent's council, who represents both agencies, explain the lack of consensus between these two government agencies that reviewed the same evidence.

There is no evidence whatsoever that shows the Respondent complied with their duty under federal laws after Pohl was placed on TDRL, or with that of their own sets of mandatory instructions issued by both the Air Force and The Department of Defense, that govern the separation of a disabled service-member in determining if the Respondent had had any culpability with Petitioner's career ending and disabling injury. The record is deplete of evidence that showed Respondent made, attempted to make, a final determination of Pohl's temporary disability regarding whether or not it still existed at the time of retirement.

The Supreme Court of The United States must now make clear that the lower courts are to apply 10 U.S.C. § 1552 to any appeal of a Board decision not to correct a military record and make clear that the time to file does not always begin when the member is separated, but upon discovery of the error of the record or

that it is in the best interest of the member to have their request for review granted. They must also make clear that veterans who wish to testify before the court on behalf of their appeal will be heard.

Reversing the decision of the lower courts and ordering a new hearing under 10 U.S.C. § 1552 is the correct and appropriate remedy here. But before such a hearing takes place, Petitioner wishes this court to further order:

a.) the Respondent to issue a final determination of Petitioner's disability at the time of his retirement as required by 10 U.S.C. § 1210(b) and;

b.) if the disability still existed when he was retired, Respondent will accept the final disability rating of the DVA as required under the IDES program and retire Pohl under 10 U.S.C. § 1204 as directed by 10 U.S.C. § 1210(c); or if there was no disability at the time of retirement, return Pohl to his previous duty position under 10 U.S.C. § 1211;

so that the reviewing court has all the evidence it needs to thoroughly adjudicate Petitioner's appeal of a Board decision not to correct his military service record.

Respectfully submitted,

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