

No. _____

In The
Supreme Court of the United States

MAJOR ALAN ADAMS, USAF, RETIRED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MAJOR ALAN ADAMS, USAF, RETIRED
101 Taylor Avenue N, Apt. 415
Seattle, WA 98109
(509) 294-0875
alan.adams135@gmail.com

Petitioner

QUESTIONS PRESENTED

If a worker becomes disabled by their work while working, and is unable to work, laws protect workers from being wrongfully discharged by companies. Similarly, in the military arena, laws such as Title 10 and Directives of the Executive Branch, such as Air Force Directive 36-3212, exist to protect military personnel. Further, Boards such as the Air Force Board of Corrections of Military Records (AFBCMR) exist to reverse errors and injustices. When the Executive Branch and US Courts are not correctly applying the law, action by the Court is needed to protect our nation's veterans and ensure the integrity of the military disability system.

The questions presented are:

The first question for the Court's consideration involves the AFBCMR. Congress created the boards for the correction of military records (10 U.S.C. § 1552) to serve as fair and impartial adjudicators of administrative law matters concerning military personnel and veterans. They are the highest level of administrative law review within the military departments. The specific question presented is whether the AFBCMR breached its legal duty to provide full and fitting relief to a disabled active duty service member, and what constitutes full and fitting relief for a *retroactively* medically retired service member.

The second question concerns the interpretation of 10 U.S.C. § 1413a, Combat-Related Special Compensation (CRSC), by the Department of Defense

QUESTIONS PRESENTED – Continued

and the Air Force, which treat “disability” as the underlying disease, condition, or injury. Congress defined “disability” as the impairment resulting from the underlying disease, condition, or injury. The interpretations by the Department of Defense and the Air Force exclude categories of claimants, such as me, that Congress expressly included, thus rendering the statutory scheme incoherent. The specific question presented is whether the AF-BCMR and the Department of Defense applied an unlawful standard to my CRSC claims.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	iii
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISION INVOLVED.....	1
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	28
A. This Court should grant certiorari on the question of whether the AFBCMR provided full and fitting relief because of the crucial role the Board plays in the administration of military justice	28
B. The Court should grant certiorari to clarify the proper standard to be applied to service members and veterans who incur disabling medical conditions while engaged in hazardous service, and who thus qualify for monetary benefits under 10 U.S.C. §1413a	35
CONCLUSION.....	44

TABLE OF CONTENTS – Continued

Page

APPENDIX

Judgment, United States Court of Appeals for the Federal Circuit, August 21, 2017	App. 1
Opinion and Order Denying Adams's Judgment on the Administrative Record, United States Court of Federal Claims, May 9, 2016	App. 3

TABLE OF AUTHORITIES – Continued

	Page
CASES	
<i>Allen v. Brown</i> , 7 Vet. App. 439 (1995)	36
<i>Connecticut Nat. Bank v. Germain</i> , 503 U.S. 249 (1992)	41
<i>Davis v. Principi</i> , 276 F.3d 1341 (Fed. Cir. 2002)	36
<i>Dilley v. Alexander</i> , 627 F.2d 407 (D.C. Cir. 1980)	28, 32
<i>Duhon v. United States</i> , 198 Ct. Cl. 564 (1972)	28
<i>Froio v. Shinseki</i> , 2014 WL 594096, 2014	34
<i>Hunt v. Derwinski</i> , 1 Vet. App. 292 (1991)	36
<i>Kungys v. United States</i> , 485 U.S. 759 (1998)	40
<i>Oleson v. United States</i> , 172 Ct. Cl. 9 (1965)	31
<i>Oneale v. Thornton</i> , 6 Cranch 53 (1810)	41
<i>Roth v. United States</i> , 378 F.3d 1371 (Fed. Cir. 2004)	28, 32
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004)	40
<i>United States v. Goldenberg</i> , 168 U.S. 95 (1897)	41
<i>United States v. Ron Pair Enterprises, Inc.</i> , 489 U.S. 235 (1989)	41
STATUTES	
10 U.S.C. Chapter 55	16
10 U.S.C. § 1214	3, 4, 9, 45
10 U.S.C. § 1413a	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
10 U.S.C. § 1413a(a).....	2, 35
10 U.S.C. § 1413a(e).....	2, 35
10 U.S.C. § 1413a(e)(1)(B).....	38
10 U.S.C. § 1413a(e)(2).....	40, 41
10 U.S.C. § 1413a(e)(2)(A)-(D)	40
10 U.S.C. § 1413a(e)(2)(B).....	39
10 U.S.C. § 1552	1, 16, 45
10 U.S.C. § 1552(c)(1).....	29, 30, 32
10 U.S.C. § 1552(h).....	31
10 U.S.C. § 1552(h)(2)	31
28 U.S.C. § 1254(1).....	1
38 U.S.C. § 1110	37
38 U.S.C. § 1131	2, 37, 38
38 U.S.C. § 1153	38
42 U.S.C. § 423(d)(1)	36
Public Law 110-181 National Defense Authori- zation Act for Fiscal Year 2008, Wounded War- rior Act.....	17
§ 1602-1614	17
§ 1631.....	17

RULES AND REGULATIONS

32 C.F.R. § 865.7	31
38 C.F.R. § 4.1.	36

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Air Force Instruction 36-3212 9, 18, 37

DoD Directive Type Memorandum (DTM) (April
27, 2004) *passim*

Major Alan Adams petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit affirmed the decision of the United States Court of Federal Claims without an opinion and is reprinted at Pet. App. 1. The opinion of the United States Court of Federal Claims is published at 126 Fed. Cl. 645 (2016) and is reprinted at App. 3. The decisions of the Air Force Board for Correction of Military Records are not published.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its decision on August 21, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 1552 (Correction of military records)

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.

10 U.S.C. § 1413a (Combat-Related Special Compensation)

Section 1413a(a) directs the Secretary concerned to “pay to each eligible combat-related disabled uniformed services retiree . . . a monthly amount for the combat-related disability of the retiree determined under subsection (b).”

Section 1413a(e) defines “combat-related disability” by reference to the law of the VA:

In this section, the term “combat-related disability” means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that –

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or
- (2) was incurred (as determined under criteria prescribed by the Secretary of Defense) –
 - (A) as a direct result of armed conflict;
 - (B) while engaged in hazardous service;
 - (C) in the performance of duty under conditions simulating war; or
 - (D) through an instrumentality of war.

38 U.S.C. § 1131 (VA Compensation)

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in

the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter.

10 U.S.C. § 1214. Right to full and fair hearing

No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it.

STATEMENT OF THE CASE

I am a retired U.S. Air Force officer. From the day of my commission from the United States Air Force Academy in 1995 until the day I was administratively separated in July 2006, my record of performance was consistently rated in the top 1% of my peers.

I received numerous awards and commendations for distinguished service, including the Air Medal (with four oak leaf clusters) for meritorious achievement in aerial flight, Officer of Year awards, the Ten Outstanding Young Americans Award (2002), and the Outstanding Young Person of the World Award (2003).

While on active duty I sustained several injuries. These injuries were later aggravated by flying KC-135 aircraft in eight combat deployments, new injuries

resulted, and I was rendered unfit for duty. To this day, I do not have retiree healthcare, nor the entitlements provided to other medically retired veterans.

It is undisputed that Major Adams was not fit for duty at the time of discharge. When any service member sustains an injury while on active duty that renders him or her unfit for duty, the service member is afforded a Physical Evaluation Board (PEB). A PEB – a fact-finding body – “investigates the nature, origin, degree of impairment, and probable permanence of the physical or mental defect or condition of any member whose case it evaluates. The disability system provides for two PEBs: an Informal PEB and a Formal PEB (FPEB). The FPEB provides the full and fair hearing required by 10 U.S.C. § 1214 for members recommended for a disability discharge or retirement.” This did not happen for me.

I put together the matrix below showing benefits to which military members retired for disability are entitled.

Customary Medical Retirement Benefits

Retirement Benefit	Statute or Directive
Retirement Pay	10 USC 1201 and 642. Entitlement to retired pay.
Identification Card	Retirees are entitled to an ID card as well as Direct Care, Commissary, MWR, and Exchange Privileges. DoDM 1000 13-V2
Medical Insurance/ Tricare	Title 32 National Defense Chapter VI Part 728 Subpart B – Members of the Uniformed Services on Active Duty
Dental Care	Title 32 National Defense Chapter VI Part 728 Subpart B – Members of the Uniformed Services on Active Duty
Dental Insurance	32 CFR Ch. I (7-1-01 Edition) 199.13 TRICARE Dental Program. 10 § 1076c. Dental insurance plan. Provides dental insurance to certain retirees.
Entitlement to Payment of Last Move	Joint Federal Travel Regulations, Volume 1 (JFTR, Vol 1). 36-3212 A2.9 Travel and Transportation
Determinations for Tax Benefits	AFI 32-3612 3.26-27
DD Form 363AF, Certificate of Retirement	AFI36-3203 6.2. The commander ensures the member receives a certificate

Retirement Ceremony	AFI 36-3212 4.13 Commanders will conduct a ceremony before members retire for disability. Air Force Pamphlet 34-1202 14.3.1. Commanders ensure members leave with a tangible expression of appreciation for their contributions to the Air Force and its mission, and with the assurance they will continue to be a part of the Air Force family in retirement.
Retirement Lapel Pin	Retired Airmen receive the retired lapel button at retirement. http://www.retirees.af.mil/Library/Fact-Sheets/Display/Article/440079/retiree-uniform-wear/
Presidential Recognition on Retirement from Military Service	DD Form 2542 is presented. Certificate of Appreciation for Service in the Armed Forces of the United States. AFI 36-3203 6.5.
Customary Achievement Medal for a Major	AFI 36-3203 6.1.2 Commanders must evaluate and recognize the contributions of their retiring members
Referral for Pre-Separation Counseling	10 U.S. Code § 1142 requirement – Pre-separation counseling

Formal Hearing for Unfit Finding	AFI 32-3612, 3.38. Gives members recommended for retirement the opportunity to appear in person before the FPEB; to be represented by counsel and to present evidence and call witnesses
Appointed Legal Counsel to Review PEB Findings	AFI 32-3612, 3.45. Members have legal representation at the formal hearing. The representative is a PEB-appointed military counsel.
Counseling For Evaluatee	AFI 32-3612, A2.1 To ensure all members undergoing disability evaluation fully understand the process . . . extensive guidance directed
Physical Evaluation Board Liaison Officer (PEBLO)	AFI 32-3612, 2.3, 4.1. The PEBLO coordinates processing actions. Ensures disability cases referred to the PEB are complete, accurate, and fully documented. Counsels evaluatees concerning their rights in the disability process.
Legal Rights	AFI 32-3612, A2.10. Member has the legal right to a full and fair hearing before being retired for physical disability.
Tax Counseling	AFI 32-3612, A2.15. Tax Counseling. After advising member of the estimate of gross retired pay, the PEBLO counsels members on how much of that pay may be subject to income tax and how much may be exempt.

Retirement Counseling	AFI 32-3612, A2.20
Presentation of U.S. Flag Upon Retirement	10 U.S. Code § 8681
Unit Shadow Box	Unit Custom/tradition to provide a framed squadron lithograph and medals in a shadow box
Concurrent Receipt	NDA ACT for Fiscal 20008 SEC. 642. Inclusion of veterans with service-connected disabilities rated as total by reason of unemployability under termination of phase-in of concurrent receipt of retired pay and veterans' disability compensation
Transfer of Unused Post 9/11 GI Bill Benefits to Dependents	Eligible Servicemembers may transfer all 36 months or the portion of unused Post-9/11 GI Bill benefits
Contributions from Income to Future Social Security Earnings	When corrections to records are made <i>retroactively</i> Air Force Finance staff said that individuals are commonly placed back into active duty for a period of time, which results in income, additional Social Security earnings and leave accrual.

While extensive PEB disability procedures and protections are available through AFI 36-3212 to provide the full and fair hearing required by 10 U.S.C. 1214 for individuals while they are *on active duty*, no such protections are extended to individuals who have been *improperly discharged*. One can see in references above that Congress intended individuals to have assistance, guidance and legal support as they face discharge by disability. The Air Force circumvented the MEB/PEB process by involuntarily separating me and denied me the assistance and protections that the law mandates.

Without assistance of the MEB process, a Physical Evaluation Board Liaison Officer, and legal counsel afforded to people facing discharge from the Air Force, I did not receive benefits that are intended for individuals who are retired due to disability. The chart below shows the status of my benefits.

Customary Medical Retirement Benefits

Retirement Benefit	Status of Benefit	Estimated Unpaid Amount Sought
Retirement Pay	DFAS Offered: \$33,513.02. Check of back pay was returned to DFAS because it required full settlement of all claims.	\$78,594.00
Identification Card	Not provided until 4+ years after discharge ~ Nov 2010	
Medical Insurance/ Tricare	Not eligible for Tricare until I had an ID card. Claims to Tricare have been denied as recently as 2016 stating that I am not eligible for Tricare. DFAS and DEERS tell me that I am eligible for Tricare but claims are denied and local military treatment facilities report being unable to provide care.	\$73,852.67

Dental Care	Dental care would have been provided while processed for disability in the Physical Evaluation Board	
Dental Insurance	Not eligible for Dental Insurance until getting ID card and pay premium. Not allowed to be "grandfathered" into full coverage due to contract limitations with the Government.	\$4,199.00
Entitlement to Payment of Last Move	DFAS-IN denies claim. They report that they have no record of \$1,031.63 check that was previously sent but not cashed.	\$1,031.63
Determinations for Tax Benefits	No assistance provided	
DD Form 363AF, Certificate of Retirement	Not received	
Retirement Ceremony	Not received	
Retirement Lapel Pin	Not received	

Presidential Recognition on Retirement from Military Service	None received	
Customary Achievement Medal for a Major	None received	
Referral for Pre-Separation Counseling	Counseling did not apply to retirement for medical disability	
Formal Hearing for Unfit Finding	None received	
Appointment of Legal Counsel to Review PEB Findings	None received	\$780.00
Counseling For Evaluatee	None received	
Physical Evaluation Board Liaison Officer (PEBLO)	None received	
Legal Rights and Availability of Counsel Throughout Disability Review Process	None received	\$104,697.55
Tax Counseling	None received	
Retirement Counseling	None received	

Presentation of U.S. Flag Upon Retirement	None received	
Unit Shadow Box	None received	
Concurrent Receipt	No determination made	
Transfer of Unused Post 9/11 GI Bill Benefits to Dependents	Not given an opportunity to transfer unused benefits	
Income and Contributions from Income to Future Social Security Earnings	Common record correction, not received	
	Total Estimate	\$263,154.85

Instead of making me whole and reaching out to resolve its mistake and resulting consequences, the Air Force further complicated my situation by denying claims previously paid, referring me to Social Security to recover my Tricare insurance, and charging me for legal fees. Previously, the Air Force reimbursed \$5,598 for healthcare premiums (Pet. App. 40) and \$1,031.63 for moving expenses. Now DFAS says it is unable to find any record of a moving expense check being issued and has not reissued the check for healthcare premium reimbursement. By discharging me without the disability retirement to which I was entitled, the Air Force deprived me of the monthly disability income that I

would have received. Without income, I was concerned about my future. I sold my home, moved into apartment, and obtained public assistance (SSDI) from the Social Security Administration, which resulted in my eligibility for Medicare Part B. Eligibility for Part B required me to pay a premium for Medicare in order to be eligible for TRICARE coverage. Had I been medically retired or kept on active duty, I would not have been required to obtain SSDI for income and my TRICARE coverage would have continued without a requirement to first pay for Medicare. On January 19, 2016, TRICARE denied paying medical bills saying I was: "enrolled as Direct Care Only for the date of service." On its medical explanation of benefits, TRICARE stated: "The patient is not eligible for TRICARE." The Government is now requesting \$452.64 through the U.S. Court of Appeals for the Federal Circuit for its legal fees, rather than correcting its negligence.

As a result of retroactively medically retiring me, the Air Force referred me to the IRS and Social Security for relief. DFAS sent me to the IRS to recover taxes that it had collected from my backpay. DFAS deducted 25% for taxes from my retroactive retired backpay when my income was \$33,075 in 2006, \$0 in 2007 and \$0 in 2008. FITW tax on this income is surely less than 25%. DFAS said it was following the rules. According to the IRS, one generally must file Form 1040X within three years from the date one filed one's original tax return or within two years from the date you paid the tax, whichever is later. Since these corrections are more than 3 years in the past, recovering the payment

of the 25% taxes that DFAS deducted is unlikely without the Court's help. In its calculations, DFAS also offset my retirement pay by offsets for increased VA disability payments that I received. So, for example in 2010, my income began to recover and I paid tax on my military retirement and other income. During this time, my taxable income was artificially higher because my VA disability had not been finalized yet and was not reducing my taxable income. Later in 2017, when DFAS retroactively applied my current, updated higher VA offset in their calculations, they used the increased VA offset to reduce my military retirement pay that is due, but DFAS did not provide credit for the extra tax paid in the past on retirement pay, prior to the increased VA offset. Another disadvantage created for me by the Air Force's negligence in not medically retiring me is that I was not eligible for a waiver of the 12-month waiting period for the full scope of benefits for Delta Dental insurance coverage. If I had been correctly medically retired in 2006, I would have enrolled within 4 months after my retirement and would have been covered for crowns that my teeth required. The aforementioned tax and dental insurance coverage issues leave me worse off and I am forced to seek tax advice, too.

I discussed these issues with the AFBCMR, DFAS, TRICARE and Delta Dental. I exhausted my appeals with TRICARE and Delta Dental, and in 2010 when I was retroactively retired to 2006, my claims were beyond the one-year time in which their regulations allow them to pay past claims. Having exhausted claims

with TRICARE and Delta Dental, I returned to the AFBCMR and DFAS. After disputing backpay calculations repeatedly with DFAS, a Claims Adjudicator from the Department of Defense Office of Hearings and Appeals sent me a letter denying all four parts of my claim for reimbursements with DFAS. Notably, he pointed me to other agencies, not the AFBCMR, for relief. For instance, "The second part of your claim is for reimbursement in full for your medical and dental expenses because you were discharged in July 2006 rather than being retired for disability, an error that the AFBCMR corrected under the authority of 10 U.S.C. 1552. The system for providing medical and dental services to retired members of the armed forces is known as Tricare and that system is established by 10 U.S.C. chapter 55. Since a member is entitled only to those payments authorized by statute and regulation, the extent of the reimbursement of your medical and dental expenses through Tricare is determined by 10 U.S.C. Chapter 55. There is no provision in 10 U.S.C. 55 for reimbursement in full for members whose records have been corrected under 10 U.S.C. 1552. Therefore, that part of your claim for reimbursement in full for medical and dental expenses based on your erroneous discharge in 2006 is denied . . . The fourth and last part of your claim is for a refund of the 25% FITW deductions from your retroactive retired pay. Regarding back pay, IRS Publication 15-A, on-line edition, "Back Pay," states: "Treat back pay as wages in the year paid and withhold and pay employment taxes as required." IRS Publication 15-A on-line edition, "Withholding," includes a 25% rate for certain pay brackets for persons

paid on a monthly basis. In applying the 25% FITW rate to your retroactive retired pay, i.e., back pay, DFAS-IN followed the tax code as interpreted by the IRS, the agency that implements the tax code. The matters of the application and justness of the 25% FITW is a matter to be resolved by you and the IRS, not DFAS-IN or our office. That part of your claim for a refund of the 25% FITW is thus denied." Again, no relief and the complications caused by *retroactive* disability retirement cost additional time and money, and I, nor are other retroactively medically retired service members, am not afforded the legal protections and counsel available from the disability system.

Congress passed Public Law 110-181, the National Defense Authorization Act for Fiscal Year 2008, Wounded Warrior Act, in part, to improve medical care and resolve problems faced by veterans separated without medical care and proper processing. Section 1602-1614 of Act provides services, recovery coordinators, medical care case managers, non-medical care case managers, access to care, transition guidance and more to assist veterans. Unfortunately, as a former member, these provisions of the law enacted in January 2008, were too late to apply to me because I was no longer an active duty member since the Air Force wrongly separated me in 2006. However, I noted that section 1631 of the Act, authorizes the Secretary to provide the same medical and dental care as a member of the Armed Forces to any *former* member of the Armed Forces with a serious injury or illness. Since my injury rendered me unfit, section 1631 enables the Secretary

to pay for the care that I acquired from my medical retirement of July 2, 2006 to the section's sunset of December 31, 2012.

It is unlikely that the Air Force would have processed me to disability retirement in six weeks (from May 15, 2006, the date of my permanent disqualification from flying, to July 1, 2006, the actual date of my separation). Because, if properly retired, I would have been referred into the Disability Evaluation System within 60 days of my scheduled separation, I would have been placed on Medical Hold orders until I completed required medical examinations, treatments, and disability evaluations. *See* AFI 36-3212, Ch. 1, ¶ 1.10. When the AFBCMR is unable to precisely ascertain how long the disability process would have taken, it makes an educated guess. *See, e.g.*, BC-2010-02769.

The Air Force improperly discharged me from active duty with severe, deteriorating medical conditions. As the VA subsequently recognized, I was unemployable on the date of my separation. By discharging me without the disability retirement to which I was entitled, the Air Force did not fulfill its obligation to provide full and fitting relief, rather it left me without income, and caused great additional expense. Furthermore, had the Air Force medically retired me as it should have, I would have had the opportunity to choose the type of TRICARE coverage that best suited my needs. I then would have conformed my medical treatment to my particular plan of coverage. This may have allowed me to avoid some of my claimed expenses.

AFBCMR Applications

On or about November 11, 2007, I applied to the AFBCMR requesting that my records be corrected to reflect a medical disability retirement. I also sought "recovery of medical expenses and retroactive pay/promotions." I contended the Air Force unjustly separated me "with unstable and worsening conditions without a military medical retirement, particularly since these problems were directly attributable to my combat aerial flight duty over Iraq and Afghanistan.

The AFBCMR sought advisory opinions from the Air Force Separation Branch and the Air Force Physical Disability Division. The Air Force Separation Branch recommended denial, claiming that my "discharge was consistent with the procedural and substantive requirements of the discharge regulation." The Physical Disability Division recommended denial, opining, "There was no evidence to indicate he would have required a medical board . . . for his conditions to be referred into the Disability Evaluation System."

On March 26, 2008 the Board granted my request that my case be temporarily withdrawn to allow more time to respond. Nevertheless, the AFBCMR's own medical consultant, Dr. Horace Carson, issued an advisory opinion on May 12, 2008. Dr. Carson conceded that I should have undergone DES processing but opined that the likely disability rating would not have entitled me to medical retirement. Dr. Carson commented that medical separation with severance pay would have

been a "reasonable alternative course of action" had I requested it.

On December 12, 2008, I disputed the advisory opinions with a comprehensive memorandum and new evidence. I included an October 7, 2007 medical report from Dr. Craig Bash, a neuro-radiologist, who detailed my medical history and opined that I should have been processed through DES and medically retired with a 50% rating. On March 4, 2009, Dr. Carson issued a second advisory opinion, 40, recommending that I receive permanent disability retirement with a 30% combined disability rating for neck, back, and ischial pain.

On June 10, 2010, the AFBCMR concluded I was the victim of an error or injustice and recommended my records be corrected to reflect a permanent disability retirement with a rating of 30%. The Director of Air Force Review Boards Agency disagreed with the 30% rating recommendation and directed that my records be corrected to reflect that I was retired by reason of physical disability with a 60% rating. With respect to my claim for reimbursement of expenses, the Board recommended denial on the basis that the request was not within its authority.

In response to the AFBCMR decision, the Defense Finance and Accounting Service (DFAS) issued me a check purporting to cover my retroactive retired pay and past insurance premiums. I did not accept the payments because they did not fully reimburse me for the amounts owed, and did not include payment for my

medical, dental, and related expenses. Pl.'s Resp. at 20, ECF No. 58.

My request for reconsideration of the AFBCMR's initial decision

On February 25, 2011, I requested AFBCMR reconsideration of items I believed were not mentioned in the DFAS "final settlement." In relevant part, I argued that my disabilities should have been treated as tax-exempt under 10 U.S.C. § 1413a because "the disability was received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war." I also requested (1) immediate TRICARE coverage (the military medical program for retirees) and coverage retroactive to July 2, 2006; (2) Reimbursement of medical and dental bills; and (3) reimbursement for my first move after retirement.

On June 23, 2011, I filed suit in the Court of Federal Claims, which stayed judicial proceedings while the AFBCMR processed my reconsideration application. ECF No. 1.

AFBCMR's decision on first request for reconsideration (first addendum)

The AFBCMR sought a third advisory opinion from Dr. Carson to address my entitlement to CRSC. Dr. Carson stated that he reviewed my petition "for a determination that his disability was the direct result of armed conflict or was caused by an instrumentality

of war.” He acknowledged that “due to the repetitive nature and duration of the applicant’s flying missions, which ultimately resulted in permanent disqualification for flying duties, the Medical Consultant *could not rule out a permanent worsening, or aggravation, of his ischial pain over time.*” (Emphasis added).

Concerning my degenerative disc disease of the cervical and lumbar regions, Dr. Carson opined:

the radiographic evidence alone is insufficient to show such a process [degeneration] was accelerated by or resulted from the applicant’s flying combat missions; as may be implicated in high performance aircraft and the effect of associated sustained high-gravitational forces over a several year period, upon the cervical, thoracic, and lumbar spine.

(Emphasis added). He concluded, “*in the absence of a discrete, significant traumatic event productive of biomechanically significant change of anatomical structure,*” he could find “*no direct causal relationship*” between my conditions and my hazardous service. (Emphasis added).

I responded on April 2, 2012. For the first time, I asserted that I was entitled to CRSC because my disability was incurred “while engaged in hazardous service” within the criteria outlined in Department of Defense Instruction 1332.18, ¶ E3.P5.2.2.2.

On May 21, 2012, the AFBCMR denied my application, issuing a record of proceedings it characterized as an “addendum.” With respect to the CRSC

issue, the AFBCMR adopted Dr. Carson's rationale, asserting "*there is no direct causal relationship* between the applicant's underlying medical condition(s) and the conditions are neither combat-related nor an instrumentality of war." (Emphasis added).

Regarding my claim for medical expenses, the Board recommended denial on the basis that the request was not within its authority. "The AFBCMR is empowered only to correct records. Determining the benefits and entitlements that are a consequence of such corrections is the responsibility of TRICARE and . . . [DFAS]."

My second request for reconsideration

On June 21, 2012, I applied for reconsideration, arguing that the AFBCMR did not address the arguments and evidence in my April 2, 2012 response. I also detailed my "extensive efforts to secure reimbursement for treatment that would have been provided had [I] been placed on the Temporary Disability Retired List and treated while [I] was still in the military."

AFBCMR decision on second request for reconsideration (second addendum)

On December 12, 2012, the AFBCMR issued its Second Addendum, denying my request. The AFBCMR requested a third advisory opinion from Dr. Carson, who "determined that another medical opinion was not necessary and indicated that he stood by his original

recommendation.” The Board concluded, “we do not find a clear linkage between his existing conditions and a combat-related injury.” With respect to the medical-reimbursement issue, the Board stated, “granting him a medical retirement with TRICARE eligibility constitutes full and fitting relief.”

Third request for reconsideration and the AFBCMR’s decision (third addendum)

On January 23, 2013, I again requested reconsideration and primarily advanced new arguments relating to my requests for reimbursement of medical, dental, and related expenses. The AFBCMR rejected the application as not meeting reconsideration criteria, but upon my motion, the trial court remanded the case to address the January 23, 2013 request. ECF No. 32.

In a “Third Addendum,” the Board denied my application, reaffirming its position as stated in the first and second addendums. The Board stated that it “is empowered only to correct military records for the removal of error or injustice” and “cannot enter an order to direct TRICARE (or DFAS for that matter) to pay applicant a specific amount.”

My remand application and the AFBCMR’s decision (fourth addendum)

On January 16, 2015, the Government moved to remand to the AFBCMR for an advisory opinion from the Director of Compensation, Office of the Secretary

of Defense (Military Personnel Policy) (ODUSD). ECF No. 72. The AFBCMR is required to procure an advisory opinion from ODUSD in cases involving CRSC claims but had previously failed to do so. *See* DoD Directive 1332.41, ¶ 3.3. The lower court granted the remand. ECF No. 73.

Thereafter, the AFBCMR required me to submit an application to the Air Force Personnel Center (AFPC) Combat-Related Specialty Compensation Board (CRSC Board), which concluded that I was entitled to CRSC for tinnitus and fibromyalgia (which are presumptive conditions and were not claimed) related to my prior Gulf War service, but not for the disabilities at issue.

The CRSC Board stated it required proof of “a specific combat-related factor rather than from routine causes or your particular physical make-up.” That is, “[t]here must be a definite, documented, causal relationship between the armed conflict and the resulting disability.”

Thereafter, ODUSD issued an advisory opinion after conducting a review using the Directive Type Memorandum, Revised Guidance on Combat-Related Special Compensation (CRSC) (April 27, 2004) (DTM) and Supplemental Guidance on Combat-Related Special Compensation (CRSC) (June 3, 2008).

ODUSD concluded that “[t]he evidence shows that the applicant’s other health issues were incurred as a result of being hit by a car while riding a bicycle in 1997 and falling in the bathroom in 2004.” ODUSD

conceded that my conditions had deteriorated over time but claimed that they were not "incurred in the requisite manner" for CRSC benefits under section 1413a.

On June 9, 2015, I disputed the recommendations of the CRSC Board and ODUSD. Three months later, the AFBCMR issued its decision denying my claims for CRSC eligibility for his cervical spine, cervical radiculopathy of the upper left extremity, thoracolumbar sprain, bilateral ischial tuberosity/bursitis, and radiculopathy involving the upper left extremity.

My out-of-pocket expenses and efforts to secure reimbursement

I expended substantial sums for medical and dental care, health insurance, and medications that I would have received for free had I been afforded disability evaluation and medically retired at the outset. These amounted to \$55,276.27 through 2011. I also incurred moving expenses that would otherwise have been absorbed by the Air Force.

Following the AFBCMR decision granting me medical retirement, I sought guidance from DFAS, which informed me that "Medical and dental reimbursements and combat tax exclusion are not included in this settlement and were not directed by the Board" and told me to contact the AFBCMR.

Likewise, I sought reimbursement from TRICARE but was informed, "the only option we have to offer

you regarding any of the above claims; is the retro-enrollment into PRIME as mentioned above (#3)." That option would require me to pay TRICARE approximately \$1100.00 in order to simply submit my claims for consideration.

Concerning my back surgery – which cost me \$32,340.00 – TRICARE asserted that it was precluded by law from paying for the procedure because it occurred overseas and without prior approval. My efforts to secure compensation for my dental expenses were equally fruitless.

U.S. Court of Federal Claims proceedings

I filed a complaint in the Court of Federal Claims on June 23, 2011 (ECF No. 1), shortly after I had submitted my first request for reconsideration to the AFBCMR. On May 9, 2016, after three additional requests for reconsideration, a remand, and three AFBCMR decisions, the Court of Federal Claims granted the defendant's motion for judgment on the administrative record and denied my cross-motion for judgment on the administrative record. ECF No. 104.

U.S. Court of Appeals For The Federal Circuit

I filed an appeal, through legal counsel, with the Federal Circuit on July 6, 2016. The Federal Circuit affirmed the decision of the U.S. Court of Federal Claims without an opinion on August 21, 2017.



REASONS FOR GRANTING THE WRIT

- A. This Court should grant certiorari on the question of whether the AFBCMR provided full and fitting relief because of the crucial role the Board plays in the administration of military justice.**

When processes in place to determine fitness for duty and disability benefits to military service members fail, the Court can act to ensure that benefits constituting "full and fitting" relief.

The military records correction boards combined adjudicate more than 40,000 applications per year, a small fraction of which undergoes judicial review. In this case, the AFBCMR exhibited a disturbing ignorance of its statutory role and authority, ignoring its legal duty to provide me full and fitting relief.

The AFBCMR has a legal duty to "take 'such corrective action as will appropriately and fully erase such error or compensate such injustice.'" *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (citation omitted). The military correction boards "were created to remedy wrongs not to confound them." *Duhon v. United States*, 198 Ct. Cl. 564, 570 (1972). "Judicial relief provided to military servicemen who have been wrongfully discharged from service has been premised upon one central principle: making the injured men 'whole.'" *Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980).

The Government is holding disability income and benefits hostage unless the Government is granted

immunity or "full" settlement of all claims, regardless if all claims are paid. In my application to the AFBCMR I requested, among other things, that I be reimbursed for all costs I "incurred for medical care and medications on and after July 1, 2006 that would have been borne by the United States" if I had been medically retired instead of improperly discharged.

To date, I have not been paid all expenses that I am owed, and I still do not have the dental insurance I am entitled to as a retired officer. Incredibly, the AFBCMR first rejected my request for compensation for out-of-pocket medical, dental, and associated expenses, stating:

With regard to the applicant's request for reimbursement of medical expenses, *this request is not within the AFBCMR's authority. The AFBCMR is empowered only to correct records.* Determining the benefits and entitlements that are a consequence of such corrections is the responsibility of TRICARE and the Defense Finance and Accounting Service.

(Emphasis added).

The Board was clearly wrong because 10 U.S.C. § 1552(c)(1) authorizes the military secretaries to pay those very claims:

The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result

of correcting a record under this section, the amount is found to be due the claimant. . . .

(Emphasis added.)

In its "Second Addendum," the Board modified its position, stating, "we believe the relief previously provided by the Board, to include granting a medical retirement with TRICARE eligibility constitutes full and fitting relief." (Emphasis added). In its "Third Addendum," the AFBCMR seemed to accept the validity of my claims, but erroneously suggested that it had somehow granted me full relief:

In an earlier rationale, the Board explained for the applicant the process of filing his claims through TRICARE; this explanation was *not a basis for the denial of his request*, but rather an attempt to assist the applicant understand his next steps *in obtaining the relief the Board had already granted him*.

(Emphasis added).

The AFBCMR fundamentally misunderstood its duties and authorities under section 1552, particularly its authority to pay my claims for out-of-pocket medical, dental, travel, and related expenses. The AFBCMR similarly misunderstood the scope of its legal duty to direct full and fitting relief.

Section 1552(c)(1) unambiguously authorizes *the Secretary to pay an applicant's claims* through the Defense Finance and Accounting Service (DFAS). There

are two pre-conditions for the Secretary's exercise of that authority.

The first condition is that there has been a correction of the applicant's records. Section 1552(h) defines a "military record" as:

a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces. . . .

(Emphasis added.)

Section 1552(h)(2) therefore extends the Secretary's correction authority to military "matters" beyond those contained in an applicant's official service and medical records. That extraordinary grant includes authority to change a "mistake or an omission bearing on pay – whether factual or legal. . . ." *Oleson v. United States*, 172 Ct. Cl. 9, 19 (1965). "[I]t is hard to imagine a more sweeping charter, or one that is more entitled to a generous rather than a constricted reading." Pl.'s Resp. at 31, ECF No. 58.

The second condition for payment is that as a result of such correction, the claimed "amount is found to be due. . . ." See 32 C.F.R. § 865.7. While DFAS computes the amount due, the AFBCMR must specify the relief an applicant is entitled to.

Applying the plain and unambiguous language of section 1552(c)(1) to my claims, it is indisputable that they are fully compensable by the AFBCMR.¹ *See also Dilley*, 627 F.2d at 414 (“Most fundamental to appellants’ reimbursement is an award of back pay; under section 1552(c), this is lumped with other remunerations of service, including ‘pay, allowances, compensation, emoluments or other pecuniary benefits’”).

My claims for out-of-pocket expenses should have been uncontroversial. My release from active duty on July 1, 2006 without disability evaluation was erroneous and unjust. Because the Air Force neglected to process me in accordance with its own regulations, I incurred more than \$50,000.00 in medical, dental, and related expenses post-discharge. Those are precisely the types of claims Congress authorized the AFBCMR to compensate.

In my case, the AFBCMR failed to take “such corrective action as will appropriately and fully erase such error or compensate such injustice.” *Roth v. United States*, 378 F.3d 1371, 1381 (2004) (citation omitted).

¹ The AFBCMR’s assertion that it “cannot enter an order to direct TRICARE to pay the applicant a specific amount,” is at odds with its actions in other cases. *See* BC-2013-03022 (directing reimbursement of \$1,295.50 “for travel and per diem”); BC-2012-03947 (directing “reimbursement of \$3,780.95 for personally procured move”); BC-2013-05143 (directing a payment of \$25,000.00 under the Traumatic Injury Protection Program (TSGLI)); BC-2013-01503 (directing payment of \$3,152.00 for “reimbursement of actual expenses incurred” for storage).

I followed the AFBCMR's guidance and sought reimbursement from DFAS. DFAS telephonically informed me on or around October 28, 2010 that "Medical and dental reimbursements and combat tax exclusion are not included in this settlement and were not directed by the Board. Talk to Board." Subsequent computations and offers of settlement by DFAS likewise have not included my out-of-pocket expenses.

I also sought reimbursement directly from TRICARE. TRICARE informed me that "the only option we have to offer you regarding any of the above claims; is the retro-enrollment into PRIME as mentioned above (#3)." That option required me to pay TRICARE some \$1100.00 to simply have my claims considered.

Concerning my back surgery – which cost me \$32,340.00 TRICARE asserted that "by law, [it] is not able to pay any portion of this claim. The medical claims would require preauthorization and the TRICARE Travel benefit does not cover travel overseas." I encountered a similar bureaucratic dead-end concerning my dental expenses.

By sending me hat-in-hand to DFAS, TRICARE, and Delta Dental, the AFBCMR abdicated its legal duty to provide full and fitting relief. The AFBCMR's recalcitrance is difficult to understand. It acknowledged that I am entitled to recover my medical, dental, and related expenses. Yet the Board refused to take the simple steps necessary to make me whole.

Additionally, during the U.S. Federal Court of Claims hearing, my counsel requested that my full

military administrative record be submitted to the Court and presented the issue of reprisal. "In addition, for a case that is heavily involved with medical records . . . we felt the Government had a duty to file Major Adams' entire health record; and the Government thought that was unreasonable. . . . And I think that that was wrong. The Court did not compel the Government to provide the full record, despite the DOJ attorney acknowledging that he was uncertain what was in the record. The Court questioned him. "So, what other medical records are there?" Mr. Laufgraben answered: "I'm unaware of what exactly consists of the entire personnel record." My record includes records showing combat relation, a retaliatory investigation, an Air Force finding that personnel actions were taken against me while I was a whistleblower, and letters showing amounts that the Government has told the Court are paid, in fact, are not paid. Specifically, when a Court is to adjudicate the issue of a veteran's potential eligibility for medical-related benefits, as is the case here, the U.S. Court of Appeals for Veterans Claims has found that Courts are clearly erroneous when they fail to assist the veteran in submitting all relevant medical records (*Froio v. Shinseki*, 2014 WL 594096, 2014).

B. The Court should grant certiorari to clarify the proper standard to be applied to service members and veterans who incur disabling medical conditions while engaged in hazardous service, and who thus qualify for monetary benefits under 10 U.S.C. §1413a.

It is likely that hundreds, if not thousands, of individuals have been wrongly denied Combat Related Special Compensation due to the misinterpretation of the statute by the Department of Defense and the military departments.

A. Applicable law and regulations

(1) 10 U.S.C. § 1413a.

Combat Related Special Compensation is established by 10 U.S.C. § 1413a. Section 1413a(a) directs the Secretary concerned to “pay to each eligible combat-related disabled uniformed services retiree . . . a monthly amount for the combat-related disability of the retiree determined under subsection (b).”

Section 1413a(e) defines “combat-related disability” by reference to the law of the VA:

In this section, the term “combat-related disability” means *a disability that is compensable under the laws administered by the Secretary of Veterans Affairs* and that –

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or

(2) *was incurred* (as determined under criteria prescribed by the Secretary of Defense) –

(A) *as a direct result* of armed conflict;

(B) *while engaged in* hazardous service;

(C) *in the performance of* duty under conditions simulating war; or

(D) *through* an instrumentality of war.

(Emphasis added.)

(2) What is a “disability” under the law of the VA?

VA law defines “disability” as the “*impairment in earnings capacity resulting from such disease and injuries and their residual conditions.*” *Davis v. Principi*, 276 F.3d 1341, 1344 (Fed. Cir. 2002) (quoting 38 C.F.R. § 4.1.) (Emphasis added). *See also Allen v. Brown*, 7 Vet. App. 439, 447-48 (1995) (same); and 42 U.S.C. § 423(d)(1) (defining disability as the “inability to engage in any substantial gainful activity *by reason of* any medically determinable physical or mental impairment. . . .”) (emphasis added). “Such a definition of ‘disability’ follows the overall statutory and regulatory purpose of the veterans’ compensation law. This purpose is reflected in the ratings system, which rates different mental and physical maladies based on diminished earning capacity. . . .” *Hunt v. Derwinski*, 1 Vet. App. 292, 296-97 (1991).

The Air Force similarly defines "disability" as:

Any impairment *due to* disease or injury, regardless of degree, which reduces or precludes an individual's actual or presumed ability to engage in gainful or normal activity.

See Air Force Instruction 36-3212 ("Terms") (emphasis added).

(3) When is a disability compensable under the law of the VA?

38 U.S.C. § 1131² establishes the basic entitlement to VA disability compensation for service during peacetime:

For *disability resulting from* personal injury suffered or disease contracted *in line of duty*, or for *aggravation of a preexisting injury suffered or disease contracted in line of duty*, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter.

(Emphasis added.)

² The wartime standard is nearly identical. See 38 U.S.C. § 1110.

Section 1131 thus authorizes compensation for disabilities (a) that result from injuries and diseases that occur or arise after entry into the military that are in the line of duty and that become disabling, and (b) that pre-exist military service and are aggravated in the line of duty to the point of disability. "Aggravation" is defined at 38 U.S.C. § 1153 as:

A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is *an increase in disability during such service*, unless there is a specific finding that *the increase in disability is due to the natural progression of the disease*.

(Emphasis added.)

(4) Disabilities "Incurred While Engaged in Hazardous Service."

In section 1413a(e)(1)(B) Congress authorized the Department of Defense to prescribe criteria for determining whether a disability is "incurred" under one or more of the four statutory categories of CRSC claims.

DoD Directive Type Memorandum (DTM) (April 27, 2004)

The DTM, Attachment 1, addresses combat-related disabilities other than those for which the Purple Heart Medal has been awarded, providing, "The Military Departments will determine whether a disability is combat-related . . . using the definitions and

criteria set forth in attachment 1-1 and this memorandum." It further provides, "A determination of ~~combat~~-relatedness will be made with respect to each separate disability with an assigned medical diagnosis code from the VASRD."

Attachment 1-1 of the DTM addresses disabilities "incurred" while "engaged in hazardous service," providing:

Such service includes, but is not limited to, aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. A finding that *a disability is the result of such hazardous service* requires that *the injury or disease be the direct result of actions taken in the performance of such service*. Travel to and from such service, or actions incidental to a normal duty status not considered hazardous are not included.

(Emphasis added).

Section 1413a(e)(2)(B) is unambiguous in not imposing on CRSC applicants the burden of proving that a disability is "a direct result" of their hazardous service. Rather, the statute demands only that applicants prove their disabilities were *incurred while engaged in hazardous service*.

B. The DTM criteria for “hazardous service” claims cannot be reconciled with 10 U.S.C. § 1413a and therefore is invalid.

With regard to hazardous service, section 1413a(e)(2) tasked the Secretary of Defense with prescribing criteria to guide the determination of when a disability *is incurred while engaged* in such service, not when a disability *is a direct result* of such service. Yet the Secretary imposed a direct causation requirement where Congress precluded it by its own choice of language. By doing so the Secretary entirely undermines the CRSC scheme.

(1) The Secretary exceeded his delegated authority.

Congress made a conscious decision in section 1413a(e)(2)(A)-(D) to employ different standards for each CRSC category. For “armed conflict,” the statute requires that an applicant show his or her disability was incurred “as *a direct result* of armed conflict.” For “hazardous service,” however, Congress only requires an applicant show that his or her disability *was incurred while engaged* in such activity. The distinction is material and the statutory language is controlling.

“Incurred” in this context cannot mean what the DTM construed it to mean, which is “the direct result of.” By employing different standards for the different categories of CRSC entitlement, Congress plainly intended different criteria to apply. *See Sosa v. Alvarez-*

Machain, 542 U.S. 692, 712 n. 9 (2004) (noting the “usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended”).

Congress’ choice to not employ the term “as a direct result of” in relation to “hazardous service” reflects a conscious choice to not impose such a causation requirement on applicants. But the DTM does what Congress did not do by requiring that “*the injury or disease be the direct result of actions taken in the performance of such service.*”

The DTM’s equation of “incurred” with “the direct result of” renders redundant Congress’ use of the term “as a direct result of” at section 1413a(e)(2). Such interpretation “violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.” *Kungys v. United States*, 485 U.S. 759, 778 (1998). “Causation” and “incurrence” are not synonymous, and “the direct result of” implies direct causation. If Congress wanted to establish a direct result causation requirement for each category of CRSC claim, it simply needed to say “caused” or “directly caused” rather than “incurred” in section 1413a(e)(2). But it did not, and the Court must proceed on the ground that Congress said what it meant and meant what it said there. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810)).

(2) The DTM excludes categories of claimants that Congress expressly included in section 1413a.

Because the VA defines “disability” as the impairment resulting from a condition or an injury, not as the underlying condition or injury, section 1413a only required that I prove that my *disabilities* (impairments) were incurred while engaged in hazardous service. The DTM’s additional requirement that applicants prove that “*the injury or disease [is] the direct result of actions taken in the performance*” of hazardous service is an abuse of discretion and contrary to law. (Emphasis added.)

The DTM language excludes from CRSC benefits all applicants except those whose underlying injuries or conditions are the direct result of hazardous service. It excludes applicants such as me because they cannot prove an *existing injury or disease is the direct result* of their hazardous service. If a service member with an existing, in-service knee injury that is not disabling engages in hazardous service and thus aggravates the existing injury to the point of disability, he cannot recover under the CRSC because his injury is the direct result of his strength training, not his hazardous service. Yet the service member can recover if the same disabling knee injury is originally suffered while performing the same hazardous service.

Furthermore, the DTM language altogether negates the legal doctrine of aggravation, which Congress expressly incorporated into the CRSC scheme. That is

because by definition preexisting conditions exist before entry into military service and applicants cannot possibly prove such conditions are the direct result of hazardous service.

Congress avoided such irrational outcomes by not imposing a direct result causation requirement on every CRSC category. Congress could not have intended to include existing and preexisting conditions within the scope of CRSC and simultaneously exclude them by requiring a showing that the underlying injury or disease was the direct result of hazardous service. Yet that is what the DTM achieves.

C. The AFBCMR erred by requiring a direct-cause relationship between my underlying conditions and my hazardous service.

The DTM's impermissible standard permeated the proceedings below, with each organization advancing its own rendition of the direct result causation requirement. Indeed, the AFBCMR, the CRSC Board, and the Department of Defense imposed requirements stricter than those of the DTM.

In its first addendum, the AFBCMR restricted the DTM criteria even further by requiring proof of "*a discrete, significant traumatic event productive of biomechanically significant change of anatomical structure.*" (Emphasis added). The AFBCMR's December 28, 2012 (Second Addendum) decision denied my CRSC claims on the same grounds stating, "[w]e do not find a clear

linkage between his existing conditions and a combat-related injury.”

On remand from the Court of Federal Claims, the AFBCMR, in its Fourth Addendum, denied my CRSC claim based on advisory opinions from the CRSC Board and the Department of Defense. Both opinions applied the DTM’s unlawful standard to my CRSC claims. According to the CRSC Board, to qualify for CRSC benefits, “[t]here must be a . . . causal relationship between the . . . hazardous service and the resulting disability. While sitting/flying in an aircraft for extended periods may be considered ‘a period of hazardous service’ as stated about [sic], this is not sufficient in and of itself for a combat-related determination.” The CRSC Board explained that it “looks for confirmation of *direct exposure to a specific combat-related event and the resulting injury*.” (Emphasis added).

CONCLUSION

The Supreme Court exists to provide judicial review of the Legislative and Executive branches. Precedents are needed to establish the entitlements of military retirees and more specifically military retirees that are retroactively retired.

Military members and their families depend on the U.S. Government to provide for them and their families if they become disabled. The Air Force circumvented the law by providing less benefits than I would

have received had I been medically processed and retired as required. This is an opportunity for the U.S. Supreme Court to check the Air Force and other Services by providing guidance that offering a lower level of benefits to retroactively medically retired service members and coercing acceptance of these benefits violates 10 U.S.C. § 1552 and 10 U.S.C. § 1413a. How are disabled individuals who are wrongfully terminated without benefits and suffer additional harm due to not having guidance, resources, legal counsel and appeals that are mandated by Congress and the retirement system itself protected, and made whole, if not by the Supreme Court?

Further, in this case, a full blown evidentiary proceeding is needed to ensure a full and fair hearing (10 U.S.C. § 1214) since the PEB process was not followed and the full administrative record was never made available by the Government, though it was requested by Counsel and a FOIA. A full and fair hearing has not been provided.

For all these reasons, this Court should grant the petition.

Respectfully submitted,

MAJOR ALAN ADAMS, USAF, RETIRED
Petitioner
101 Taylor Avenue N, Apt. 415
Seattle, WA 98109
(509) 294-0875