

No. 25-

IN THE
Supreme Court of the United States

MALCOLM WADE PIPES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a military reservist, who was lawfully ordered to engage in remedial fitness training without pay and points, and suffered injury, was on inactive-duty training status while performing ordered military training within the meaning of 10 U.S.C. § 101(d)(7)(B) and, therefore, entitled to disability retirement.

PARTIES TO THE PROCEEDING

The petitioner is Malcolm Wade Pipes.

The respondent is the United States.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Pipes v. United States, No. 15-1163, U.S. Court of Federal Claims. Order filed October 13, 2017.

Pipes v. United States, No. 15-1163, U.S. Court of Federal Claims. Judgment entered September 11, 2018.

Pipes v. United States, No. 2019-1189, U.S. Court of Appeals for the Federal Circuit. Judgment entered November 15, 2019.

Pipes v. United States, No. 15-1163C, U.S. Court of Federal Claims. Order filed September 11, 2020.

Pipes v. United States, No. 15-1163C, U.S. Court of Federal Claims. Judgment entered January 10, 2022.

Pipes v. United States, No. 2022-1509, U.S. Court of Appeals for the Federal Circuit. Judgment entered December 16, 2024.

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Malcolm Wade Pipes petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App.1a-18a, is reported at 123 F.4th 1324. The claims court opinion, App.19a-47a, is reported at 157 Fed.Cl. 483. The opinion of the court of appeals, App.48a-60a, is reported at 791 F. App'x 910. The claims court opinion, App.61a-77a, is reported at 139 Fed.Cl. 538.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2024. The court of appeals denied a timely combined petition for rehearing and rehearing *en banc* on March 5, 2025. App.78a. This Court extended the deadline to file this petition until July 18, 2025. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Code are produced in the Appendix. *See* App.80a-105a.

STATEMENT

This case raises an important question for all members of the military who are injured while performing ordered military training, without pay or points, and the relief they may be entitled to receive. This case concerns the definition and application of inactive-duty training (“IDT”)

and how it applies to Petitioner Malcolm Wade Pipes, an Air Force Reservist who was injured after being lawfully ordered to engage in remedial fitness training called the Self-Paced Fitness Improvement Program (“SFIP”).

Petitioner suffered a stroke from a Cerebrovascular Accident (“CVA”) while exercising under a mandated SFIP, which he was instructed to participate in since November 2004 and August 2005 by lawful and valid military orders. Petitioner sought disability retirement under 10 U.S.C. § 1204, which provides the conditions for entitlement to such retirement for service members who were on active duty or IDT for thirty (30) days or less.

10 U.S.C. § 101(d) defines duty status. Section 101(d) (7)(B) identifies IDT without compensation, which is relevant to Petitioner, such that the IDT he was ordered to engage in, the SFIP, was not for pay or points. This is the pertinent provision at issue, and applicable to Petitioner, because Petitioner suffered a stroke while on IDT, but did not receive pay or points. The lower court ultimately found that, notwithstanding the Petitioner was ordered to engage in the SFIP and suffered injury, Petitioner was not authorized for IDT status while performing the SFIP and, therefore, he was not entitled to relief.

As a result, Petitioner, and other Air Force Reservists and Air National Guard members who are injured because they were ordered to engage in training, thus performing IDT without pay or points, are being denied the right to obtain disability retirement under 10 U.S.C. § 1204. Petitioner seeks certiorari for compelling reasons based on an issue of critical importance to all military service members and veterans.

A. Legal Background

The Administrative Procedure Act (“APA”) prescribes procedures for agency action and outlines the basic parameters of judicial review of such action. This notion is rooted in *Marbury v. Madison*, 5 U.S. 137 (1803), and reaffirmed by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The APA instructs courts, not agencies, to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. Relevant to Petitioner’s case, the court of appeals had the authority to exercise independent judgment from the Air Force Board for Corrections of Military Records (“AFBCMR”) to interpret whether Petitioner was in a “duty” status when he suffered from a stroke while participating in a mandatory Self-Paced Fitness Improvement Program (“SFIP”) to determine his eligibility for military disability retirement.

Pursuant to 10 U.S.C. § 1204, members of the Armed Forces who are unfit to perform the duties of their office, grade, rank, or rating, because of physical disability, like Petitioner, may be retired with retirement pay. This statute also provides that “the disability is of a permanent nature and stable” and was “the proximate result of performing active duty or inactive-duty training.” 10 U.S.C. § 1204(1)-(2)(A)(i).

10 U.S.C. § 101(d)(7) defines inactive-duty training (“IDT”) as follows: “(A) Duty prescribed for Reserves by the Secretary concerned under Section 206 of Title 37 or any other provisions of law; and (B) special additional duties authorized for Reserves by an authority designated

by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.”

Section 101(d)(7)(A) refers to 37 U.S.C. § 206, which, in relevant part, compensates those engaging in IDT with pay and points. Section 101(d)(7)(B) provides IDT without pay or points. There is also no requirement of compensation under 10 U.S.C. § 101(d)(7)(B). The controlling instruction in this matter at the relevant time, Air Force Instruction (“AFI”) 36-2910, provides as follows:

Inactive Duty Training (IDT)—Authorized training performed by a member of a Reserve Component not on active duty or active duty for training and consisting of regularly scheduled unit training assemblies, additional training assemblies, periods of appropriate duty or equivalent training, and any special additional duties authorized for Reserve Component personnel by the Secretary concerned, and performed by them in connection with the prescribed activities of the organization in which they are assigned *with or without pay*. Does not include work or study associated with correspondence course. Also called IDT.

Appx180 (emphasis added).¹

1. “Appx” refers to the record below, specifically the Non-Confidential Joint Appendix filed with the court of appeals on May 18, 2023.

B. Factual and procedural background

Petitioner enlisted into the military in 1983 where he honorably served sixteen (16) years with the Air Force, consisting of seven (7) years on active duty and nine (9) years in the Reserve. App.21a, App.49a.

In 2003, the Air Force began phasing in more rigorous physical fitness standards. These increased standards included, *inter alia*, a one and one-half (1.5) mile run. Appx142. Where this run accounted for fifty percent (50%) of annual test scoring, the abdominal circumference accounted for thirty percent (30%), and the push-up and abdominal crunch components accounted for ten percent (10%) respectively. Appx277.

In 2004, the Air Force Reserve began phasing in the aforementioned fitness program. App.49a. Petitioner began participating in the new fitness program and he was exercising approximately two (2) to four (4) times per week. During this same timeframe, the annual medical physical evaluation requirements were changed for Airmen, which eliminated blood and urine tests, as well as Electrocardiography and heavily relied on a questionnaire completed by the military service member and civilian physician. Appx139, Appx142. If a service member experienced or had a history of certain medical conditions, a medical clearance examination was required to clear the member to participate in the exercise program. Appx139.

In October 2004, Petitioner and his unit were notified by their Commander of the new standards and the expectations. App.49a. According to medical records at that time, Petitioner had erratic blood pressure

measurements and an increasing tendency to feel bad after multiple daily exercises. App.50a. In November 2004, Petitioner failed the new test, and his fitness was rated as poor. App.49a. Petitioner was verbally counseled, presented with a letter amounting to an order enrolling him in the SFIP, which was a mandatory program under AFI 10-248, and Petitioner was ordered to exercise according to the program requirements. App.21a, App.29a. In August 2005, Petitioner failed a second fitness test. App.50a. Petitioner was ordered to exercise five (5) days per week to address the repeat failure to pass the fitness test. App.21a, App.50a.

In October 2004, prior to mandatory enrollment in the SFIP by the Reserves, Petitioner's blood pressure was recorded as 160/100. Appx455. In November 2005, Petitioner's blood pressure was recorded as 165/105. Appx455. A few days later, Petitioner's blood pressure dropped to 124/90. Appx455. Petitioner reported the high blood pressure as a concern prior to the upcoming annual fitness testing on his annual Air Force physical screening for fitness testing on January 6, 2006. App.50a. Petitioner's physician was concerned and opined that Petitioner be excused from running given the blood pressure issues, which was presented to the Medical Unit. App.50a.

On February 5, 2006, Petitioner was evaluated by Colonel Granger, a medical doctor of the Air Force. App.50a. Dr. Granger's evaluation demonstrated that Petitioner had extremely elevated blood pressure, which ranged between 151/94 when sitting to 146/99 when standing. App.50a. Dr. Granger rendered a diagnosis of hypertension and obesity. App.50a. Dr. Granger did not relay this critical health information to Petitioner or refer

him to his personal physician. App.50a-51a. Dr. Granger cleared Petitioner for full participation in the SFIP in which he had been mandatorily enrolled, and Petitioner took a fitness test on the same day. App.51a.

Petitioner became ill during the run portion of the aforementioned fitness test. App.51a. This was Petitioner's third fitness test failure and his second failure since being placed in the SFIP. App.51a. Petitioner participated in additional fitness tests on May 7 and July 10, 2006, which he also failed. App.51a.

After the July 2006 test, Petitioner reported to the unit fitness advisor that he was running in accordance with the SFIP, but he was not seeing any improvement and that he often felt ill after running. App.51a. Despite medical notice of hypertension, and the continued failures of the fitness tests and demonstrated failure to improve, Petitioner was not referred by medical personnel for further evaluation. App.51a.

Petitioner continued to experience discomfort after exercising for a period of nearly two (2) years without any related improvement. Petitioner's medical providers noted an elevated high blood pressure. Petitioner reported his high blood pressure to the Air Force. Petitioner was later examined by the Air Force, through Dr. Granger, who cleared Petitioner to participate in the fitness testing program, despite the recorded high blood pressure and a diagnosis by Dr. Granger of hypertension. After vomiting and not being able to complete the run portion of the fitness test on the same day as his medical examination, there was no follow-up with Dr. Granger or referral to other medical personnel.

On September 3, 2006, Petitioner became ill while exercising under the mandated SFIP. App.51a-52a. Petitioner experienced a headache, difficulty breathing, dizziness, an impression of being overheated, and a general feeling of malaise. App.51a-52a. Petitioner's right hand later became slightly clumsy, and he developed a slight limp. Appx456. Petitioner went to the hospital at approximately 2:00 am on September 4, 2006. App.52a. Petitioner was diagnosed with having suffered a Cerebrovascular Accident ("CVA"), commonly referred to as a stroke. App.52a. The CVA occurred while Petitioner was running in a mandated program, the SFIP, and with military physician approval and under command of the Air Force.

On September 6, 2006, Petitioner contacted his unit concerning the stroke. App.52a. The Air Force was then obligated to report the stroke to Headquarters at the Air Force Reserve Command ("AFRC"), but no such reporting was ever made and the medical documentation that should have been prepared has disappeared. App.52a. Petitioner's unit should have initiated an investigation to determine if the injuries occurred during the line of duty ("LOD"). Petitioner's unit failed to perform an LOD investigation into the stroke. Instead, the unit determined, without any investigation, that Petitioner was "off duty" when the stroke occurred. App.52a.

On February 4, 2007, Petitioner was evaluated by Colonel (Dr.) Robert Savory to determine whether Petitioner was fit for duty or whether he should be referred for medical discharge. Appx88. Dr. Savory concluded that Petitioner did not meet medical retention standards due to the persistent numbness of important muscle groups

and lack of coordination of his right extremities. Appx88. Petitioner was notified he was not eligible for retirement benefits until the age of sixty (60). App.52a. Since no LOD investigation was ever conducted, Petitioner was ineligible for consideration by a Medical Evaluation Board. App.52a.

Also on February 4, 2007, Petitioner was declined for a fitness for duty board or the Informal Physical Evaluation Board ("IPEB"). Appx63. The IPEB could not determine eligibility for retirement benefits. Appx73-74. On November 4, 2007, the Commander of the 917th Wing Group made a recommendation to AFRC on the status of Petitioner. Appx457. The Commander indicated that Petitioner was "unable to function or even get to his office." Appx112-113. The Commander opined that Petitioner should be medically retired. Appx113. The Commander indicated, without any substantiating documentation, that Petitioner was not in a military status at the time the condition was first diagnosed, despite the lack of any required LOD determination to that effect. Appx112. The Commander also noted that Petitioner was in the SFIP and that he was unable to pass his fitness tests. Appx113. On December 20, 2007, Petitioner was notified that separation was initiated to discharge him for physical disqualification. Appx458.

In October 2008, Petitioner was informed that his regular retirement was approved. App.52a. To receive regular retirement benefits, however, Petitioner must be sixty (60) years old. Petitioner was forty-seven (47) years old at the time. App.52a.

On September 23, 2009, Petitioner filed an application for benefits with the Department of Veterans Affairs

(“VA”). Appx458. The VA denied service-connection for both hypertension and stroke. Petitioner appealed the VA’s decision, but he was again denied. The VA refused to consider Petitioner’s CVA as a potentially reimbursable injury, solely because the unit arbitrarily assumed, without an LOD, that the CVA was not duty-related or compensable. As a result, Petitioner was denied VA benefits and disability retirement.²

In August 2011, Petitioner appealed to the AFBCMR. App.53a. On June 4, 2012, the Air Force Office of the Assistant Secretary for Military and Reserve Affairs (“SAF/MRB”) issued a memorandum for the AFBCMR recommending denial of the change in records to reflect Petitioner was permanently medically retired. App.53a.

On February 28, 2013, the AFBCMR denied Petitioner’s application for correction of military records, finding that he was not entitled to disability retirement based on a determination that he did not demonstrate the existence of a material error or injustice. App.53a.

On April 30, 2013, and July 3, 2013, Petitioner sought reconsideration by the AFBCMR in denying Petitioner the ability to be permanently and medically retired as of 2007. App.53a. On August 11, 2014, the Air Force Office of

2. Petitioner was subsequently given a one hundred percent (100%) service-connection disability rating. On May 18, 2018, the Board of Veterans’ Appeals found that Petitioner was entitled to service-connection for residuals of a CVA (i.e., stroke). The Board of Veterans’ Appeals held that the residuals of the CVA incurred in 2006 were related to Petitioner’s active-duty military service. *See* No. 13-31 133A, BVA 18-102810 (BVA May 16, 2018) (unpublished). His Reserve service was of no consequence in the decision.

the Assistant Secretary, SAF/MRB, through its Executive Director, affirmed the denial of Petitioner's request for reconsideration. App.53a.

1. Summary of United States Courts of Federal Claims and Federal Circuit Holdings

On October 9, 2015, Petitioner timely filed a complaint in the Court of Federal Claims claiming that he was denied disability retirement pay and benefits under 10 U.S.C. § 1204. App.53a. On October 13, 2017, the claims court vacated the AFBCMR's February 28, 2013, decision that denied Petitioner's application for a correction of military records and remanded to the AFBCMR to reconsider Petitioner's application. App.54a.

On February 1, 2018, the AFRC/Judge Advocate ("AFRC/JA") issued an advisory opinion to the AFBCMR recommending that the AFBCMR deny Petitioner's application. App.54a-55a. On May 3, 2018, the AFBCMR issued its reconsideration decision holding that Petitioner did not demonstrate the existence of material error or injustice and, therefore, Petitioner's application was denied. App.55a. The matter returned to the claims court for further adjudication.

On September 11, 2018, the claims court denied relief. App.55a. The claims court considered newly provided evidence on remand, including a report where "the Medical Advisor found it plausible that [Petitioner's] participation in vigorous training for his fitness assessment may have contributed to the occurrence of his stroke[.]" App.67a, Appx.71a. Meanwhile, the claims court held that Petitioner was not in military status or on IDT while performing the

SFIP. App.76a. The court held that a service member is not on an IDT status while performing in a SFIP, because a SFIP is a recommended remedial intervention program for traditional Reservists, conducted on a voluntary basis, not mandated, and performed in a non-duty status. App.76a. Pipes timely appealed to the court of appeals.

On November 15, 2019, the court of appeals reversed and remanded. App.60a. The court held “both the AFBCMR and Claims Court erred in concluding that Pipes was not lawfully ordered to perform the SFIP designed for him.” App.59a The court held that “the argument that Pipes was in a non-duty status when ordered to perform his SFIP is no longer a valid rationale.” App.60a. The court noted that “[a]t the time of Pipes’ stroke, the AFI made clear that Reservists could participate in SFIP ‘on or off duty status.’ But, in this case, for reasons not explained by the Air Force, the apparently *sui generis* SFIP designed for Pipes to perform when in civilian status went beyond recommendation and encouragement, being mandated by lawful orders issued during time when Pipes was in inactive duty status.” Appx59a (internal citation omitted). In light of the court of appeals’ opinion, the claims court remanded to the AFBCMR. App.2a, App.7a. On May 14, 2020, AFBCMR determined that Petitioner was in a non-duty status when he suffered his stroke. Appx25.

On September 11, 2020, the claims court vacated the May 11, 2020 AFBCMR decision. Appx20. The matter was remanded to AFBCMR to consider whether Petitioner was required to satisfy the administrative requirement of the Air Force Manual (“AFMAN”) in effect at that time. Appx33-34.

On December 22, 2020, the AFBCMR concluded that the administrative requirements of AFMAN 36-8001 applied to IDT pursuant 10 U.S.C. § 101(d)(7)(B) and Petitioner could not have been in a duty status when he was exercising in compliance with a lawful military order and suffered a stroke because a ministerial form was not completed by Petitioner's unit commander. Appx337-347. The AFBCMR ignored AFI 36-2910; the controlling instruction for determining IDT status. Appx151-202.

Petitioner then timely filed with the claims court. The JA then issued an Advisory Opinion, which found that Petitioner was not entitled to relief because the SFIP was not an order placing him in IDT. App.27a. The Reserve Surgeon General's Office also issued an advisory opinion, which concluded that the squadron medical personnel were not negligent in failing to alert command that Petitioner had untreated hypertension and should have been barred from SFIP. App.43a-44a. On August 10, 2021, the AFBCMR adopted both advisories and determined that the SFIP order did not place Petitioner in IDT and recommended against correcting Petitioner's records. Appx419-440.

On January 7, 2022, the claims court denied relief and held that "the relevant provisions of the AFMAN apply to all IDT and require advance authorization for a service member to be in IDT status" and "the SFIP order did not automatically place Pipes in IDT status while participating in the SFIP." App.46a-47a.

Petitioner timely filed with the court of appeals. On December 16, 2024, the court of appeals affirmed and held that, at the time of his injury, Petitioner was not in

IDT status. App.1a-18a. The court of appeals rejected Petitioner's following arguments: (1) the claims court erred in upholding the AFBCMR's conclusion that the AFMAN 36-8001 applies to all IDT under 10 U.S.C. § 101(d)(7)(B); and (2) the claims court erred in agreeing with the AFBCMR that Petitioner failed to prove he received the advance authorization required by the AFMAN. The court denied the first argument on the basis that "Mr. Pipes points to no provision of the AFMAN contemplating that IDT may be performed without receipt of pay or points or that the AFMAN applies to only a subset of IDT." App.11a. The court denied the second argument on the basis that Petitioner did not point to "any source of law establishing an IDT status implicitly authorized" by way of lawful order. App.39a-40a. Petitioner subsequently timely filed a combined petition for rehearing and rehearing *en banc*, which was denied on March 5, 2025. App.79a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for compelling reasons as the question presented is of critical importance to all military service members and veterans. The decision below is not only wrong, but it is important because it impacts thousands of service members.

Military service members and veterans, like Petitioner, who were lawfully ordered to engage in training that causes injury, are being denied relief based on, at best, a technicality. Thousands of service members and veterans are being denied LOD investigations and determinations. They are being denied certain VA benefits. They are being denied a disability retirement. Meanwhile, there is no dispute that Petitioner was ordered

to engage in the SFIP. There is no dispute that Petitioner had several underlying medical conditions that should have disqualified him from the SFIP. There is no dispute that Petitioner suffered from a stroke. The only dispute is whether Petitioner was authorized, or pre-authorized, to be in a duty status when he was engaging in the SFIP at the time of injury. Because Petitioner was ordered to engage in the SFIP, and he did so engage at the time of injury, he was authorized to be in a duty status. As a result, Petitioner's military records should have been corrected, and he should have been granted disability retirement. No future case is likely to offer a better opportunity to address the question presented as the decision below.

I. THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW.

While the court of appeals correctly identified that 10 U.S.C. § 1204 provides the conditions for entitlement to disability retirement for service members who were on active duty or IDT for thirty (30) days or less, it failed to properly apply the definition of IDT under 10 U.S.C. § 101(d)(7). IDT is defined, in relevant part, as follows:

- (A) duty prescribed for Reserves ... by the Secretary concerned under section 206 of title 37 or any other provision of law; and
- (B) special additional duties authorized for Reserves ... by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

10 U.S.C. § 101(d)(7). Section 101(d)(7)(A) refers to 37 U.S.C. § 206, which, in relevant part, compensates those engaging in IDT with pay and points:

For a regular period of instruction that the member is scheduled to perform but is unable to perform because of physical disability resulting from an injury, illness, or disease incurred or aggravated.

37 U.S.C. § 206(a)(3)(A)(ii).

The court of appeals failed to acknowledge that 10 U.S.C. § 101(d)(7)(A) applies to those entitled to compensation. Because Petitioner did not receive pay or points for engaging in IDT, the court should have analyzed and applied 10 U.S.C. § 101(d)(7)(B), because it is controlling here.

Petitioner was given “special additional duties authorized for Reserves.” 10 U.S.C. § 101(d)(7)(B). These special additional duties were the enrollment in the SFIP. Beginning on November 4, 2004, Petitioner was ordered to participate in the SFIP, which mandated that he exercise five (5) times per week, including engaging in a one and one-half (1.5) mile run. App.21a, App.50a. Under AFI 10-248, the Air Force established that all Air Force members, AFRC, and Air National Guard members must meet the standards of being physically fit to support the Air Force mission. Appx138-150. This held all members, even those not in military duty status, accountable for meeting fitness standards at reassessment intervals using the SFIP to enforce the fitness requirement. Therefore, because Petitioner repeatedly failed the fitness test, he

was lawfully ordered into the SFIP to enforce the fitness requirement of meeting fitness standards at reassessment intervals.

Petitioner was placed in the SFIP by an authority designated by the Secretary. The authority designated by the Secretary counseled Petitioner to increase the frequency of his exercise and formally ordered Petitioner into the SFIP. Petitioner was presented with a letter ordering him in the SFIP as established by AFI 10-248, requiring almost daily exercise between normal monthly unit training assemblies. App.49a-50a. This AFI is a controlling instruction, because it is issued by the Secretary of the Air Force, and compliance with the publication is mandatory. Appx138.

Petitioner performed the SFIP on a voluntary basis insofar as it was without pay. Where the SFIP directed Petitioner to record his participation on Air Force Form 1975, Personal Fitness Progress Chart, Appx141, Appx144, Appx150, the written order included an attached page with the required frequency and performance standards applicable for each of the specified exercises. The order did not specify the days and times for Petitioner to perform these exercises but required him to exercise at least five (5) times per week. App.49a-50a. Petitioner was free to use his discretion in determining when to meet the requirements of the SFIP, and he documented his training and compliance using the specified Form 1975.

In *Wake v. United States*, 89 F.3d 53, 59 (2d Cir. 1996), that plaintiff was in inactive duty status, engaged in activity incident to military service at the time of her injury. The Second Circuit held:

... voluntary activities that are *authorized* are considered “duty.” See 10 U.S.C. § 101(d)(7)(B) (“inactive-duty training” means “special duties authorized for Reserves ... and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.”)

Id. at 59 (emphasis in original). Following the same logic, where Petitioner was ordered and authorized to participate in SFIP, the “self-paced” component of the SFIP itself coincides with the “voluntary basis” requirement of 10 U.S.C. § 101(d)(7)(B). Therefore, Petitioner’s participation in the SFIP was on a voluntary basis without pay and authorized as defined by Section 101(d)(7)(B), as IDT without pay or points.

The court of appeals held that Petitioner was not in duty status at the time of his stroke. The court reasoned that, while the VA awarded Petitioner entitlements for residuals of a CVA, “the VA’s disability determinations are not ‘binding upon our court nor conclusive on the issue of disability retirement.’” App.16a (quoting *Gilbreth v. United States*, 95 Fed. Cl. 88, 97 (2010) (quoting *Finn v. United States*, 548 F.2d 340, 342, 212 Ct. Cl. 353 (Ct. Cl. 1977)). The plaintiff in *Gilbreth* relied on 10 U.S.C. § 1201(a), which authorized disability retirement pay for a member who incurs physical disabilities during active service. *See id.* However, this is distinct from Petitioner’s claim, such that his claim relied on 10 U.S.C. § 1204(2)(B), which provides that, among other things, a service member may be retired with pay where a member of the armed forces is unfit to perform the duties of his office, grade, rank, or rating because of a disability permanent in nature

caused, incurred, aggravated, or resulting from, *inter alia*, performing IDT after September 23, 1996, which was not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence. Because *Gilbreth* is premised on "active" duty, while Petitioner's claim was that he was on "inactive" duty instead, *Gilbreth* is not controlling nor is it persuasive. And while the VA's determination may not be binding nor conclusive on the issue, it should have been considered under the circumstances.

Petitioner satisfies the criteria of 10 U.S.C. § 101(d)(7)(B), because he suffered a stroke while performing ordered IDT, without pay or points, while engaging in the SFIP. Because the SFIP met the requirements of the unambiguous statute, 10 U.S.C. § 101(d)(7)(B), and placed Petitioner in IDT when he participated in the SFIP, he was in a duty status when he suffered a stroke. Such a clear and unambiguous statute cannot be disregarded or rewritten, and it must be followed. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); *Lindemann Maschinenfabrik v. American Hoist and Derrick Co.*, 730 F.2d 1452, 1459 (Fed. Cir. 1984). To the extent the lower court required some additional form of authorization, nothing in the statute has such a requirement, and it should not have been interpreted by the lower court to be a requirement.

The lower court's failure to apply the unambiguous statute is even more egregious here where the designation of non-pay and non-points IDT is at issue. While Petitioner's participation in IDT meets the definition of 10 U.S.C. § 101(d)(7)(B), as well as Department of Defense directives defined in AFI 36-2910, the court instead

applied the requirements for IDT for pay as enumerated in AFMAN 36-8001, contending that it provides guidelines for all training and education activities within an Air Force Reserve unit; even those lasting less than two (2) hours. App.11a-12a. However, the AFMAN, at various points, notes that any IDT duration under two (2) hours does not qualify for pay or points. Appx33, Appx260, Appx509-510, Appx515.

The lower court incorrectly applied AFMAN 36-8001 such that it conveyed two (2) requirements for all IDT: (1) the IDT must be authorized in advance and in writing, in addition to a written order placing the service member in a pay status, by the Reservist's supervisor, and (2) the IDT must be performed for either pay and points or points only. App.11a-12a. Meanwhile, not all IDTs are authorized in advance and in writing and not all IDTs are for pay or points. For example, as admitted by AFRC/JA, Form 40A of AFMAN "... is the tool used to memorialize the order and duty performed, but it is the commander or commander's representative, not the form, that authorizes the IDT." Appx12. The AFMAN does not contain any procedure for traditional Reservists to use Form 40As for pre-authorization for IDT, and no actual evidence of such a bifurcated process requiring both a written order and a separate written pre-authorization was offered. Nor was any evidence offered that this procedure even exists in practice. There is also no requirement of compensation in the clear language of the statute under 10 U.S.C. § 101(d)(7)(B), and any compensation falls under 37 U.S.C. § 206 and, thus, 10 U.S.C. § 101(d)(7)(A). In any event, Petitioner's orders mandated the SFIP and inherently authorized, that is mandated and required Petitioner, to engage in the SFIP exercise regimen five (5) times per week. The

lower court's opinion makes obedience to orders optional and, at worst, requires Reservists to ignore and disobey lawful orders lacking a separate written authorization.

AFMAN 36-8001 sets the general requirements for members of the Air Force Reserve unit, the Individual Mobilization Augmentees program, and the Individual Ready Reserve taking part in pay or points gaining activity. AFMAN 36-8001 is a pay regulation for processing IDT participation for pay and points as defined by 10 U.S.C. § 101(d)(7)(A), insofar as "duty prescribed for Reserves ... by the Secretary concerned under section 206 title 37 or any other provision of law," such that 37 U.S.C. § 206 applies to those entitled to compensation and requires at least a two (2) hour IDT duration. Petitioner was participating in IDT, without pay or points, the ordered training lasted, at most, one (1) hour, and AFMAN 36-8001 was, therefore, not applicable and can never apply to without pay training lasting less than two (2) hours. Thus, non-pay IDT necessarily falls outside the AFMAN.

AFMAN 36-8001 explicitly requires using AFI 36-2910 for determining IDT status in the event of illness or injury during training. Paragraph 1.4 of AFI 36-2910 provides members who may be subject to LOD determinations, such that Paragraph 1.4.2.1. applies to:

Members of the ARC who die, incur or aggravate an illness, injury, or disease while:
on published orders for any period of time, or
while on inactive duty.

Appx156. The Air Force must follow the AFI and apply the definition of IDT therein. *See Service v. Dulles*, 354

U.S. 363, 388 (1957); *Voge v. U.S.*, 844 F.2d 776, 779 (Fed. Cir. 1988). The Air Force has never addressed IDT as defined in AFI 36-2910; instead ignoring the existence of this controlling AFI for determining IDT and duty status.

The court of appeals, however, had the authority to exercise independent legal judgment, regarding the definition of IDT and how it applies to Petitioner. Under the *Chevron* doctrine, courts were required to defer to “permissible” agency interpretations of the statutes those agencies administer – even when a reviewing court reads the statute differently. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412-13 (2024), however, held that the APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous. *Loper Bright Enterprises* recognized that exercising independent judgment often includes according due respect to Executive Branch interpretations of federal statutes; however, “respect” meant that the views of the Executive Branch could inform the judgment of the Judiciary but did not supersede it. *Loper Bright Enterprises*, 603 U.S. at 382, 412-13. *Loper Bright Enterprises* reasoned: “Whatever respect an Executive Branch interpretation was due, a judge ‘certainly would not be bound to adopt the construction given by the head of a department’ ... [o]therwise judicial judgment would not be independent at all.” *Id.* at 386 (internal citations and quotation marks omitted).

Since *Loper Bright Enterprises*, courts must exercise independent judgment when interpreting a statute. *Union*

P. R.R. Co. v. Surface Transportation Bd., 113 F.4th 823, 833 (8th Cir. 2024), held that “in determining ‘whether an agency has acted within its statutory authority, as the APA requires,’ we ‘must exercise [our] independent judgment.’” (citations omitted). *Union Pacific Railroad* further reasons that “when interpreting a statute, we begin with the statute’s plain language, giving words the meaning that proper grammar and usage would assign them. If the intent of Congress can be clearly discerned from the statute’s language, the judicial inquiry must end.” *Id.* (quoting *United States v. Lester*, 92 F.4th 740, 742 (8th Cir. 2024). *Gray TV, Inc. v. Fed. Commun. Comm’n*, 130 F.4th 1201, 12023 (11th Cir. 2025), acknowledged that “but, now, ‘[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.’” (citations omitted). *Avon Nursing and Rehab. v. Becerra*, 119 F.4th 286, 291 (2d Cir. 2024), also acknowledged that “[a]llowing the agency’s terminology to control our interpretation of the statute would be an abdication of our duty to interpret the statute independently.” (citations omitted).

In light of *Loper Bright Enterprises*, *supra*, the lower court was incorrect to not exercise its independent judgment from the AFBCMR to determine the question of whether Petitioner was in duty status when performing the SFIP that resulted in a stroke, and whether the *sui generis* order to participate in the SFIP automatically placed Petitioner into duty status whenever he performed the SFIP, which was authorized under AFI 10-248. The lower court’s deference to the reasoning of the AFBCMR does not exemplify an exercise of independent judgment and fails to give proper consideration to the compulsory mandating effect of Petitioner’s lawful orders or the mandatory guidance in AFI 36-2910.

Petitioner, who was an Air Force Reservist ordered to engage in the SFIP, suffered a stroke while complying with the lawful orders of his commanding officers. The repeated denial of his request for a correction of military records to ensure he receives disability compensation and retirement pay for this injury is a manifest injustice. This is an issue of critical importance, not simply for Petitioner, but for all members of the military who follow lawful orders and who are injured for doing so. There is no additional vehicle for relief for these individuals, and thousands have been affected. Based on these reasons, Petitioner pleads this Court to correct a manifest injustice and grant the petition.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
DECIDED DECEMBER 16, 2024**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2022-1509

MALCOLM PIPES,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Decided: December 16, 2024

Before PROST, CLEVINGER, and CHEN, *Circuit Judges.*

CHEN, *Circuit Judge.*

Malcolm Pipes appeals the decision of the United States Court of Federal Claims (Claims Court) granting the United States' motion for judgment on the administrative record and denying Mr. Pipes's. *Pipes v. United States*, 157 Fed. Cl. 483 (2022) (*Decision*). Mr. Pipes, a former reservist in the United States Air Force (Air Force), seeks disability-retirement pay and benefits through his Application for Correction of Military Records filed with

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the Air Force Board for Correction of Military Records (AFBCMR).¹

This case is before us for a second time. In the first appeal, we reversed, holding that Mr. Pipes was in a duty status—specifically, inactive-duty training (IDT) status—when he was ordered to participate in the Air Force’s Self-paced Fitness Improvement Program (SFIP). *Pipes v. United States*, 791 F. App’x 910, 916 (Fed. Cir. 2019) (*Pipes I*). We reversed because, “to the extent their analysis turned on [Mr.] Pipes’[s] duty status at the time of his orders, both the AFBCMR and the Claims Court erred in concluding that [Mr.] Pipes was not lawfully ordered to perform the SFIP designed for him.” *Id.* Although the SFIP was ordinarily offered to reservists as a recommendation, Mr. Pipes received a *sui generis* mandate to participate. *Id.* at 916 n.4. *Pipes I* did not address, however, the question of whether Mr. Pipes was in a duty status when *performing* the SFIP, nor did it suggest that the *sui generis* order to participate automatically placed him into such status. On remand, the Claims Court and the AFBCMR denied relief to Mr. Pipes, concluding that, at the time of his injury, he was not in IDT status. For the reasons explained below, we *affirm*.

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. [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department.” 10 U.S.C. § 1552(a)(1).

*Appendix A***BACKGROUND**

Our previous decision explains the circumstances of Mr. Pipes’s enrollment in the SFIP and his stroke while participating in that program, as well as the procedural history before the AFBCMR and Claims Court leading up to that appeal. *Pipes I*, 791 F. App’x at 911–14. We assume familiarity with these facts and therefore provide further details only as relevant to this appeal.

I

We begin with an overview of the legal framework for Air Force reserve disability retirement, with a particular focus on IDT status. Section 1204 of Title 10 of the United States Code provides the conditions for entitlement to disability retirement for service members who were on active duty for 30 or fewer days or on IDT. In relevant part, the statute provides:

Upon a determination by the Secretary concerned² that a member of the armed forces . . . is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay . . . if the Secretary also determines that the disability . . . is a result of an injury, illness, or disease incurred or

2. The term “Secretary concerned” means “the Secretary of the Air Force, with respect to matters concerning the Air Force and the Space Force.” 10 U.S.C. § 101(a)(9)(C).

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aggravated in line of duty . . . *while performing*
active duty or *inactive-duty training*

10 U.S.C. § 1204(2)(B)(i) (emphases added). The term “inactive-duty training,” in turn, is defined in relevant part as:

(A) duty prescribed for Reserves . . . by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves . . . by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

Id. § 101(d)(7).

The Air Force regulates “reserve personnel participation and training procedures” through Air Force Manual (AFMAN) 36-8001. J.A. 473 (capitalization removed); *see also id.* (The manual “gives guidelines for training and education activities within an Air Force Reserve unit.”). AFMAN 36-8001 is issued by order of the Secretary of the Air Force (Secretary), and compliance with the publication is mandatory. *Id.* Chapter four of AFMAN 36-8001 concerns IDT, including the types of IDT available and the administrative requirements for “IDT Authorization.” J.A. 250–51 ¶¶ 4.1–4.2. In relevant part, paragraph 4.2.1 provides:

*Appendix A*4.2.1. *All IDT must:*

4.2.1.1. Have *advance authorization* from the member's unit commander (or designated representative) for unit personnel. For Individual Reservists the authorizing authority is the supervisor or program manager (This is done in Block III of the AF Form 40A).

4.2.1.2. . . . *All IDT periods must be approved in advance, in writing*, by the member's supervisor with an information copy to the appropriate assigned Program Manager, *in advance of performing any IDT period*.

4.2.1.3. Be performed *for pay and points,³ or points only* as an [Air Force Reserve] member without pay from another US government source (i.e. no dual compensation).

J.A. 250 ¶ 4.2.1 (emphases added). This paragraph conveys two requirements for “[a]ll” IDT: (1) the IDT must be authorized in advance and in writing by the reservist’s

3. “Points are a unit of measurement of tracking a member’s participation. They are also used to calculate the amount of participation for retirement purposes.” J.A. 238 ¶ 2.1.

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supervisor, and (2) the IDT must be performed for either pay and points or points only. *Id.*

Chapter four of AFMAN 36-8001 also provides the minimum duration of an activity to be eligible for IDT: “Paid IDT periods shall not be under 4 hours,” and “[p]oints only IDT periods shall not be under 2 hours.” *Id.* at 254 ¶ 4.9. The only exception is for certain designated activities, for which a reservist can use the “cumulative method of time accounting” to “accumulate time spent (over 1 or more days) until reaching the 4-hour standard for one point.” *Id.* ¶ 4.9.1.

II

On remand from our decision in *Pipes I*, the AFBCMR denied relief to Mr. Pipes on the basis that the order Mr. Pipes received to participate in the SFIP, “even though *lawful*, was not *enforceable* when the member was in civilian status,” and therefore Mr. Pipes was not in duty status when his stroke occurred while he was participating in the SFIP. J.A. 468, 470 (emphases added). The Claims Court vacated that decision as arbitrary and capricious because the “finding that the lawful order was legally unenforceable is inconsistent with” this court’s holding in *Pipes I*. *Pipes v. United States*, 150 Fed. Cl. 76, 82–84, 87 (2020). The Claims Court further noted that the AFBCMR “did not consider whether [Mr. Pipes] was required to satisfy the requirements of the AFMAN to qualify for IDT status.” *Id.* at 86–87. Accordingly, the Claims Court remanded the case to the AFBCMR to consider that question, which turns on “whether the

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AFMAN's provisions are applicable to IDT pursuant to subparagraph (B) of section 101(d)(7) of Title 10.”⁴ *Id.* at 87.

In December 2020, on remand from the Claims Court, the AFBCMR again denied relief to Mr. Pipes. The AFBCMR determined that “the AFMAN 36-8001 administrative requirements apply to both 10 U.S.C. [§] 101(d)(7), subparagraphs (A) and (B)” and “AFMAN 36-8001 implements 10 U.S.C. [§] 101(d)(7) by providing the procedures for scheduling and authorizing IDTs, paid or unpaid, and the method for ensuring the proper accounting for each IDT.” J.A. 346. The AFBCMR concluded, then, that under the AFMAN, reservists “must have the commander’s (or designee[’s]) authorization in advance to perform an IDT, paid or unpaid.” *Id.* The AFBCMR found that Mr. Pipes failed to prove he obtained the authorization for IDT required by the AFMAN:

Although the commander issued [Mr. Pipes] a lawful order to perform the SFIP . . . , after a review of the entire case file, to include [Mr. Pipes’s] rebuttal, the [AFBCMR] finds no documented evidence of advance IDT authorization by the commander (or designee) for exercising. . . . While the commander ordered [Mr. Pipes] to exercise, the [AFBCMR]

4. Mr. Pipes does not claim that at the time of his stroke he was in IDT status under subparagraph (A) of that section.

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finds this order does not automatically authorize
IDT, paid or unpaid.

Id.

Following that decision, Mr. Pipes moved before the Claims Court for a further remand to the AFBCMR so that it could consider a new report by Mr. Pipes's expert, Colonel (Ret.) Larry D. Youngner. The Claims Court granted Mr. Pipes's motion.

In August 2021, the AFBCMR reviewed Col. Youngner's new expert report (as well as his supplemental expert report) and issued another decision, stating that it "remain[ed] unconvinced the evidence presented demonstrates an error or injustice." J.A. 433. The AFBCMR found that "a valid order to perform duty does not automatically place a service member in an IDT period and the commander, outside of any other orders given to the reservist, must approve IDT periods." *Id.* at 435. It then reiterated that, "as explained in [the AFBCMR's] previous conclusion . . . [Mr. Pipes] has provided no evidence that his commander ever attempted to authorize[] an unpaid IDT for [Mr. Pipes's] SFIP participation outside of the UTA." *Id.*⁵

In January 2022, the Claims Court granted the United States' motion for judgment on the administrative record

5. A UTA, or Unit Training Assembly, is a scheduled period of IDT completed by a Reserve unit. *See* J.A. 250 ¶ 4.1.2; *Pipes I*, 791 F. App'x at 912.

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and denied Mr. Pipes's.⁶ First, the court rejected Mr. Pipes's argument that the AFBCMR's interpretation of the AFMAN's scope was contrary to law. *Decision*, 157 Fed. Cl. at 489–90. Second, the court agreed with the AFBCMR that the order for Mr. Pipes to participate in the SFIP did not itself authorize IDT status and that “there is no evidence in the record that [Mr. Pipes] had advance authorization for IDT status, as required by the AFMAN.” *Id.* at 491–92.

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

STANDARD OF REVIEW

We review a decision of the Claims Court granting or denying a motion for judgment on the administrative record *de novo* and apply the same standard of review as the Claims Court. *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004); *see also Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005). Under that standard, “we will not disturb the decision of the [AFBCMR] unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence.” *Chambers*, 417 F.3d at 1227.

DISCUSSION

Mr. Pipes's claim for disability-retirement pay and benefits rests on his view that he was in IDT status at

6. The Claims Court “review[ed] both the AFBCMR's December 2020 decision on remand after *Pipes I*[] and its August 2021 decision responding to Col. Youngner's report.” *Decision*, 157 Fed. Cl. at 488 n.5 (citations omitted).

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the time of his injury. Mr. Pipes does not dispute that he did not receive authorization to perform IDT for either pay or points. Instead, Mr. Pipes contends that when participating in the SFIP, he was performing IDT for no pay and no points and was authorized to do so. He alleges two errors in the decision of the Claims Court on appeal. First, Mr. Pipes argues that the Claims Court erred in upholding the AFBCMR's conclusion that the AFMAN applies to all IDT under 10 U.S.C. § 101(d)(7)(B). Second, Mr. Pipes contends that even if the AFMAN did apply to him, the Claims Court erred in agreeing with the AFBCMR that he failed to prove he received the advance authorization required by the AFMAN. We reject both arguments.

I

According to Mr. Pipes, “[t]he AFMAN does not apply to duties not performed for pay or points, nor does it apply to training periods less than two (2) hours.” Appellant’s Br. 21. In other words, Mr. Pipes contends that a reservist can perform IDT without complying with the AFMAN’s procedural requirements if performing duties not for pay or points or duties of insufficient duration.

Mr. Pipes has not shown the existence of a class of IDT that is without compensation and not subject to the strictures of the AFMAN. The AFMAN, with which “compliance . . . is mandatory,” J.A. 473 (capitalization removed), states on its face that “[a]ll IDT must . . . [b]e performed for pay and points, or points only” and must “[h]ave advance authorization from the member’s unit

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commander,” J.A. 250 ¶ 4.2.1 (emphasis added). Mr. Pipes points to no provision of the AFMAN contemplating that IDT may be performed without receipt of pay or points or that the AFMAN applies to only a subset of IDT.

Mr. Pipes relies primarily on several publications—Air Force Instruction 36-2910 and two chapters from Volume 7A of the Department of Defense (DOD) Financial Management Regulation—that discuss IDT “without pay.” *See* J.A. 180; J.A. 311; J.A. 312. These references do not support Mr. Pipes’s argument. It is undisputed that IDT without pay exists. These references do not show the existence of IDT without compensation, i.e., IDT without pay *or* points. Indeed, they are consistent with the AFMAN, which distinguishes between IDT “for *pay and points*” and IDT “for . . . *points only . . . without pay* from another US government source.” J.A. 250 ¶ 4.2.1.3 (emphases added). Mr. Pipes also cites a definition of IDT contained in DOD Instruction Number 4515.16, but this definition does not even mention the words pay or points, let alone indicate whether IDT may be performed without pay or points. J.A. 230–31.

Nevertheless, even if Mr. Pipes were correct as to the existence of a type of IDT without compensation under 10 U.S.C. § 101(d)(7)(B),⁷ the AFMAN is clear that “*all* IDT” must be authorized in advance. J.A. 250 (emphasis added); *see also* 10 U.S.C. § 12315(a) (mandating that “[d]uty without pay shall be considered for all purposes as if

7. We note that Mr. Pipes does not challenge the legality of AFMAN 36-8001 as contrary to 10 U.S.C. § 101(d)(7)(B).

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it were duty with pay”). Mr. Pipes confuses the AFMAN’s requirements for IDT with the scope of the AFMAN. That the AFMAN does not contemplate IDT without pay or points or IDT for activity periods under two hours does not mean that such activity can constitute IDT beyond the scope of the AFMAN and thus be exempt from its procedural requirements. Such logic would lead to the nonsensical result that activity failing to meet any of the AFMAN’s regulations of IDT—for example, activity that lacks “appropriate and adequate training”—is exempted from the AFMAN’s requirement that all IDT be approved in advance. J.A. 250.

The Claims Court did not err in concluding that the AFBCMR’s determination that the AFMAN applies to and requires advance authorization for all IDT is not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

II

We next address Mr. Pipes’s contention that even if the AFMAN requires that he obtain advance authorization for IDT status, he received such authorization for his participation in the SFIP and the Claims Court and AFBCMR erred in holding otherwise. We reject each of Mr. Pipes’s arguments in support of this position.

A

Mr. Pipes first relies on certified statements by two of his former supervising Commanders asserting that he

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was in IDT status when performing his SFIP. Mr. Pipes forfeited this argument. As the United States points out, “Mr. Pipes did not bring up these statements or argue their relevance before the AFBCMR on *two* remands or to the [Claims Court] after the AFBCMR’s subsequent *two* decisions, even though he had opportunities to do so.” Appellee’s Br. 32; *see Metz v. United States*, 466 F.3d 991, 999 (Fed. Cir. 2006) (collecting cases and finding forfeiture of “ability to challenge the [AFBCMR’s] decision based on” argument not raised to the AFBCMR). Mr. Pipes’s only response is to note that these statements were part of the record before the AFBCMR, the Claims Court, and our court during *Pipes I*. *See* Appellant’s Reply Br. 5–6. This does not suffice. Courts of appeals “apply forfeiture to unarticulated legal and evidentiary theories not only because judges are not like pigs, hunting for truffles buried in briefs or the record, but also because such a rule ensures fairness to both parties.” *Jones v. Kirchner*, 835 F.3d 74, 83, 425 U.S. App. D.C. 302 (D.C. Cir. 2016) (cleaned up).

In any event, despite Mr. Pipes’s failure to particularly identify to the AFBCMR the statements he now relies on, the AFBCMR reviewed Mr. Pipes’s “entire case file” and “all Exhibits” yet still found “no documented evidence of advance IDT authorization.” J.A. 346; J.A. 433, 435. The AFBCMR presumably reviewed the Commanders’ certified statements and reasonably found them inadequate. Neither Commander avers that he gave Mr. Pipes the necessary advance authorization for IDT status, nor claims personal knowledge that another Commander did so. The conclusory, *post hoc* statements

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do not render the AFBCMR's finding unsupported by substantial evidence.

B

Mr. Pipes next argues that the lawful order requiring him to participate in the SFIP itself constituted authorization for IDT status. Like the AFBCMR and the Claims Court, we are unpersuaded by this argument. The Claims Court noted that Mr. Pipes “has not pointed to any source of law establishing an IDT status implicitly authorized in this way, and [Mr. Pipes’s] counsel admitted at oral argument that this situation was not necessarily contemplated by the relevant statutes and regulations.” *Decision*, 157 Fed. Cl. at 492. Mr. Pipes has also not provided any such authority before us.

Our decision in *Clark v. United States*, 656 F.3d 1317 (Fed. Cir. 2011) (*Clark II*) is instructive. In *Clark II*, National Guard members brought a class action seeking compensation for time spent taking correspondence courses that they were required to take by the Secretary of the Army and the Secretary of the Air Force. *Id.* at 1318–19. We affirmed a grant of summary judgment against the National Guard members because regulations prescribed by the respective Secretaries required “written authorization placing [a member] into a pay duty status” as a “prerequisite” for training to be compensable, and “none of the plaintiffs received written orders or authorizations from their state commanders in connection with any of the correspondence courses they took.” *Id.* at 1322 (citation omitted). That is, *Clark II* held that a requirement to

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participate in certain training does not *ipso facto* place a member of the armed forces into duty status if advance authorization for such status is a prerequisite prescribed by the Secretary but is not obtained.⁸

Mr. Pipes cites several non-binding cases and one case from one of our predecessor courts in support of his argument. Crucially, none of Mr. Pipes's cases address whether a lawful order to perform some activity automatically places a service member in duty status despite a lack of required preauthorization for such status. In *Skaradowski v. United States*, 471 F.2d 627, 629, 200 Ct. Cl. 488 (Ct. Cl. 1973) (*per curiam*), for example, a member of the Army Active Reserve was ordered in writing to active duty for training for a defined duration “unless . . . *extended by proper authority*.” The Army Board for the Correction of Military Records found that verbal orders of the reservist's commanding officer were insufficient evidence that his active duty had been extended. *Id.* at 629, 631. The Court of Claims disagreed, holding that the reservist's initial period of active duty was properly *extended* by verbal order, notwithstanding that the order was not confirmed in writing. *Id.* at 631. By contrast, the issue in our case is whether Mr. Pipes was authorized for duty status at all when performing his SFIP.

8. Mr. Pipes cites to and misreads our earlier decision in *Clark v. United States*, 322 F.3d 1358 (Fed. Cir. 2003) (*Clark I*), as determining that the National Guard members were “entitled to compensation for completing required correspondence courses in off duty time.” Appellant's Br. 34. We expressly noted in *Clark II* that our *Clark I* “opinion did not express an ultimate view on the merits of [the] claim for compensation.” 656 F.3d at 1321.

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Furthermore, unlike the formalistic reasoning of the military corrections board in *Skaradowski*, the AFBCMR here found that “the case turns on whether [Mr. Pipes] had prior commander authorization to be in a no pay/no points IDT status” regardless of the absence in Mr. Pipes’s case file of a completed Form 40A—the form directed by the AFMAN to be used in obtaining and documenting advance authorization for IDT. J.A. 346; *see* J.A. 250 ¶ 4.2.1.1; J.A. 257 ¶ 4.12.1.1; *see also* *Decision*, 157 Fed. Cl. at 491 (“[T]he lack of the [Air Force] Form 40A was not determinative for the [AFBCMR’s] decision . . .”). Mr. Pipes’s arguments concerning Form 40A therefore miss the point, as the AFBCMR’s decision did not turn on the absence of that form.

Accordingly, the AFBCMR’s conclusion that the order directing Mr. Pipes to participate in the SFIP did not itself authorize IDT status is not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

C

Finally, Mr. Pipes suggests that his stroke must have occurred while he was in duty status because the Department of Veterans Affairs (VA) has granted him service connection for residuals of the stroke. *See* Appellant’s Br. 24, 32, 40. But because of the different standards applicable to the VA’s inquiry for service connection, “the VA’s disability determinations are not ‘binding upon the court nor conclusive on the issue of disability retirement.’” *Gilbreth v. United States*, 94 Fed. Cl. 88, 97 (2010) (quoting *Finn v. United States*, 548 F.2d

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340, 342, 212 Ct. Cl. 353 (Ct. Cl. 1977)). Such differences are on full display in this case. By regulation, the VA will consider a “secondary condition” to be service connected if the disability “is proximately due to or the result of a service-connected disease or injury.” 38 C.F.R. § 3.310(a). In granting service connection for Mr. Pipes’s stroke, the Board of Veterans’ Appeals did not determine that Mr. Pipes’s stroke was incurred or aggravated during duty status. Rather, it merely found that the stroke was proximately caused by Mr. Pipes’s already service-connected hypertension. *See* J.A. 271–74; Appellee’s Br. 36–37 (citing J.A. 271–74). This finding has no bearing on the issue of Mr. Pipes’s duty status and whether he received the advance authorization required by the AFMAN for such status.⁹

* * *

After reviewing Mr. Pipes’s submissions, the AFBCMR ultimately found that Mr. Pipes provided no evidence that he was authorized for IDT status when

9. Mr. Pipes relatedly contends that a conflict exists between the applications of 10 U.S.C. § 1204 and 38 U.S.C. § 5107, the statutory “benefit of the doubt” rule applicable to claims for VA benefits. In obligating “the Secretary” to provide VA claimants with the benefit of the doubt in cases of approximately equipoised evidence, section 5107 refers to the Secretary of Veterans Affairs, not the Secretary of the Air Force or of any other military branch. *See* 38 U.S.C. § 101(1). And to the extent Mr. Pipes refers to the differing outcomes between the VA’s grant of service connection and the AFBCMR’s determinations regarding Mr. Pipes’s duty status, there is no “conflict” as just explained.

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performing the SFIP. We cannot say that this finding is arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

CONCLUSION

We have considered Mr. Pipes's remaining arguments but find them unpersuasive. We sympathize with the plight of Mr. Pipes. However, we discern no error in the decision under review before us. We therefore affirm the judgment of the Claims Court.

AFFIRMED

COSTS

No costs.

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**APPENDIX B — OPINION OF THE UNITED STATES
COURT OF FEDERAL CLAIMS,
FILED JANUARY 7, 2022**

UNITED STATES COURT OF FEDERAL CLAIMS

157 Fed.Cl. 483

MALCOLM PIPES,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. 15-1163C

|

Filed: January 7, 2022

MEMORANDUM OPINION

HERTLING, Judge

The plaintiff, Malcolm Pipes, seeks review of a decision of the Air Force Board for Correction of Military Records (“AFBCMR” or “the Board”). While in the U.S. Air Force (“USAF”) Reserve, the plaintiff was injured while participating in the Air Force’s Self-Paced Fitness Improvement Program (“SFIP”) between scheduled Unit Training Assemblies (“UTAs”). The AFBCMR denied him

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disability-retirement pay and benefits, finding that he was not in inactive-duty training (“IDT”) status at the time of his injury and thus was not injured in the line of duty, as required by the relevant statute to receive disability-retirement pay and benefits.

This case has been before the Board and this court on numerous occasions. After the case returned to the court from the most recent remand to the AFBCMR, the parties filed supplemental briefs in support of their cross-motions for judgment on the administrative record under Rule 52.1 of the Rules of the Court of Federal Claims (“RCFC”).

The plaintiff argues that he was in IDT status at the time of his injury because he was lawfully ordered to exercise in the SFIP between UTAs, and that the AFBCMR erred in holding otherwise. The defendant argues that the AFBCMR decision was not arbitrary and capricious and should be upheld.

The applicable Air Force guidance requires advance authorization for a reservist to be in IDT status. Because there is no evidence that the plaintiff was authorized for IDT, the AFBCMR found that he was not in IDT status at the time of his injury. The AFBCMR’s findings are consistent with the law and the record and, under the applicable standard of review, must be sustained.

The defendant’s motion for judgment on the administrative record is granted, and the plaintiff’s motion for judgment on the administrative record is denied.

*Appendix B***I. BACKGROUND****A. Facts¹**

Beginning in 1983, the plaintiff served in the USAF for approximately 16 years, consisting of seven years on active duty and nine in the USAF Reserve. (ECF 1, ¶ 7.) In 2004, while serving in the USAF Reserve, the plaintiff failed an annual fitness assessment and received a “poor” rating. (*Id.* ¶ 13.) As a result of that rating, the plaintiff received verbal counseling and was enrolled in the Air Force’s SFIP with orders to begin running five days a week between UTAs. (*Id.*)

On September 3, 2006, the plaintiff became ill while running in accordance with the SFIP between scheduled UTAs. (*Id.* ¶ 19.) In the early hours of September 4, he went to a hospital where his injury was diagnosed as a cerebrovascular accident, commonly referred to as a stroke. (*Id.*) Within days, the plaintiff notified the USAF of the diagnosis. (*Id.* ¶ 21.)

In November 2007, the USAF determined the plaintiff to be “medically disqualified for continued military duty”

1. For a full recitation of the facts, see Chief Judge Braden’s first memorandum opinion in this matter. *Pipes v. United States* (“*Pipes I*”), 134 Fed. Cl. 380, 382-86 (2017); *see also Pipes v. United States* (“*Pipes III*”), 791 F. App’x 910, 911-13 (Fed. Cir. 2019) (providing a summary of the facts). The facts here are only a background summary relevant to the parties’ supplemental briefs in support of their cross-motions for judgment on the administrative record.

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due to his stroke. (AR 749.²) He was transferred from the USAF Reserve to the Retired Reserve in 2008, with an effective retirement date of September 4, 2006. (AR 220; *see also* AR 370.)

B. Procedural History

In 2011, after receiving his USAF medical records, the plaintiff filed an application for correction of his military records with the AFBCMR. Among other things, the plaintiff requested that “[h]is Air Force Reserve medical and personnel records be corrected to reflect that he is permanently medically retired at 60 percent (or more) effective 4 September 2006.” (AR 41.) The AFBCMR denied relief, finding that “[i]nsufficient relevant evidence has been presented to demonstrate the existence of error or injustice.” (AR 46.)

In 2015, the plaintiff filed a complaint in this court seeking review of the Board’s rejection of his request for disability retirement. (ECF 1.) He alleged that, because he was participating in the SFIP, he was in IDT status at the time of his stroke and thus entitled to disability retirement. (*Id.* ¶¶ 41-44.) The court denied the defendant’s motion to dismiss and remanded the case to the AFBCMR for reconsideration due to the parties’ supplemental declarations of relevant witnesses and additional medical records not before the Board when it first ruled against the plaintiff. *Pipes I*, 134 Fed. Cl. 380.

2. Citations to the administrative record (ECF 97) are cited as “AR” with the pagination reflected in that record as filed with the court.

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On remand, an Air Force medical advisor concluded that it was “plausible that the [plaintiff’s] participation in vigorous training for his Fitness Assessment, during the 12-hour cycle of time between his alleged running activity and onset of stroke symptoms, contributed to the occurrence of a stroke on or about [September 4, 2006].” (AR 34-35.) The AFBCMR nevertheless denied relief because the SFIP was not undertaken in the line of duty. (AR 38.) The AFBCMR found that the plaintiff “was never lawfully ordered to participate in SFIP while in civilian status nor that he was in an IDT status when he did so participate.” (*Id.*)

After the AFBCMR issued its decision, this court granted judgment on the administrative record to the defendant. *Pipes v. United States* (“*Pipes II*”), 139 Fed. Cl. 538 (2018). The court agreed with the AFBCMR that participation in the SFIP while in non-duty status could not be mandated. *Id.* at 544-45. The court concluded that the AFBCMR’s determination—that the plaintiff “was never lawfully ordered to participate in SFIP while in civilian status nor that he was in an IDT status when he did so participate” (AR 38)—was not arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *Pipes II*, 139 Fed. Cl. at 545.

On the plaintiff’s appeal, the Federal Circuit reversed and held “that, to the extent their analysis turned on [the plaintiff’s] duty status at the time of his orders, both the AFBCMR and the Claims Court erred in concluding that [the plaintiff] was not lawfully ordered to perform the SFIP designed for him.” *Pipes III*, 791 F. App’x at 916.

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The Federal Circuit explained that “the argument that [the plaintiff] was in a non-duty status when ordered to perform his SFIP is no longer a valid rationale for denying his disability retirement.” *Id.* Although the relevant Air Force Instruction (“AFI”) “encouraged” SFIP participation, as a mandated lawful order, “the apparently *sui generis* SFIP designed for [the plaintiff] to perform when in civilian status went beyond recommendation and encouragement” *Id.* at 916 n.4. The Federal Circuit remanded the case to this court with instructions to remand the case to the AFBCMR for further assessment of the plaintiff’s request for correction of his military records. *Id.* at 916.

Following the remand from the Federal Circuit, the case was reassigned to the undersigned (ECF 51) and then was remanded to the AFBCMR for reconsideration in accordance with the Federal Circuit’s mandate (ECF 52).

The AFBCMR again denied relief to the plaintiff in May 2020. (AR 23.) It agreed with the Federal Circuit that the plaintiff had received a lawful order from his commander while in duty status but nonetheless found that “his stroke occurred during a non-duty, civilian status.” (AR 29.) The Board based its decision on the exhibits, the Air Force Reserve Command (“AFRC”) Supplement provisions on the SFIP, and the statutory definition of “inactive-duty training.” (*Id.*) The AFBCMR found that “a reservist’s participation in the SFIP between UTAs does not warrant automatic IDT status, even if ordered during [*sic*] while in a duty status.” (*Id.*) It further found “no evidence ... that the [plaintiff] requested or the

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[plaintiff's] commander ever attempted to place him in an authorized IDT status between UTAs to exercise.” (AR 30.) The AFBCMR therefore found that the plaintiff did not warrant an “In Line of Duty” determination and subsequent disability-retirement processing. (*Id.*)

On consideration of the parties’ cross-motions for judgment on the administrative record following the Board’s decision, the Court found that the Air Force’s argument that the SFIP order was lawful, yet unenforceable, was inconsistent with the Federal Circuit’s decision. *Pipes v. United States* (“*Pipes IV*”), 150 Fed. Cl. 76, 82-84 (2020). Although the Court rejected the Board’s decision, the plaintiff was not awarded the relief he sought. Because it had rejected the plaintiff’s claim on another ground, the AFBCMR had not considered whether the relevant provision of the Air Force Manual (“AFMAN”) governing IDT status, AFMAN 36-8001, *Reserve Personnel Participation and Training Procedures* (Jan. 22, 2004), applied to both subparagraphs of the statutory definition of IDT.³ *Id.* at 86-87. If the AFMAN applied only to the first subparagraph of the statute and if the plaintiff could show that his service was authorized under the second subparagraph, then the plaintiff would not need to

3. “Inactive-duty training” is statutorily defined as “(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and (B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.” 10 U.S.C. § 101(d)(7)(A) & (B).

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meet the AFMAN's administrative prerequisites for IDT status. The Court remanded the case to the AFBCMR so that it could consider the issue in the first instance.⁴ *Id.*

In December 2020, the AFBCMR again denied the plaintiff relief. (AR 12.) It found that the AFMAN's provisions governing IDT do apply to both subparagraphs of the statutory definition of IDT. (AR 21.) Because service "members must have the commander's (or designee) authorization in advance to perform an IDT, paid or unpaid," the plaintiff cannot establish that he was in IDT status while participating in the SFIP. (*Id.*) Despite the lawful order for the plaintiff to participate in the SFIP between UTAs, the AFBCMR found "no documented evidence of advance IDT authorization by the commander (or designee) for exercising." (*Id.*) The commander's order to participate in the SFIP, the AFBCMR found, "does not automatically authorize IDT, paid or unpaid," regardless of whether an AF Form 40A is required for IDT status. (*Id.*) Without evidence of the commander's authorization, the AFBCMR declined to correct the plaintiff's records and award him disability retirement. (*Id.*)

After the AFBCMR issued its December 2020 decision, the plaintiff filed a supplemental brief in support of his motion for judgment on the administrative record. (ECF 79.) With his supplemental brief, he attached a report written by retired Air Force Colonel Larry D.

4. In *Pipes II*, Judge Braden applied the AFMAN's provisions governing IDT to the plaintiff but did not address the issue of whether they should not apply to the plaintiff, as the plaintiff argued in *Pipes IV* and argues now. See *Pipes II*, 139 Fed. Cl. at 543-44.

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Youngner. Col. Youngner's report purportedly supported the plaintiff's position that he was in IDT status when performing the SFIP between UTAs. The report, however, had not been submitted to the AFBCMR, so it had not considered the report. The Court held a status conference at which the plaintiff was informed that because Col. Youngner's report was not part of the administrative record, it could not be considered in support of the plaintiff's motion for judgment. Thereafter, on the plaintiff's unopposed motion for remand, the Court remanded the case to the AFBCMR for the limited purpose of allowing the plaintiff to submit Col. Youngner's report to the AFBCMR for consideration. (ECF 82.)

In the AFBCMR's most recent decision in August 2021, it again denied the plaintiff relief. (AR 1.) The AFBCMR reviewed all submitted exhibits, Col. Youngner's report, the plaintiff's rebuttal to various Air Force advisory opinions received by the Board regarding Col. Youngner's report, and a supplemental report prepared by Col. Youngner. (AR 8.) The AFBCMR's determination, however, did not change. (AR 8-11.)

Following the AFBCMR's December 2020 and August 2021 decisions, the parties have filed supplemental briefs in support of their cross-motions for judgment on the administrative record. (ECF 100 & 104.) The Court heard oral argument on December 9, 2021.

II. JURISDICTION AND STANDARD OF REVIEW

The Tucker Act, 28 U.S.C. § 1491(a)(1), authorizes this court to exercise jurisdiction over claims against the

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United States based on money-mandating statutes and regulations. *Metz v. United States*, 466 F.3d 991, 995-98 (Fed. Cir. 2006). A statute is money-mandating when it is “reasonably amenable to the reading that it mandates a right of recovery in damages.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). The statute governing military retirement for disability, 10 U.S.C. § 1201, is a money-mandating statute. *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005).

As a claim for military-retirement pay, the plaintiff’s claim falls within the court’s jurisdiction. *Pipes I*, 134 Fed. Cl. at 388, 393-95 (finding jurisdiction over the plaintiff’s claim and denying the defendant’s motion to dismiss).

The parties have cross-moved for judgment on the administrative record under RCFC 52.1. In consideration of such motions, the court’s review is limited to the administrative record, and the court makes findings of fact as if it were conducting a trial on a paper record. *See Bannum, Inc. v. United States*, 404 F.3d 1346, 1354 (Fed. Cir. 2005); *see also Young v. United States*, 497 F. App’x 53, 58-59 (Fed. Cir. 2012) (per curiam) (applying the standard of review articulated in *Bannum* to a motion for judgment on the administrative record involving review of a decision of the AFBCMR), *cert. denied*, 569 U.S. 964, 133 S.Ct. 2036, 185 L.Ed.2d 898 (2013). The court must determine whether a party has met its burden of proof based on the evidence contained within the administrative record. *Bannum*, 404 F.3d at 1355. Genuine issues of material fact will not foreclose judgment on the administrative record. *Id.* at 1356.

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The court must uphold a “decision of the AFBCMR unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence.” *Barnick v. United States*, 591 F.3d 1372, 1377 (Fed. Cir. 2010). The court cannot substitute its judgment for that of the military departments, even if “reasonable minds could reach differing conclusions on the same evidence.” *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983). Although the scope of review is narrow, the court must determine “whether [the agency] examined ‘the relevant data’ and articulated ‘a satisfactory explanation’ for [its] decision, ‘including a rational connection between the facts found and the choice made.’” *Sharpe v. United States*, 935 F.3d 1352, 1358 (Fed. Cir. 2019) (alterations in original) (quoting *Dep’t of Comm. v. New York*, __ U.S. __, 139 S. Ct. 2551, 2569, 204 L.Ed.2d 978 (2019)).

III. DISCUSSION⁵

To qualify for disability retirement, a military member’s disability must, in relevant part, be “a result of an injury, illness, or disease incurred or aggravated in the line of duty ... while performing active duty or inactive-duty training.” 10 U.S.C. § 1204(2)(B)(i). The plaintiff was not in active-duty status at the time of his injury. The only other option under the law by which he can qualify for disability retirement is IDT status. The issue before the Board and this Court is whether the plaintiff was in IDT status at the time of his stroke. If the plaintiff was not in

5. The Court reviews both the AFBCMR’s December 2020 decision (AR 12-22) on remand after *Pipes IV* and its August 2021 decision (AR 1-11) responding to Col. Youngner’s report.

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IDT status when performing his SFIP at the time of his stroke, he is not entitled to a disability retirement; if he was in IDT status, he is entitled to disability retirement.

The AFBCMR's December 2020 and August 2021 decisions found that the plaintiff was not in IDT status at the time of his stroke. The plaintiff argues that those decisions were arbitrary, capricious, and an abuse of discretion. The defendant argues that the AFBCMR's decisions are supported by the law and evidence and are not arbitrary or capricious and not an abuse of discretion. The parties dispute whether the lawful order to participate in the SFIP between UTAs placed the plaintiff in IDT status while he exercised pursuant to that order.

A. IDT Status

Title 10 of the U.S. Code defines "inactive-duty training" in two subparagraphs, providing that IDT refers to both:

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

10 U.S.C. § 101(d)(7)(A) & (B).

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In *Pipes IV*, the Court did not decide whether the plaintiff had been in IDT status at the time of his stroke because an issue remained for the AFBCMR to consider.⁶

6. The plaintiff argues that the Court has already found that the plaintiff was in IDT status while participating in the SFIP. No court has made that determination.

The Federal Circuit eliminated one basis for finding the plaintiff to have been in a non-duty status at the time of his stroke, explaining that “the argument that [the plaintiff] was in a non-duty status when ordered to perform his SFIP is no longer a valid rationale for denying his disability retirement.” *Pipes III*, 791 F. App’x at 916. The Federal Circuit held “that, to the extent their analysis turned on [the plaintiff’s] duty status at the time of his orders, both the AFBCMR and the Claims Court erred in concluding that [the plaintiff] was not lawfully ordered to perform the SFIP designed for him.” *Id.* The Federal Circuit specifically noted that the plaintiff was “in civilian status” while performing his SFIP. *Id.* at 916 n.4. The Court will not treat that reference by the Federal Circuit as a specific holding on the issue but notes that this reference appears to undercut the plaintiff’s assertion that the question of the plaintiff’s status in IDT has been resolved already in his favor.

When the case came back to this Court from the AFBCMR after remand following the Federal Circuit’s decision, the Court vacated the AFBCMR’s decision, finding it inconsistent with the Federal Circuit’s holding: “Although the Federal Circuit’s opinion does not expressly answer the question of whether the plaintiff was in IDT status at the time of his injury, the Board’s conclusion that he was not is inconsistent with the Federal Circuit’s decision.” *Pipes IV*, 150 Fed. Cl. at 78. The plaintiff relies on that sentence from the introduction of the Court’s 2020 memorandum opinion to buttress his argument that the issue of the plaintiff’s status has already been resolved. That sentence, however, was not intended to imply that the Federal Circuit’s opinion required a finding that the plaintiff was in IDT status at the time of his stroke. Rather, as the Court went on to explain in its opinion, the AFBCMR’s decision was inconsistent

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The AFBCMR had found that the plaintiff was not authorized for IDT and never considered whether the relevant provisions of the AFMAN applied to the IDT claimed by the plaintiff. *Pipes IV*, 150 Fed. Cl. at 86-87. The Court again remanded the case for the AFBCMR to consider whether the provisions of the AFMAN governing IDT applied to both subparagraphs of the statutory definition of IDT, 10 U.S.C. § 101(d)(7). *Id.*

1. Air Force Manual

Chapter four of AFMAN 36-8001 establishes administrative prerequisites for IDT status. The AFMAN provides that all IDT must “[b]e performed for pay and points, or points only”⁷ AFMAN 36-8001, ¶ 4.2.1.3. All IDT must “be approved in advance, in writing, by the [service] member’s supervisor with an information copy to the appropriate assigned Program Manager, in advance of performing any IDT period.” *Id.* ¶ 4.2.1.2. “The authorizing

with the Federal Circuit’s decision for a different reason. *Id.* at 82-84. The Air Force Evaluation, on which the AFBCMR relied, had argued that the lawful order to participate in the SFIP between UTAs was unenforceable. *Id.* at 82. The Court found that position to be inconsistent with the Federal Circuit’s holding—a lawful order must be enforceable. *Id.* at 83. That determination also does not reflect a judicial finding that the plaintiff was in IDT status at the time he suffered his stroke. The question of whether the plaintiff was in IDT status at the time of his injury remains undecided and is the focus of this decision.

7. “Points are a unit of measurement of tracking a [reserve] member’s participation. They are also used to calculate the amount of participation for retirement purposes.” AFMAN 36-8001, ¶ 2.1.

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official for IDT is the commander of the assigned unit, the [individual Mobilization Augmentee] program manager, supervisor, or a representative designated in writing.” *Id.* ¶ 4.4. Although the AFMAN prohibits paid IDT periods of less than four hours or points-only IDT periods of less than two hours, the program manager could “designate activities for which the member may accumulate time spent (over 1 or more days) until reaching the 4-hour standard for one point.” *Id.* ¶¶ 4.9-4.9.1. The AF Form 40A is the designated form to certify all types of IDT, except certain training not relevant here. *Id.* ¶ 4.12.1.

a. Scope

The plaintiff argues that he was in IDT status for no pay and no points while exercising for the SFIP between UTAs. (ECF 100 at 9 (citing AR 3098).) Capt. Pipes averred in July 2021 that “[t]he 917th Wing Commander expressly stated in a mass briefing that pay and points were not authorized, because the time period required to complete the exercise fell below the threshold period of both 2 and 4 hours.” (AR 3098.) Because the AFMAN provides that IDT must be for pay and points or for points only, AFMAN 36-8001, ¶ 4.2.1.3, the plaintiff argues that the AFMAN’s provisions apply only to the first half of the statutory definition of IDT, 10 U.S.C. § 101(d)(7) (A), which cross-references a statute providing for IDT compensation.

According to the plaintiff, the IDT authorized by § 101(d)(7)(B) and 10 U.S.C. § 12315 falls outside the AFMAN’s scope. He argues that these statutes provide

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for IDT even when the reservist is not receiving pay or points or both. (ECF 100 at 12-13.) First, the second half of the statutory definition of IDT, § 101(d)(7)(B), provides that IDT includes “special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.” 10 U.S.C. § 101(d)(7)(B). The plaintiff reads the word “voluntary” in this portion of the statute to mean without pay. Second, 10 U.S.C. § 12315 provides explicitly for reserve duty “with ... consent, without pay.” *Id.* § 12315(a)(2). The plaintiff reads these provisions to authorize IDT without pay or points or both.

The plaintiff argues that pursuant to these statutory provisions he need not meet the AFMAN’s requirements governing IDT because the *sui generis* order from his commander to him to participate in the SFIP placed him in IDT status pursuant to those statutory provisions, which are outside the scope of the AFMAN’s IDT provisions covering IDT for pay or points. According to the plaintiff, because IDT is available when the reservist is not receiving pay or points or both, the AFMAN’s IDT-status administrative prerequisites, which expressly require IDT for pay or points, do not apply to this form of IDT he was in when he was accruing no pay and no points. In sum, the plaintiff reads the AFMAN’s provisions governing IDT to apply only to 10 U.S.C. § 101(d)(7)(A), the first subparagraph of the statutory definition of IDT.

Although the Court left the issue for the AFBCMR to consider in the first instance, in its 2020 memorandum

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opinion the Court conducted its own interpretative analysis without making a final determination on the issue. *Pipes IV*, 150 Fed. Cl. at 84-86. The Air Force's position on remand is consistent with the Court's analysis of the statutory text. The AFBCMR reviewed and agreed with the Air Force Evaluation, which interpreted the word "voluntary" in § 101(d)(7)(B) to refer to an exercise of free will, not to IDT without pay.⁸ (AR 21; *see also* AR 2593-94.) Accordingly, in its December 2020 decision, the AFBCMR found that "the AFMAN 36-8001 administrative requirements apply to both 10 U.S.C. [§] 101(d)(7), subparagraphs (A) and (B)." (AR 21.)

The Air Force Evaluation also found that "[t]he AFMAN implements 10 U.S.C. [§] 101(d)(7) by providing the procedures for scheduling and authorizing IDTs and the method for ensuring the proper accounting for each IDT." (AR 2594.) The Air Force found that, even if § 101(d)(7)(B) were meant to apply to IDT without pay, the AFMAN would still apply because 10 U.S.C. § 12315 explicitly provides that "[d]uty without pay shall be considered for all purposes as if it were duty with pay." 10 U.S.C. § 12315(a). (AR 2594-95.) The AFBCMR agreed with the Air Force's conclusions on the scope of the AFMAN. (AR 21.)

8. Each time the AFBCMR considers a request for correction of military records, an Air Force Judge Advocate submits an advisory memorandum to the Board. When the AFBCMR summarizes the memorandum, it refers to it as the Air Force Evaluation. In this opinion, the Court will refer to the AFRC Judge Advocate memoranda as "Air Force Evaluations."

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The plaintiff has not demonstrated that the AFBCMR's interpretation is contrary to law. The AFBCMR's interpretation harmonizes the IDT statutes with the AFMAN. The Court finds the AFBCMR's conclusions regarding the scope of the AFMAN's coverage on IDT to be consistent with the relevant statutes.

b. Authorization

AFMAN 36-8001 is the designated publication governing "Reserve Personnel Participation and Training Procedures" issued "by order of the Secretary of the Air Force." (AR 2467 (formatting modified).) The Secretary requires that all IDT "be approved in advance, in writing, by the [service] member's supervisor with an information copy to the appropriate assigned Program Manager, in advance of performing any IDT period." AFMAN 36-8001, ¶ 4.2.1.2.

Having concluded that the AFMAN's provisions governing IDT status applied, the AFBCMR rested its decision that the plaintiff was not in IDT status on the AFMAN's authorization requirement for IDT. "Although the commander issued the [plaintiff] a lawful order to perform the SFIP between UTAs, after a review of the entire case file, to include the [plaintiff's] rebuttal," the AFBCMR found, "no documented evidence of advance IDT authorization by the commander (or designee) for exercising." (AR 21.) The AFBCMR found that the plaintiff "failed to provide evidence that reflects his commander ... authorized a no pay/no point IDT status in order to perform the ordered exercise regime." (*Id.*)

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Without evidence of advance authorization, the AFBCMR recommended against correcting the plaintiff's records. (*Id.*)

The plaintiff raises several objections concerning the AF Form 40A and a supplement to an AFI. The AFBCMR, however, did not rely on either in making its determination—this case is all about advance authorization.

The AFMAN requires reservists to use AF Form 40A to certify all types of IDT, other than exceptions not relevant here. AFMAN 36-8001, ¶ 4.12.1. The plaintiff argues that an AF Form 40A is not required for placement in IDT status. (ECF 100 at 8-9, 14-15.) The May 2021 Air Force Evaluation agreed that “the Form 40A is the tool used to memorialize the order and duty performed, but it is the commander or the commander's representative, not the form, that authorizes the IDT.” (AR 2845.) The AFBCMR's December 2020 decision noted that the record contained no completed AF Forms 40A for any of the relevant SFIP periods. (AR 21.) The AFBCMR, however, found that, even if an AF Form 40A was not required for placement in IDT, “the case turns on whether the [plaintiff] had prior commander authorization to be in a no pay/no points IDT status.” (*Id.*) Because the lack of the AF Form 40A was not determinative for the Board's decision, the plaintiff's argument based on the absence of the AF Form 40A does not undercut the AFBCMR's rejection of the plaintiff's claim.

The plaintiff also objects to the AFBCMR's interpretation of AFRC Supplement 1 to AFI 10-248. The

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AFBCMR found that the AFRC's Supplement prohibited cumulative AF Form 40As.⁹ (ECF 100 at 10-12.) The May 2021 Air Force Evaluation opined that the plaintiff's command could not have approved a cumulative AF Form 40A, in part, because two paragraphs of Supplement 1 prohibited it. (AR 2845-46.) The AFBCMR found that only one of those provisions applied to traditional reservists like the plaintiff; namely, paragraph 6.4.7 applied. (AR 10.) Paragraph 6.4.7 provides, "Members will not be placed on orders for the sole purpose of participation in the [Healthy Living Workshop/Fitness Improvement Program]." (*Id.* (quoting AFRC Supplement 1, AFI 10-248, ¶ 6.4.7).) The AFBCMR noted, however, that "one could interpret that the two paragraphs do not apply in the [plaintiff's] case, as he was a traditional reservist." (*Id.*) Apparently recognizing some uncertainty over the applicability of the AFRC Supplement to the AFI, the AFBCMR did not rest its decision on this AFRC Supplement. It found that "even if one would find the two paragraphs did not apply to a traditional reservist, ... a prior authorization for all IDTs is necessary." (*Id.*) Accordingly, the plaintiff's refutation of the putative application of the AFRC Supplement to his case does not undercut the Board's rejection of his claim.

In its August 2021 decision, the AFBCMR agreed with Col. Youngner that it has "the authority to correct an administrative error of the wing regarding the AF Form 40s to award the [plaintiff] IDT points." (AR 10.)

9. For specifically designated activities, reserve members may accumulate time spent in the activity, even over multiple days, until reaching the four-hour standard for one point. AFMAN 36-8001, ¶ 4.9.1.

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The AFBCMR's finding that cumulative AF Form 40As were prohibited was not dispositive in determining that the plaintiff was not in IDT status at the time of his injury, but the AFBCMR did rely on the prohibition to respond to Col. Youngner's objection regarding the AFBCMR's authority. Because it found that cumulative AF Form 40As were prohibited, the Board found that there was no administrative error to correct. (*Id.*) Although the plaintiff argues that those findings are arbitrary and capricious (ECF 100 at 14-15), this issue goes to the hypothetical relief available had the AFBCMR found the plaintiff to have been in IDT status at the time of his injury. The AFBCMR discussed the issue solely to respond to the plaintiff's submission of Col. Youngner's report, and that discussion does not undercut the AFBCMR's decision regarding the plaintiff's duty status.

As previously noted, the Board determined that the AF Form 40A is not required for authorization of IDT. (AR 2845.) The plaintiff agrees. (ECF 100 at 8-9.) As a result, each of the plaintiff's objections regarding the AF Form 40A is ultimately not relevant to the threshold question of whether the plaintiff had advance authorization for IDT status, and the AFBCMR did not deny relief on the basis that the plaintiff had not completed an AF Form 40A.

To show advance authorization, the plaintiff can point only to the order to participate in the SFIP. The plaintiff argues that the *sui generis* lawful order to participate in the SFIP between UTAs authorized IDT for no pay and no points. (ECF 100 at 12-14.) The plaintiff has not pointed to any source of law establishing an IDT status implicitly

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authorized in this way, and the plaintiff's counsel admitted at oral argument that this situation was not necessarily contemplated by the relevant statutes and regulations. (See Oral Arg. at 1:27:25 to 1:27:35.)

Considering other similar orders given to reserve members for compliance between UTAs, the Court finds that accepting the plaintiff's argument would run counter to typical Air Force operations performed by reservists. The May 2021 Air Force Evaluation notes that "[r]eservists are ordered to update medical records, to retrieve and provide records to their command, complete medical readiness requirements, finish on-line training, certify licensing status, complete required military professional education, complete [Air Force Specialty Code] qualification requirements, etc. and often by a certain date as ordered by their commander." (AR 2845.) These duties extend beyond the scheduled duty periods but do not place reservists in an IDT status. (*Id.*) While the plaintiff's order was *sui generis* for the normally "encouraged" SFIP, orders requiring reservists to perform other duties between UTAs do not appear to be unique. To rule for the plaintiff could have broad implications for other types of inter-UTA orders given to reservists.

Without pointing to any law supporting its position or undermining the AFBCMR's, the plaintiff has failed to show that the AFBCMR acted improperly.¹⁰ The Court is

10. The plaintiff also alleges that the defendant has acted in bad faith, but he has not presented any evidence supporting such a claim. (See ECF 100 at 5, 14-15.)

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bound by a deferential standard of review, under which the AFBCMR's decision must be upheld "unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence."¹¹ *Barnick*, 591 F.3d at 1377. The AFBCMR correctly pointed out that there is no evidence in the record that the plaintiff had advance authorization for IDT status, as required by the AFMAN. The AFBCMR's reasoning is consistent with the record and the law, including the previous opinions in this case of the Federal Circuit and this court.

2. Colonel Youngner's Report

To rebut the AFBCMR's December 2020 decision, the plaintiff filed with his supplemental brief in this

11. In arguing that the AFBCMR is not entitled to *Chevron* deference in this case, the plaintiff appears to conflate *Chevron* deference with the standard of review applied to decisions of military-records corrections boards in this court. (See ECF 100 at 4-6 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).) The defendant relies not on *Chevron* deference but on the deferential standard of review applied by this court to decisions of military-records corrections boards. (ECF 104 at 9 ("While this case certainly involves interpretation of statutes and regulations administered by the military, and deference is therefore due the agency's interpretation, the standard of review applied by this Court to military pay cases goes beyond statutory interpretation and extends to application of law to facts and factual determinations.").) The plaintiff has provided no valid basis for deviating from that standard. See *Sharpe*, 935 F.3d at 1358-59 (discussing the standard of review applied to decisions of military-records corrections boards); see also *Heisig*, 719 F.2d at 1156.

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court a report written by Col. Youngner. (ECF 79-1.) The report was written after the December 2020 decision, so it was not part of the administrative record. The Court granted the plaintiff's unopposed motion for remand to the AFBCMR so that it could review and consider Col. Youngner's report. (ECF 82.) The AFBCMR conducted a further review of all exhibits, Col. Youngner's report, the plaintiff's rebuttal to the advisory opinions received by the Board, and Col. Youngner's supplemental report, but the AFBCMR "remain[ed] unconvinced the evidence presented demonstrates error or injustice." (AR 8.)

On remand, the AFBCMR responded to each of Col. Youngner's objections to the Board's December 2020 decision. (AR 8-10.) In responding to Col. Youngner's report, the AFBCMR again found that the AFMAN's administrative prerequisites for IDT status applied to the plaintiff, that the lawful order to participate in the SFIP between UTAs did not automatically place the plaintiff in IDT status, and that "prior authorization for all IDTs is necessary." (AR 9-10.)

The Court has already determined that the AFBCMR's conclusions in both its December 2020 and August 2021 decisions regarding the applicability of the AFMAN and the lack of authorization are consistent with the record and the law, and that the issues concerning the AF Form 40A are not relevant to those conclusions. *Supra*, III.A.1.

Aside from the duty-status issue, Col. Youngner also argued that the AFBCMR "never fully addressed that the 917th Wing Reserve Medical Units neglected to enforce

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medical screening standards and neglected to complete [line-of-duty] requirements after receiving information of Capt Pipes' stroke in September 2006." (ECF 79-1 at 30.) To respond to this objection, the AFBCMR sought an advisory opinion from the Surgeon General of the AFRC. The Board's request for the advisory opinion resulted in the defendant moving to extend the remand. (ECF 87.) In opposition, the plaintiff argued that the advisory opinion was for an "ancillary issue"; the advisory opinion "has no bearing on whether Plaintiff's disability retirement should be approved" (ECF 90 at 2.) The Court granted the extension because the AFBCMR had determined that it needed the additional advisory opinion to respond to Col. Youngner's report, as required by the remand order. (ECF 93.)

In his supplemental brief, the plaintiff again argues that the medical-advisory opinion exceeded the scope of the Court's remand order. (ECF 100 at 20.) He requests that the opinion either be stricken from the record or given no weight. (*Id.*) The defendant now concedes that the question of whether medical squadron personnel met standards of care is an ancillary issue. (ECF 104 at 14.)

The AFBCMR explained that the medical-advisory opinion was necessary to address Col. Youngner's objection to the medical care afforded to the plaintiff, and "the Court order specifically asked the AFBCMR to consider the applicant-provided report." (AR 9.) Although the AFBCMR noted that all three medical-advisory opinions in this case have recommended denying the plaintiff's request, the medical-advisory opinion does

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not appear to be the reason relief has been denied to the plaintiff by the Board. (*See id.*) Reiterated throughout the decision, the reason for denying relief was the lack of advance authorization for IDT. (AR 9-10.)

The Court finds that, although the AFBCMR followed the Court's remand order, the issue addressed by the Surgeon General's advisory opinion is ancillary, as both parties agree. The AFBCMR's conclusions on this issue have no bearing on whether the plaintiff qualifies for disability retirement.¹²

B. Judicial Estoppel

Judicial estoppel “prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000)). The Federal Circuit has explained the three factors informing a court's judicial-estoppel determination:

12. The plaintiff argues that the most recent medical-advisory opinion contradicts the December 2017 medical-advisory opinion, “which concluded that there was medical negligence on the part of the 917th medical unit” (ECF 100 at 7 (emphasis omitted).) The December 2017 opinion, however, did not find that the military medical providers were negligent. (*See generally* AR 1970-78.) The Court declines to resolve any dispute over the medical-advisory opinions because they are ancillary to the issue presented by the plaintiff's claim.

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The determination of whether a party's inconsistent legal positions constitute judicial estoppel is informed by three factors, which the Supreme Court did not intend to be exclusive: (1) whether the "party's later position [is] 'clearly inconsistent' with its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (modifications in original) (quoting *New Hampshire*, 532 U.S. at 750-51, 121 S.Ct. 1808 (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982))).

The plaintiff argues that the "[d]efendant should be estopped from continuing its approach of judicial whack-a-mole" (ECF 100 at 17.) According to the plaintiff, the "[d]efendant is clearly and deliberately changing positions according to the exigencies of the moment and it has consistently done so over the course of the last several years of litigation." (*Id.* at 16.) Specifically, the plaintiff asserts that the AFBCMR first relied on its finding that

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the SFIP order was unlawful, but that it now relies on additional IDT requirements not previously raised. (*Id.* at 15-17.)

The defendant has not taken inconsistent positions in this case. On each remand, the AFBCMR has reconsidered the plaintiff's claim pursuant to the court's remand orders. In its May 2018 decision, the AFBCMR ended its analysis when it determined that the plaintiff could not be legally mandated to participate in the SFIP. (AR 37-38.) After the Federal Circuit rejected that basis for denying relief, the AFBCMR in its May 2020 decision determined that there was no evidence that the plaintiff had authorization for IDT status between UTAs to exercise, even as a lawful order. (AR 29-30.) Since the May 2020 decision, the AFBCMR has consistently asserted that position. (*See* AR 21 (December 2020 decision), 8-10 (August 2021 decision).) In December 2020, the AFBCMR considered on remand the applicability of the AFMAN's IDT requirements as directed by the order of this Court. *See Pipes IV*, 150 Fed. Cl. at 86-87 (explaining the issue remaining for the AFBCMR to resolve in the first instance).

By following the remand orders in this case, the defendant has not engaged in "judicial whack-a-mole." The Court finds no basis for judicially estopping the AFBCMR from determining that the plaintiff had to have advance authorization to be placed in IDT status.

IV. CONCLUSION

The AFBCMR found that the relevant provisions of the AFMAN apply to all IDT and require advance

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authorization for a service member to be in IDT status. The plaintiff has not presented any evidence that he was authorized for IDT, except the order to participate in the SFIP. Applying the AFMAN, the AFBCMR noted the lack of evidence and found that the SFIP order did not automatically place the plaintiff in IDT status while participating in the SFIP. The AFBCMR's findings are consistent with the record and are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Accordingly, the defendant's motion for judgment on the administrative record is granted, and the plaintiff's motion for judgment on the administrative record is denied.

The Court will issue an order in accordance with this memorandum opinion.

**APPENDIX C — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
DECIDED NOVEMBER 15, 2019**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2019-1189

MALCOLM PIPES,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal
Claims in No. 1:15-cv-01163-SGB, Senior Judge Susan
G. Braden.

Begore PROST, *Chief Judge*, CLEVINGER and MOORE,
Circuit Judges.

CLEVINGER, *Circuit Judge.*

Decided: November 15, 2019

Captain Malcolm W. Pipes (“Pipes”) appeals from
the final judgment of the United States Court of Federal
Claims (“Claims Court”) granting Judgment on the

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Administrative Record to the United States on his complaint. *Pipes v. United States*, 139 Fed. Cl. 538 (2018). For the reasons set forth below, we reverse the Claims Court's final judgment and remand with instructions to remand the case to the Air Force Board for Correction of Military Records for further assessment consistent with this opinion.

BACKGROUND**I. Facts**

Pipes enlisted in the United States Air Force (“USAF”) in 1983. He served on active duty for seven years and in the United States Air Force Reserve for nine years. In 2004, while Pipes was in the Reserve, the Air Force established stringent physical fitness standards, which subjected Reserve members to an annual scored fitness assessment. All members of the Air Force were notified that they must be physically fit to support the Air Force mission. J.A. at 91. Members who failed to satisfy physical fitness requirements would be subject to discharge. On October 1, 2004, Pipes was informed by his Flight Commander that members who score at the marginal or poor fitness levels would be entered into the Self-paced Fitness Improvement Program (“SFIP”). On November 7, 2004, Pipes failed his fitness assessment which was conducted during a scheduled Unit Training Assembly (“UTA”). UTA is prescribed by the Secretary of the Air Force as a form of Inactive Duty Training (“IDT”). J.A. at 189. During that UTA, Pipes was formally enrolled in the SFIP and was given a written order from

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his Commander to “exercise at least five times per week,” performing the exercises specified by the SFIP, which included pushups, crunches, and a 1.5 mile run.

Shortly before that first fitness assessment, Pipes began receiving elevated blood pressure readings. Though Pipes continued his engagement in the SFIP, he informed his Commander that he was having blood pressure issues and trouble with the running portion of the SFIP. Pipes’ Squadron Commander expressed concern about Pipes’ high blood pressure and was concerned a vigorous fitness program could lead to injury, stroke, and heart attack. However, in August 2005, Pipes failed a second fitness assessment and was once again given orders to exercise five days per week to address his repeat fitness assessment failures.

On January 6, 2006, due to his continuously elevated blood pressure readings, Pipes reported high blood pressure as a concern on his annual USAF physical screening. On February 5, 2006, Pipes was evaluated by Dr. Granger, a USAF medical doctor. Pipes produced medical records to Dr. Granger from his civilian physician showing elevated blood pressure as well as a USAF form completed by his civilian physician stating her concerns regarding Pipes’ continued participation in the SFIP. Dr. Granger’s evaluation demonstrated that Pipes had elevated blood pressure, which ranged between 151/94 when sitting to 146/99 when standing. Further, Dr. Granger rendered a diagnosis of hypertension and obesity.¹ Unlike Pipes’ civilian physician, Dr. Granger

1. Both Pipes’ Squadron Commander, John Rowlands, and Logistics Support Squadron Commander, John Snowman, assert

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did not relay this health information to Pipes and instead communicated to him the need for healthy living and for additional exercise. According to Pipes' Commander, the standing policy of his wing unit was to bar any member observed with untreated hypertension from exercise in a SFIP. Under the existing command, the medical squadron was ordered to advise the Commander of any member who should so be barred. In Pipes' case, his Commander concluded that the medical squadron failed to follow the standing orders. As a result, Pipes was not excused from the SFIP he had been ordered to perform.

After being cleared for continued participation in the SFIP by Dr. Granger, Pipes participated in a third fitness assessment that same day. However, Pipes became ill during the run portion and was unable to complete the assessment. Pipes participated in additional fitness assessments on May 7, 2006 and July 10, 2006, both of which he also failed. After the July 2006 fitness assessment, Pipes reported to Major Lara Rowlands, the unit fitness advisor, that he was running in accordance with the SFIP, but that he was not seeing any improvement and that he often felt ill after running. Nevertheless, the medical squadron again failed to remove Pipes from the SFIP.

On September 3, 2006, Pipes became ill while running in accordance with the SFIP and experienced "a headache, difficulty breathing, dizziness, an impression of being

in their affidavits that "Capt. Pipes was not obese, and his correct BMI was 28.9 as recorded in his physical fitness assessment records for 4 Feb 2006." J.A. at 74; *see also* J.A. at 58.

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overheated, and a general feeling of malaise.” J.A. at 14 (internal citation omitted). These symptoms continued into the night, requiring Pipes to go to the hospital around 2:00 AM on September 4, 2006. Pipes was diagnosed with a Cerebrovascular Accident, *i.e.*, a stroke.

On September 6, 2006, Pipes contacted his unit concerning the stroke. On December 5, 2006, without performing a Line of Duty (“LOD”) determination, the USAF informed Pipes that “he was not eligible to receive disability benefits, because his stroke did not occur during inactive duty training.” J.A. at 14.

On November 26, 2007, Pipes was determined by the USAF to be medically disqualified for continued military duty. However, in lieu of an administrative discharge, the USAF informed Pipes that he was eligible for retirement. On January 30, 2008, Pipes applied for transfer to the Retired Reserves in lieu of administrative discharge for physical disqualification. On September 15, 2008, Pipes was assigned to the Retired Reserves, and the assignment was backdated, effective September 4, 2006. In October 2008, Pipes was informed that his retirement from the USAF was approved. However, Pipes, who was forty-seven years old at the time, would not be able to obtain the approved retirement benefits until he was sixty years old.

On or about October 15, 2010, Pipes obtained a copy of his USAF medical records. Upon review of these records, Pipes learned for the first time that during his February 4, 2006 medical clearance exam, the USAF Medical Examiner observed that his blood pressure

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was abnormally high, rendered a diagnosis of untreated hypertension, but nonetheless cleared him for continued participation in the SFIP and his fitness assessments.

On August 10, 2011, Pipes filed an Application For Correction Of Military Record with the Air Force Board for Correction of Military Records (“AFBCMR”) requesting a LOD determination for disability retirement instead of his already-approved regular retirement. On June 4, 2012, the USAF Office of the Assistant Secretary for Military and Reserve Affairs issued a Memorandum for the AFBCMR recommending denial of the change in records to reflect Pipes was permanently medically retired. On July 5, 2012, Pipes responded to the June 4, 2012 Memorandum by providing supplemental documentation to the AFBCMR. On February 28, 2013, the AFBCMR denied Pipes’ Application for Correction of Military Records, finding that he was not entitled to disability retirement based on a determination that he did not demonstrate the existence of a material error or injustice. On April 30, 2013, and again on July 3, 2013, Pipes requested reconsideration by the AFBCMR to remedy the decision denying him the ability to be permanently and medically retired as of 2007. On August 11, 2014, the USAF Office of the Assistant Secretary affirmed the AFBCMR’s denial.

II. Procedural History

On October 9, 2015, Pipes filed a Complaint in the Claims Court alleging that he was denied the disability retirement pay and benefits to which he was allegedly entitled under 10 U.S.C. § 1204.

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On May 8, 2017, the Government filed a Motion To Dismiss, pursuant to RCFC 12(b)(1) and 12(b)(6), or, in the alternative, for Judgment On The Administrative Record, pursuant to RCFC 52. On June 8, 2017, Pipes filed a Cross-Motion For Judgment On The Administrative Record And Response to the Government's May 8, 2017 Motion To Dismiss.

On September 29, 2017, the Claims Court issued, under seal, a Memorandum Opinion And Order denying the Government's Motion To Dismiss and the Government's Motion For Judgment On The Administrative Record, and granting Pipes Cross-Motion For Judgment On The Administrative Record. *Pipes v. United States*, 134 Fed. Cl. 380, 389 (2017). The September 29, 2017 Memorandum Opinion And Order also vacated the February 28, 2013 AFBCMR Decision denying Pipes' Application For A Correction Of Military Records and remanded the case to the AFBCMR for 120 days "to reconsider Plaintiff's Application For A Correction Of Military Records in light of the new evidence presented by the parties," pursuant to RCFC 52.2(a), (b)(1)(B).² *See id.* On October 13, 2017, the court issued the public version of the September 29, 2017 Memorandum Opinion And Order. *See id.*

On February 1, 2018, an Air Force Reserve Command/ Judge Advocate ("AFRC/JA") issued an Advisory Opinion to the AFBCMR recommending that the AFBCMR deny Pipes' requested relief because it believed that Pipes'

2. This new evidence consisted of "supplemental declarations of relevant witnesses," as well as Pipes' "STRs and USAF medical records" provided by the VA. *Pipes*, 134 Fed. Cl. at 405.

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non-duty status rendered the order by his Commander to participate in the SFIP illegal.

On May 3, 2018, the AFBCMR issued a reconsideration decision (“Reconsideration Decision”) concerning Pipes’ Application For Correction Of Military Records. In its Reconsideration Decision, the AFBCMR noted that the Medical Advisor found “it plausible that the applicant’s participation in vigorous training for his Fitness Assessment, during the 12-hour cycle of time between his alleged running activity and onset of stroke symptoms, contributed to the occurrence of a stroke on or about 4 Sep 06.” J.A. at 168-69. The AFBCMR opined that “adherence to SFIP could . . . be legally mandated when the applicant was in a duty status.” J.A. at 172. However, the AFBCMR agreed with the AFRC/JA that (1) Pipes was never lawfully ordered to participate in the SFIP, and (2) because he was never lawfully ordered to participate in the SFIP, Pipes was not in an IDT status when he did so participate. J.A. at 172. Accordingly, the Board denied Pipes’ requested relief.

On September 11, 2018, the Claims Court, in agreement with the Reconsideration Decision, issued a Memorandum Opinion and Final Order on Remand granting the Government’s Motion for Judgment on the Administrative Record and denying Pipes’ Cross-Motion for Judgment on the Administrative Record. The Claims Court’s decision became final on September 11, 2018. Pipes timely appealed on November 5, 2018.

*Appendix C***STANDARD OF REVIEW**

We review a decision of the Claims Court granting or denying a motion for judgment on the administrative record *de novo*, and “apply the same standard of review[.]” *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004); *see also Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005). Thus, this Court “will not disturb the decision of the corrections board unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence.” *Chambers*, 417 F.3d at 1227 (citing *Haselrig v. United States*, 333 F.3d 1354, 1355 (Fed. Cir. 2003)).

DISCUSSION

Pipes’ October 9, 2015 Complaint alleged that he was denied the disability retirement pay and benefits to which he is and has been entitled under 10 U.S.C. § 1204, which provides in relevant part:

Upon a determination by the Secretary concerned that a member of the armed forces . . . is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay . . . , if the Secretary also determines that . . . the disability . . . is a result of an injury, illness, or disease incurred or aggravated in line of duty after September 23, 1996 . . . *while performing active duty or inactive-duty training*[.]

10 U.S.C. § 1204(2)(B)(i) (2000) (italics added).

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First, it is not disputed that Pipes is unfit to perform the duties of his office, grade, rank, or rating because of physical disability. Second, it is not disputed that the disability plausibly resulted from an injury incurred or aggravated after September 23, 1996, while performing his SFIP. Finally, it is not disputed that Pipes' injuries did not occur while in active duty. Thus, the only issue in dispute is whether Pipes' disability resulted from an injury incurred or aggravated *while performing inactive-duty training*.

Section 101 of Title 10 of the United States Code defines "inactive-duty training" as:

- (A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and
- (B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

10 U.S.C. § 101(d)(7). Pipes argues that his participation in the SFIP constituted "inactive-duty training" under 10 U.S.C. § 101(d)(7)(B).

As noted above, the AFBCMR agreed with the AFRC/JA that Pipes' participation in the SFIP did not

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constitute “inactive-duty training” because Pipes was never lawfully ordered to participate in the SFIP. J.A. at 172. Specifically, the AFBCMR, relying on AFI 10-248 (AFRC Sup1_I, May 2004), found that any order by Pipes’ Commander placing him in the SFIP was unlawful due to Pipes’ supposed “non-duty status.”³ As the AFBCMR noted, however, Pipes’ adherence to the SFIP could have been legally mandated if Pipes was in a duty status, making him subject to the Uniform Code of Military Justice (“UCMJ”). J.A. at 172.

AFI 10-248 (AFRC Sup1_I, May 2004) states that for each Unit Reservist, Individual Mobilization Augmentee, or Participating Individual Ready Reservist member at a marginal or poor fitness level will be enrolled in a SFIP by their commander. *See* AFI 10-248 (2004 Supp.) at 30. Members are entered into the SFIP by letter “during the same UTA/IDT in which the member completed the fitness assessment.” *See id.* During that UTA, which is a form of inactive duty training, members are in a duty status. *Id.* at 28. Orders issued to reserve members during UTAs are valid orders.

According to Pipes’ Commander, “Capt. Pipes failed a fitness test on 7 Nov. 2004. He was formally enrolled in the Self-Paced Fitness Program (SFIP) the same day.” J.A. at 56. Thus, on the record before us, it is clear that:

3. As the AFRC/JA noted in its Advisory Opinion, upon which the AFBCMR relies, an “order requir[ing] participation while in a non-duty status” is “illegal” because “reservists are not subject to the Uniform Code of Military Justice when not in status.” J.A. at 162.

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(1) Pipes went into a duty status during the Nov. 7, 2004 UTA/IDT in which he completed his fitness assessment; (2) because he was in a duty status, Pipes was subject to the UCMJ, *see* 10 U.S.C. § 802(a)(3)(A)(i); and (3) while he was in a duty status and subject to the UCMJ, Pipes was ordered, in writing, by his Commander to enroll in a personalized SFIP requiring him to exercise at least five times per week. Pipes' order to engage in the SFIP was renewed in August 2005, if not in each of the subsequent UTAs in which he failed his fitness assessments. As the AFBCMR noted, "adherence to SFIP could . . . be legally mandated when the applicant was in a duty status." J.A. at 172. As Pipes was in a duty status, the order from his Commanding Officer to participate in the SFIP was not unlawful for that reason.⁴

Thus, we hold that, to the extent their analysis turned on Pipes' duty status at the time of his orders, both the AFBCMR and the Claims Court erred in concluding that Pipes was not lawfully ordered to perform the SFIP designed for him. The consequence of that error is the

4. As defined by the Air Force, SFIP is intended to be a "remedial program recommended for traditional Reservists," such as Pipes, with participation in SFIP "encouraged" and generally "not mandated." AFI 10-248 (AFRC Sup1_I, May 2004) at 46; J.A. at 221. At the time of Pipes' stroke, the AFI made clear that Reservists could participate in SFIP "on or off duty." AFI 10-248 (AFRC Sup1_I, May 2004) at 84. But in this case, for reasons not explained by the Air Force, the apparently *sui generis* SFIP designed for Pipes to perform when in civilian status went beyond recommendation and encouragement, being mandated by lawful orders issued during times when Pipes was in inactive duty status.

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absence of any consideration of Pipes' request for disability retirement in the light of the fact that he was ordered to perform exercises that caused his stroke and hence his retirement. Thus, the argument that Pipes was in a non-duty status when ordered to perform his SFIP is no longer a valid rationale for denying his disability retirement. Our holding is limited to a determination that Pipes was ordered to engage in the SFIP when in a duty status.

We therefore reverse the decision of the Claims Court, agreeing with the AFBCMR, that Pipes is not entitled to a disability retirement under 10 U.S.C. § 1204(2)(B)(i) (2000) due to his non-duty status at the time he was ordered to participate in the SFIP. The case is remanded with instructions to remand the case to the AFBCMR for further assessment of Pipes' request for correction of his military records.

REVERSED AND REMANDED**COSTS**

The parties shall bear their own costs.

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**APPENDIX D — OPINION OF THE UNITED STATES
COURT OF FEDERAL CLAIMS,
FILED SEPTEMBER 11, 2018**

UNITED STATES COURT OF FEDERAL CLAIMS

139 Fed.Cl. 538

MALCOLM PIPES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 15-1163

|

Filed: September 11, 2018

**MEMORANDUM OPINION AND
FINAL ORDER ON REMAND**

BRADEN, Senior Judge.

**I. RELEVANT FACTUAL AND PROCEDURAL
BACKGROUND.¹**

On October 9, 2015, SSgt Pipes (“Plaintiff”) filed a Complaint in the United States Court of Federal Claims

1. The relevant facts discussed herein were derived from the October 9, 2015 Complaint (“Compl.”) and the Appendix attached to the Government’s January 27, 2016 Motion To Dismiss (“AR i, ii, 1–251, AF Form 40A”), and are related in *Pipes v. United States*, 134 Fed.Cl. 380 (Fed. Cl. 2017).

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alleging that he was “denied the disability retirement pay and benefits to which he is entitled under 10 U.S.C. § 1204[.]” ECF No. 1 at 9.

On May 8, 2017, the Government filed a Motion To Dismiss, pursuant to RCFC 12(b)(1) and 12(b)(6), or, in the alternative, for Judgment On The Administrative Record, pursuant to RCFC 52. ECF No. 25. On June 8, 2017, Plaintiff filed a Cross-Motion For Judgment On The Administrative Record And Response to the Government’s May 8, 2017 Motion To Dismiss. ECF No. 26.

On September 29, 2017, the court issued, under seal, a Memorandum Opinion And Order denying the Government’s May 8, 2017 Motion To Dismiss and the Government’s May 8, 2017 Motion For Judgment On The Administrative Record, and granting Plaintiff’s June 8, 2017 Cross-Motion For Judgment On The Administrative Record. *See Pipes*, 134 Fed.Cl. at 389. The September 29, 2017 Memorandum Opinion And Order also vacated a February 28, 2013 Air Force Board For Correction Of Military Records (“AFBCMR”) Decision denying Plaintiff’s Application For A Correction Of Military Records and remanding this case to the AFBCMR for 120 days “to reconsider Plaintiff’s Application For A Correction Of Military Records in light of the new evidence presented by the parties,” pursuant to RCFC 52.2(a), (b) (1)(B). *See id.* On October 13, 2017, the court issued the public version of the September 29, 2017 Memorandum Opinion And Order. *See id.*

On December 22, 2017, the parties filed a Joint Status Report notifying the court that the new evidence

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presented was “under consideration and review by the Air Force Reserve Command/Judge Advocate [(“AFRC/JA”)] and the Medical Review Board Medical Consultant [(“MRBMC”)], both of which are advisors to the AFBCMR.” ECF No. 35 at 1. The December 22, 2017 Joint Status Report also stated that once the AFRC/JA and MRBMC “complete their reviews, they will present their findings and recommendations to the AFBCMR,” that will “review the recommendations and reconsider [Plaintiff’s] Application” For A Correction Of Military Records. ECF No. 35 at 1.

On January 18, 2018, the parties filed a Joint Motion For Extension Of Remand And Stay requesting a 120-day extension of the remand and stay, because “the AFRC/JA and MRBMC have not yet completed their review and have not yet forwarded their recommendations to the AFBCMR.” ECF No. 36 at 1–2. On that same day, the court issued an Order granting, in part, the parties’ January 18, 2018 Joint Motion. ECF No. 37. The January 18, 2018 Order extended the remand and stay to May 7, 2018, “or until AFBCMR issues the reconsideration decision.” ECF No. 37 at 1. The January 18, 2018 Order also directed the parties to file a Joint Status Report “within ten days of the AFBCMR’s reconsideration decision[,] or on May 7, 2018, whichever occurs first.” ECF No. 37 at 1.

On February 1, 2018, the AFRC/JA issued an Advisory Opinion to the AFBCMR recommending that the AFBCMR deny Plaintiff’s requested relief. ECF No. 40 at 18–21.

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On May 14, 2018, the parties filed a Joint Status Report notifying the court that on May 3, 2018, the AFBCMR issued a reconsideration decision (“May 3, 2018 AFBCMR Reconsideration Decision”) concerning Plaintiff’s Application For Correction Of Military Records. ECF No. 38 at 1. The May 14, 2018 Joint Status Report stated that Plaintiff believes:

(1) that the [c]ourt has properly ruled in favor of [Plaintiff] on the Administrative Record; (2) that the Air Force has now found that [Plaintiff]’s injury (stroke) was incurred in the line of duty ...; (3) that the Air Force has properly found that [Plaintiff] was indeed ordered to run and engage in [Self-paced Fitness Improvement Program (“SFIP”)]; and (4)] that the Air Force has made a legally indefensible finding that [Plaintiff] can ignore an acknowledged order of his Commander ..., when it has been found that orders from superiors requiring the performance of military duties are presumed to be lawful.”

ECF No. 38 at 2.

In contrast, the Government stated that the May 3, 2018 AFBCMR Reconsideration Decision affords a satisfactory basis for disposition of this case. ECF No. 38 at 2.

On June 12, 2018, the court issued an Order directing the AFBCMR to file with the Clerk of Court two copies

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of the May 3, 2018 AFBCMR Reconsideration Decision, pursuant to RCFC 52.2(e). On June 22, 2018, the Government filed two copies of the May 3, 2018 AFBCMR Reconsideration Decision, including attachments thereto. ECF No. 40.

On July 3, 2018, Plaintiff filed a Motion To Supplement The Administrative Record with “DOJ publication, *Employment Rights of the National Guard and Reserve*,” because this handbook was submitted by Plaintiff to the AFBCMR on remand. ECF No. 41 at 1.

On July 10, 2018, the Government responded that, “[b]ecause this case involves [Plaintiff’s] claim for a disability retirement pension rather than a claim of discrimination[,] based on military service, the Government fails to see how the handbook ... is relevant to [Plaintiff’s] claims[.]” ECF No. 42 at 1. Nevertheless, the Government did not oppose Plaintiff’s July 3, 2018 Motion. ECF No. 42 at 1. On that same day, Plaintiff filed a Notice together with the attached handbook. ECF No. 43. On August 3, 2018, the court issued an Order granting Plaintiff’s July 3, 2018 Motion.

II. THE AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS’ RECONSIDERATION DECISION ON REMAND.

On May 3, 2018, the AFBCMR issued a Reconsideration Decision,² that “reconsider[ed Plaintiff’s] request to:

2. The May 3, 2018 AFBCMR Reconsideration Decision is part of the Administrative Record. *See* 5 Charles Alan Wright

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1. Correct [Plaintiff's] record to reflect [that Plaintiff] is permanently medically retired at 60 percent (or more) effective 4 Sep[tember] [20]06;
2. Receive back pay from the above date of retirement and [for Plaintiff] and his family [to] be reimbursed for all medical bills from the effective date of his permanent retirement; and, by amendment,
3. Be placed on active duty orders and afford him the opportunity to enter a military health facility at the Air Force's expense for further medical rehabilitative evaluation and treatment.

ECF No. 40 at 37.

The May 3, 2018 AFBCMR Reconsideration Decision found:

1. After again reviewing [Plaintiff's] reconsideration application, the court documents, and the evidence provided in support of [Plaintiff's] appeal, we remain unpersuaded [that] the evidence presented demonstrate[s] the existence of an error

& Arthur R. Miller, Federal Practice and Procedure § 8306 (3d ed. 2018) ("Formal record[:] The record for review ... includes the decision of any lower level decisionmakers.").

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or injustice and agree with the previous Board's decision. While the Board notes the Medical Advisor found it plausible that [Plaintiff's] participation in vigorous training for his fitness assessment may have contributed to the occurrence of his stroke, the Board further notes in order [for Plaintiff's] stroke to be considered in the line of duty as a traditional Reservist, it must be determined it was the proximate result of performing military service. In this regard, the Board slightly differs from the AFRC/JA opinion that [Plaintiff] was actually ordered to participate in ... SFIP; however, the Board does agree with AFRC/JA that [Plaintiff] was never lawfully ordered to participate in SFIP while in civilian status[,] nor that [Plaintiff] was in an ["inactive-duty training"] status when he did so participate. The Board further agrees with the AFRC/JA opinion that adherence to SFIP could only be legally mandated when [Plaintiff] was in a duty status and that SFIP training is no different than any other daily routine to maintain fitness between drilling UTAs. Continued adherence to any fitness routine while in civilian status is highly encouraged, but cannot be and is not mandated. The Board agrees with AFRC/JA and finds the contention that all reservists should be in a duty status when they are maintaining their fitness to meet Air Force fitness standards not only overbroad, but [also] misconstrues the statute. Therefore, the

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Board determines [Plaintiff's] disability processing was done in accordance with the applicable regulations and instructions at the time as [Plaintiff] was not in an official military duty status. While the Board notes [Plaintiff's] counsel contends the [February 1, 2018] AFRC/JA [A]dvisory [Opinion] should be disregarded[,] since it referenced the wrong Air Force Instruction ... and [United States Air Force Reserve Command ("AFRC")] Supplement, the Board reviewed the applicable AFIs and found no material difference. Additionally[,] the Board determined [that] the AFRC supplement referenced was in effect at the time of [Plaintiff's] stroke and it clearly states member participation in a non-duty status is encouraged. As stated above, participation in a fitness program could only be legally mandated when [Plaintiff] was in a duty status, and at the time of [Plaintiff's] stroke, he was not. Therefore, in the absence of evidence to the contrary, we find no basis to recommend granting the requested relief.

2. [Plaintiff's] case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved. Therefore, the request for a hearing is not favorably considered.

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Therefore, the May 3, 2018 AFBCMR Reconsideration Decision ruled that “[Plaintiff] be notified [that] the evidence presented did not demonstrate the existence of material error or injustice; the application was denied without a personal appearance; and the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.” ECF No. 40 at 43.

III. DISCUSSION.³**A. Standard Of Review For Judgment On The Administrative Record.**

As a matter of law, the review of a military correction board’s decision is “limited to the administrative record before the deciding official or officials.” *Wyatt v. United States*, 23 Cl. Ct. 314, 319 (Cl. Ct. 1991). The standard for judgment on the administrative record, pursuant to RCFC 52.1, is whether the plaintiff has met the burden of proof to show that the decision was without a rational basis or not in accordance with the law, after considering the administrative record. *See Bannum, Inc. v. United States*, 404 F.3d 1346, 1357 (Fed. Cir. 2005) (instructing the court to make “factual findings under RCFC 52.1 from

3. The court’s October 1, 2017 Memorandum Opinion And Order determined that: Plaintiff has standing to bring the claims alleged in the October 9, 2015 Complaint; the claims alleged in the October 9, 2015 Complaint are not barred by the statute of limitations; and the facts alleged in the October 9, 2015 Complaint state a claim on which relief can be granted. *See Pipes*, 134 Fed. Cl. at 389, 395, 401.

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the [limited] record evidence as if it were conducting a trial on the record”). Where the parties have filed cross-motions for judgment on the administrative record, RCFC 52.1 provides a procedure for parties to seek the equivalent of an expedited trial on a “paper record, allowing fact-finding by the trial court.” *Id.* at 1356. Unlike summary judgment, genuine issues of material fact do not preclude a judgment on the administrative record. *See id.* at 1355–56.

The standard of review is limited to determining whether the agency decision is “arbitrary, capricious, unsupported by substantial evidence, or contrary to law.” *Porter v. United States*, 163 F.3d 1304, 1312 (Fed. Cir. 1998); *see also Hoskins v. United States*, 40 Fed.Cl. 259, 271–72 (Fed. Cl. 1998) (“Once a plaintiff has sought relief from a correction board ... the plaintiff is bound by that board’s determination unless he can satisfy the difficult standard of proof that the correction board’s decision was illegal[,] because it was arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced, or money is due.”) (citations omitted). The court is not authorized to retry the case on the merits. *See Chayra v. United States*, 23 Cl. Ct. 172, 178 (Cl. Ct. 1991) (“While the court might disagree with the board’s decision, it cannot substitute its own judgment for that of the board if reasonable minds could reach differing resolutions of the disputed matter.”).

Plaintiff bears the burden of proving any deficiency by “cogent and clearly convincing evidence.” *Wronke v.*

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Marsh, 787 F.2d 1569, 1576 (Fed. Cir. 1986) (internal citations omitted). Therefore, the proffered evidence must “overcome the strong, but rebuttable, presumption that the administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith.” *Porter*, 163 F.3d at 1316 (quoting *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979)).

B. Whether The Air Force Board For Correction Of Military Records’ Reconsideration Decision Was “Arbitrary, Capricious, Unsupported By Substantial Evidence, Or Contrary To Law.”

The October 9, 2015 Complaint alleges that Plaintiff was “denied the disability retirement pay and benefits to which he is and has been entitled under 10 U.S.C. § 1204[.]” Compl. ¶ 43. After considering the new evidence on remand, the May 3, 2018 AFBCMR Reconsideration Decision ruled that “the Medical Advisor found it plausible that [Plaintiff’s] participation in vigorous training for his fitness assessment may have contributed to the occurrence of his stroke[.]” ECF No. 40 at 43. Therefore, the only remaining issue is whether Plaintiff met the retirement criteria set forth in 10 U.S.C. § 1204.

That Section provides, in relevant part:

Upon a determination by the Secretary concerned that a member of the armed forces ... is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with

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retired pay ..., if the Secretary also determines[, *inter alia*,] that ... the disability ... is a result of an injury, illness, or disease incurred or aggravated in line of duty after September 23, 1996 ... *while performing active duty or inactive-duty training*[.]

10 U.S.C. § 1204(2)(B)(i) (2000) (italics added).

The term “active duty” means “full-time duty in the active military service of the United States.” 10 U.S.C. 101(d)(1) (2000). The October 9, 2015 Complaint does not allege that Plaintiff was in an “active duty” status at the time of the alleged injury. Compl. ¶ 44 (Plaintiff “suffered a [stroke] ... that rendered him physically disabled, and that [stroke] was incurred while performing the task of running as he was ordered to do as part of the SFIP *inactive-duty training*.”) (italics added).

Section 101 of Title 10 of the United States Code defines “inactive-duty training” as:

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37^[4] or any other provision of law; and

4. The duties prescribed for Reserves by the Secretary of the Air Force in Section 206 of Title 37 are: (1) “a regular period of instruction[;]” (2) “the performance of such other equivalent training, instruction, duty, or appropriate duties, as the Secretary [of the Air Force] may prescribe;” and (3) “a regular period of instruction that the member is scheduled to perform but is unable to perform[,] because of physical disability[.]” 37 U.S.C. § 206 (2000).

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(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

10 U.S.C. § 101(d)(7) (2000).

The Secretary of the Air Force, however, requires that, “[a]ll [‘inactive-duty training’] must ... [h]ave advance authorization from the [service] member’s unit commander (or designated representative) for unit personnel. For Individual Reservists[,] the authorizing authority is the supervisor or program manager ([t]his is done in Block III of the AF Form 40A).” AFMAN 36-8001 ¶ 4.2.1.1 (Jan. 22, 2004). In addition, “[a]ll [‘inactive-duty training’] must ... [b]e performed for pay and points, or points only as an USAFR member without pay from another [United States] government source (i.e. no dual compensation).” AFMAN 36-8001 ¶ 4.2.1.3 (Jan. 22, 2004).

In this case, the Administrative Record evidenced that Plaintiff failed to establish that he was in an “inactive-duty training” status while performing SFIP. First, Plaintiff did not produce a completed AF Form 40A to demonstrate that he was authorized by his Commander to perform “inactive-duty training.” Such authorization is a pre-condition for any activity, including SFIP, to be considered performed by a service member in an “inactive-duty training” status. *See* AFMAN 36-8001

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¶ 4.2.1.1 (Jan. 22, 2004); *see also United States v. Hale*, 77 M.J. 598, 604 (A.F. Ct. Crim. App. 2018) (determining that “no authority existed to extend a reserve member’s military status while on inactive-duty training beyond the designated block of time listed on the AF Form 40A”). Second, Plaintiff did not produce evidence that he performed SFIP for pay and points, or points only. As a matter of law, all “inactive-duty training” must be performed for pay and points, or points only. *See* AFMAN 36-8001 ¶ 4.2.1.3 (Jan. 22, 2004); *see also* 31 U.S.C. § 1342 (“An officer or employee of the United States Government ... may not accept voluntary services for [the G]overnment or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. ... As used in this section, the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.”).

SFIP is not a “special additional dut[y]” authorized by the Secretary of the Air Force as a type of “inactive-duty training.” *See* 10 U.S.C. § 101(d)(7)(B). The Secretary of the Air Force has determined that there are only five types of “inactive-duty training:” (1) Training Period: “[a] 4-hour period of training, duty, or instruction[;]” (2) Unit Training Assembly: “[a] planned period of training, duty, instruction, or test alert completed by a Reserve unit[;]” (3) Equivalent Training: “[a] training period accomplished in place of a scheduled [Unit Training Assembly] or [Training Period;]” (4) Additional Ground

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Training Period: “[a] flying training period authorized for an individual in an authorized flying position[;]” and (5) Readiness Management Periods: training periods “used to support the ongoing day-to-day operation of the unit accomplishing unit administration, training preparation, support activities, and maintenance functions.” AFMAN 36-8001 ¶¶ 4.1.1 to 4.1.5 (Jan. 22, 2004). Each of these types of “inactive-duty training” are performed “in connection with the prescribed training or maintenance activities of the units to which they are assigned.” 10 U.S.C. § 101(d) (7)(B); *see also Clark v. United States*, 93 Fed.Cl. 756, 773 n.40 (Fed. Cl. 2010) (“like all inactive-duty training, [Equivalent Training] is a formal, supervised period of training”) (internal corrections omitted). *Cf. United States v. Wolpert*, 75 M.J. 777, 781 (A. Ct. Crim. App. 2016) (determining that a service member was not in an “inactive-duty training” status after signing out from a period of Unit Training Assembly).

Instead, SFIP is “[a] remedial intervention program *recommended* for traditional Reservists ... identified with a composite poor fit score.” U.S. AIR FORCE, AIR FORCE INSTRUCTION 10-248 (May 26, 2004) (“AFI 10-248”) at 46 (*italics added*). Reservists “are *highly encouraged* to take part [in SFIP] on a *voluntary basis* in all available intervention programs” so that they can meet the minimum fitness requirements of the Air Force. *See* AFI 10-248 at 46 (“All [service] members of the Air Force must be physically fit to support the Air Force mission.”); *see also id.* (“The [Air Force] uses a composite fitness score based on aerobic fitness, muscular strength[,], and body composition to determine overall fitness. Overall fitness

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is directly related to health risk, including risk of disease (morbidity) and death (mortality). A composite score of 70 represents the minimum accepted health, fitness[, and readiness levels.”). As the May 3, 2018 AFBCMR Reconsideration Decision explains, “SFIP training is no different than any other daily routine to maintain fitness between drilling [Unit Training Assemblies].” ECF No. 40 at 43.

Therefore, as a matter of law, a service member is not in an “inactive-duty training” status while performing SFIP. This is so, because Congress requires that all service members who perform “inactive-duty training” are in a “*duty status*.” 10 U.S.C. § 101(d)(7) (*italics added*) (defining “inactive-duty training” as a type of “duty status”). The Secretary of the Air Force also stated that all service members who perform SFIP “are in a *non-duty status*, [and] their participation ... is not mandated.” AFI 10-248 at 46 (*italics added*). Accordingly, the May 3, 2018 AFBCMR Reconsideration Decision correctly ruled that, “[c]ontinued adherence to any fitness routine while in civilian[, non-duty] status is highly encouraged, but cannot be and is not mandated.” ECF No. 40 at 43.

Accordingly, the May 3, 2018 AFBCMR Reconsideration Decision’s determination that Plaintiff was neither “lawfully ordered to participate in SFIP while in civilian[, non-duty] status, nor ... in an [‘inactive-duty training’] status when he did so participate” is not arbitrary, capricious, unsupported by substantial evidence, nor contrary to law.

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IV. CONCLUSION.

For these reasons, the Government's May 8, 2017 Motion For Judgment On The Administrative Record is granted and Plaintiff's June 8, 2017 Cross-Motion For Judgment On The Administrative Record is denied. The Clerk of Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

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**APPENDIX E — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
FILED MARCH 5, 2025**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2022-1509

MALCOLM PIPES,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal
Claims in No. 1:15-cv-01163-RAH, Judge Richard A.
Hertling.

Before MOORE, *Chief Judge*, LOURIE, CLEVINGER¹,
DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL,
CUNNINGHAM, and STARK, *Circuit Judges*.²

Filed March 5, 2025

1. Circuit Judge Clevenger participated only in the decision
on the petition for panel rehearing.

2. Circuit Judge Newman did not participate.

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Appendix E

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

ORDER

PER CURIAM.

On January 30, 2025, Malcolm Pipes filed a combined petition for panel rehearing and rehearing en banc [ECF No. 55]. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

March 5, 2025

Date

**APPENDIX F — STATUTORY
PROVISIONS INVOLVED**

10 U.S.C. §101. Definitions

(a) In General.—The following definitions apply in this title:

(1) The term “United States”, in a geographic sense, means the States and the District of Columbia.

[(2) Repealed. Pub. L. 109–163, div. A, title X, §1057(a)(1), Jan. 6, 2006, 119 Stat. 3440.]

(3) The term “possessions” includes the Virgin Islands, Guam, American Samoa, and the Guano Islands, so long as they remain possessions, but does not include any Commonwealth.

(4) The term “armed forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(5) The term “uniformed services” means—

(A) the armed forces;

(B) the commissioned corps of the National Oceanic and Atmospheric Administration; and

(C) the commissioned corps of the Public Health Service.

(6) The term “department”, when used with respect to a military department, means the executive part

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of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, such term means the executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments.

(7) The term “executive part of the department” means the executive part of the Department of Defense, Department of the Army, Department of the Navy, or Department of the Air Force, as the case may be, at the seat of government.

(8) The term “military departments” means the Department of the Army, the Department of the Navy, and the Department of the Air Force.

(9) The term “Secretary concerned” means—

(A) the Secretary of the Army, with respect to matters concerning the Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Department of the Navy;

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(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and

(D) the Secretary of Homeland Security, with respect to matters concerning the Coast Guard when it is not operating as a service in the Department of the Navy.

(10) The term “service acquisition executive” means the civilian official within a military department who is designated as the service acquisition executive for purposes of regulations and procedures providing for a service acquisition executive for that military department.

(11) The term “Defense Agency” means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department (other than such an entity that is designated by the Secretary as a Department of Defense Field Activity); or

(B) that is designated by the Secretary of Defense as a Defense Agency.

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(12) The term “Department of Defense Field Activity” means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department; and

(B) that is designated by the Secretary of Defense as a Department of Defense Field Activity.

(13) The term “contingency operation” means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

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(14) The term “supplies” includes material, equipment, and stores of all kinds.

(15) The term “pay” includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(16) The term “congressional defense committees” means—

(A) the Committee on Armed Services and the Committee on Appropriations of the Senate; and

(B) the Committee on Armed Services and the Committee on Appropriations of the House of Representatives.

(17) The term “base closure law” means the following:

(A) Section 2687 of this title.

(B) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note).

(C) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note).

(18) The term “acquisition workforce” means the persons serving in acquisition positions within the Department of Defense, as designated pursuant to section 1721(a) of this title.

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(b) Personnel Generally.—The following definitions relating to military personnel apply in this title:

(1) The term “officer” means a commissioned or warrant officer.

(2) The term “commissioned officer” includes a commissioned warrant officer.

(3) The term “warrant officer” means a person who holds a commission or warrant in a warrant officer grade.

(4) The term “general officer” means an officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

(5) The term “flag officer” means an officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or rear admiral (lower half).

(6) The term “enlisted member” means a person in an enlisted grade.

(7) The term “grade” means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

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(8) The term “rank” means the order of precedence among members of the armed forces.

(9) The term “rating” means the name (such as “boatswain’s mate”) prescribed for members of an armed force in an occupational field. The term “rate” means the name (such as “chief boatswain’s mate”) prescribed for members in the same rating or other category who are in the same grade (such as chief petty officer or seaman apprentice).

(10) The term “original”, with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to that member’s most recent appointment in that component that is neither a promotion nor a demotion.

(11) The term “authorized strength” means the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces.

(12) The term “regular”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(13) The term “active-duty list” means a single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under section 620 of this title) which contains the names of all officers of that

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armed force, other than officers described in section 641 of this title, who are serving on active duty.

(14) The term “medical officer” means an officer of the Medical Corps of the Army, an officer of the Medical Corps of the Navy, or an officer in the Air Force designated as a medical officer.

(15) The term “dental officer” means an officer of the Dental Corps of the Army, an officer of the Dental Corps of the Navy, or an officer of the Air Force designated as a dental officer.

(16) The term “Active Guard and Reserve” means a member of a reserve component who is on active duty pursuant to section 12301(d) of this title or, if a member of the Army National Guard or Air National Guard, is on full-time National Guard duty pursuant to section 502(f) of title 32, and who is performing Active Guard and Reserve duty.

(c) Reserve Components.—The following definitions relating to the reserve components apply in this title:

(1) The term “National Guard” means the Army National Guard and the Air National Guard.

(2) The term “Army National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

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(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(3) The term “Army National Guard of the United States” means the reserve component of the Army all of whose members are members of the Army National Guard.

(4) The term “Air National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

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(5) The term “Air National Guard of the United States” means the reserve component of the Air Force all of whose members are members of the Air National Guard.

(6) The term “reserve”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of one of the armed forces.

(7) The term “reserve active-status list” means a single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under section 14002 of this title) that contains the names of all officers of that armed force except warrant officers (including commissioned warrant officers) who are in an active status in a reserve component of the Army, Navy, Air Force, or Marine Corps and are not on an active-duty list.

(d) Duty Status.—The following definitions relating to duty status apply in this title:

(1) The term “active duty” means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

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(2) The term “active duty for a period of more than 30 days” means active duty under a call or order that does not specify a period of 30 days or less.

(3) The term “active service” means service on active duty or full-time National Guard duty.

(4) The term “active status” means the status of a member of a reserve component who is not in the inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

(5) The term “full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

(6)(A) The term “active Guard and Reserve duty” means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more for

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the purpose of organizing, administering, recruiting, instructing, or training the reserve components.

(B) Such term does not include the following:

(i) Duty performed as a member of the Reserve Forces Policy Board provided for under section 10301 of this title.

(ii) Duty performed as a property and fiscal officer under section 708 of title 32.

(iii) Duty performed for the purpose of interdiction and counter-drug activities for which funds have been provided under section 112 of title 32.

(iv) Duty performed as a general or flag officer.

(v) Service as a State director of the Selective Service System under section 10(b) (2) of the Military Selective Service Act (50 U.S.C. App. 460(b)(2)).

(7) The term “inactive-duty training” means—

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

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(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

Such term includes those duties when performed by Reserves in their status as members of the National Guard.

(e) Facilities and Operations.—The following definitions relating to facilities and operations apply in this title:

(1) Range.—The term “range”, when used in a geographic sense, means a designated land or water area that is set aside, managed, and used for range activities of the Department of Defense. Such term includes the following:

(A) Firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access, and exclusionary areas.

(B) Airspace areas designated for military use in accordance with regulations and procedures prescribed by the Administrator of the Federal Aviation Administration.

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(2) Range activities.—The term “range activities” means—

(A) research, development, testing, and evaluation of military munitions, other ordnance, and weapons systems; and

(B) the training of members of the armed forces in the use and handling of military munitions, other ordnance, and weapons systems.

(3) Operational range.—The term “operational range” means a range that is under the jurisdiction, custody, or control of the Secretary of a military department and—

(A) that is used for range activities, or

(B) although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.

(4) Military munitions.—(A) The term “military munitions” means all ammunition products and components produced for or used by the armed forces for national defense and security, including ammunition products or components under the control of the Department of Defense, the Coast Guard, the Department of Energy, and the National Guard.

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(B) Such term includes the following:

(i) Confined gaseous, liquid, and solid propellants.

(ii) Explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries, including bulk explosives and chemical warfare agents.

(iii) Chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, and demolition charges.

(iv) Devices and components of any item specified in clauses (i) through (iii).

(C) Such term does not include the following:

(i) Wholly inert items.

(ii) Improvised explosive devices.

(iii) Nuclear weapons, nuclear devices, and nuclear components, other than nonnuclear components of nuclear devices that are managed under the nuclear weapons program of the Department of Energy after all required sanitization operations under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) have been completed.

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(5) Unexploded ordnance.—The term “unexploded ordnance” means military munitions that—

(A) have been primed, fused, armed, or otherwise prepared for action;

(B) have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and

(C) remain unexploded, whether by malfunction, design, or any other cause.

(f) Rules of Construction.—In this title—

(1) “shall” is used in an imperative sense;

(2) “may” is used in a permissive sense;

(3) “no person may * * *” means that no person is required, authorized, or permitted to do the act prescribed;

(4) “includes” means “includes but is not limited to”; and

(5) “spouse” means husband or wife, as the case may be.

(g) Reference to Title 1 Definitions.—For other definitions applicable to this title, see sections 1 through 5 of title 1.

*Appendix F***10 U.S.C. §1201. Regulars and members on active duty for more than 30 days: retirement**

(a) Retirement.—Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

(b) Required Determinations of Disability.—Determinations referred to in subsection (a) are determinations by the Secretary that—

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either—

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by

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the Department of Veterans Affairs at the time of the determination; and either—

(i) the disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service);

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after September 14, 1978.

(c) Eligible Members.—This section and sections 1202 and 1203 of this title apply to the following members:

(1) A member of a regular component of the armed forces entitled to basic pay.

(2) Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 10148(a) of this title) for a period of more than 30 days.

(3) Any other member of the armed forces who is on active duty but is not entitled to basic pay by reason

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of section 502(b) of title 37 due to authorized absence (A) to participate in an educational program, or (B) for an emergency purpose, as determined by the Secretary concerned.

*Appendix F***10 U.S.C. §1204. Members on active duty for 30 days or less or on inactive-duty training: retirement**

Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that—

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability—

(A) was incurred before September 24, 1996, as the proximate result of—

(i) performing active duty or inactive-duty training;

(ii) traveling directly to or from the place at which such duty is performed; or

(iii) an injury, illness, or disease incurred or aggravated while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training,

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if the site of the inactive-duty training is outside reasonable commuting distance of the member's residence;

(B) is a result of an injury, illness, or disease incurred or aggravated in line of duty after September 23, 1996—

(i) while performing active duty or inactive-duty training;

(ii) while traveling directly to or from the place at which such duty is performed; or

(iii) while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training; or

(C) is a result of an injury, illness, or disease incurred or aggravated in line of duty—

(i) while the member was serving on funeral honors duty under section 12503 of this title or section 115 of title 32;

(ii) while the member was traveling to or from the place at which the member was to so serve; or

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(iii) while the member remained overnight at or in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence;

(3) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(4) either—

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.

*Appendix F***37 U.S.C. §206. Reserves; members of National Guard:
inactive-duty training**

(a) Under regulations prescribed by the Secretary concerned, and to the extent provided for by appropriations, a member of the National Guard or a member of a reserve component of a uniformed service who is not entitled to basic pay under section 204 of this title, is entitled to compensation, at the rate of 1/30 of the basic pay authorized for a member of a uniformed service of a corresponding grade entitled to basic pay—

(1) for each regular period of instruction, or period of appropriate duty, at which the member is engaged for at least two hours, including that performed on a Sunday or holiday;

(2) for the performance of such other equivalent training, instruction, duty, or appropriate duties, as the Secretary may prescribe; or

(3) for a regular period of instruction that the member is scheduled to perform but is unable to perform because of physical disability resulting from an injury, illness, or disease incurred or aggravated—

(A) in line of duty while performing—

(i) active duty; or

(ii) inactive-duty training;

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(B) while traveling directly to or from that duty or training (unless such injury, illness, disease, or aggravation of an injury, illness, or disease is the result of the gross negligence or misconduct of the member); or

(C) in line of duty while remaining overnight immediately before the commencement of inactive-duty training, or while remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training.

(b) The regulations prescribed under subsection (a) for each uniformed service, the National Guard, and each of the classes of organization of the reserve components within each uniformed service, may be different. The Secretary concerned shall, for the National Guard and each of the classes of organization within each uniformed service, prescribe—

(1) minimum standards that must be met before an assembly for drill or other equivalent period of training, instruction, duty, or appropriate duties may be credited for pay purposes, and those standards may require the presence for duty of officers and enlisted members in numbers equal to or more than a minimum number or percentage of the unit strength for a specified period of time with participation in a prescribed kind of training;

(2) the maximum number of assemblies or periods of other equivalent training, instruction, duty, or

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appropriate duties, that may be counted for pay purposes in each fiscal year or in lesser periods of time; and

(3) the minimum number of assemblies or periods of other equivalent training, instruction, duty, or appropriate duties that must be completed in stated periods of time before the members of units or organizations can qualify for pay.

(c) A person enlisted in the inactive National Guard is not entitled to pay under this section.

(d)(1) Except as provided in paragraph (2), this section does not authorize compensation for work or study performed by a member of a reserve component or by a member of the National Guard while not in Federal service in connection with correspondence courses of a uniformed service.

(2) A member of the Selected Reserve of the Ready Reserve may be paid compensation under this section at a rate and under terms determined by the Secretary of Defense, but not to exceed the rate otherwise applicable to the member under subsection (a), upon the member's successful completion of a course of instruction undertaken by the member using electronic-based distributed learning methodologies to accomplish training requirements related to unit readiness or mobilization, as directed for the member by the Secretary concerned. The compensation may be paid regardless of whether the course of instruction was under the direct control of

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the Secretary concerned or included the presence of an instructor.

(3) The prohibition in paragraph (1), including the prohibition as it relates to a member of the National Guard while not in Federal service, applies to—

(A) any work or study performed on or after September 7, 1962, unless that work or study is specifically covered by the exception in paragraph (2); and

(B) any claim based on that work or study arising after that date.

(e) A member of the National Guard or of a reserve component of the uniformed services may not be paid under this section for more than four periods of equivalent training, instruction, duty, or appropriate duties performed during a fiscal year instead of the member's regular period of instruction or regular period of appropriate duty during that fiscal year.

(f) A member of the Individual Ready Reserve is not entitled to compensation under this section for participation in screening for which the member is paid a stipend under section 433a of this title.