DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office **of the Assistant Secretary**

FEB 12 1999

AFBCMR 97-03785

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [redacted] be corrected to show that a new Physical Disqualification Review Board (PDRB) be convened in accordance with AFI 36-3209 to determine whether he should be administratively discharged; that he be provided the assistance of counsel different from the one who assisted him in March 1996; that he be notified in advance and given an opportunity to be heard before the PDRB makes its decision; and that the PDRB formally document its required determinations in accordance with AFI 36-3209.

It is further directed that the results of the PDRB be forwarded to the Air Force Board for Correction of Military Records at the earliest practicable date so that all necessary and appropriate actions may be completed.

JOE G. LINEBERGER
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 97-03785

COUNSEL: George E. Day

HEARING DESIRED: No

FEB 1 2 1999

APPLICANT REUUESTS THAT:

The administrative discharge be set aside, he be reinstated in the US Air Force Reserves (USAFR), and that he be evaluated by a Physical Evaluation Board (PEB) for a finding consistent with his physical impairments, and the Board order ''correction of all of his reserve records which are inconsistent with Air Force Instructions" (AFIs).

APPLICANT CONTENDS THAT:

The USAFR improperly resolved his case by ruling that his medical condition existed prior to service (EPTS). The Air Force Reserves Surgeon General (AFRES/SG) improperly found that applicant's fall and injury while TDY on 13-17 February at Ft. Belvoir, VA, was a separate and distinct injury and not an aggravation or re-injury [of a previous injury that occurred in Ecuador in Summer 19931. Neither of the findings are supported by the evidence and both are contrary to the findings of his treating orthopedic surgeons and reviewing doctors. He was separated from the USAFR without a disability rating, although the Veterans' Administration (VA) and his treating physicians found his injury to be an aggravation of an existing injury, and not a new injury. The USAFR failed to follow AFI 36-3209 and 36-3212.

A copy of applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Relevant facts pertaining to this application are contained in the letters prepared by the appropriate offices of the USAFR and in the official documentation submitted by the applicant. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Acting Chief, Aerospace Medicine Division, HQ AFRC/SGP, provides an undated letter from HQ AFRES/JAS, a letter from HQ AFRES/JAG, medical documents, and a letter from HQ AFRC/JAG. The bottom line of these various documents apparently is that applicant's **1993** "In Line **of** Duty" (LOD) injury did not result in disability or warrant disability processing and that his February **1995** "EPTS---LOD not applicable" (not LOD) injury resulted in both his disqualification for further Reserve duty and his ineligibility for disability processing, in accordance with the applicable directives [AFI **36-2910** & AFI 36-3212].

A copy of the complete Air Force evaluation, with attachments, is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A complete copy of the Air Force letter, with attachments, was forwarded to counsel. Counsel in turn provided a rebuttal from the applicant. Applicant argues' with the definition of EPTS and rebuts various comments within the Air Force letter and its attachments.

A copy of applicant's complete response, with attachments is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The AFBCMR Medical Consultant reviewed the appeal and states that all evidence clearly indicates that the second injury in **1995** was a new injury which just happened to occur at the site of a previous injury. By all indications, complete resolution of the initial injury was achieved by the surgery. The second injury, while occurring in the location of the first, was a new event, one which should not permit a LOD determination for disability reasons. All conclusions reached by HQ AFRC/SGP are valid and disability consideration for the second injury should not be granted.

A copy of the complete additional evaluation is at Exhibit F.

The Chief, General Law Division, HQ USAF/JA, also evaluated the application and provides a six-page, in-depth discussion regarding the case. The Chief concludes that the applicant's contentions are without merit and recommends denial of the appeal on those grounds. However, the Chief also concludes the applicant was denied procedural due process---although not in the manner alleged by his counsel. Contrary to AFI **36-3209,** the applicant was not informed of the physical disqualification review board (PDRB) and his right to submit matters for consideration prior to

its convening. Also noted is that the judge advocate (JA) detailed to assist the applicant in March 1996 was the same attorney who authored an opinion for HQ AFRES/JA in September 1995 recommending the applicant's 1995 injury be found EPTS. Nothing in the file suggests the applicant was informed of this attorney's prior involvement. The Chief believes the applicant should be afforded a new PDRB, with notice in advance and an opportunity to be heard before the board makes its decision. When a new PDRB is convened, the applicant should be afforded the assistance of a different counsel, or be informed in writing of the JA's prior involvement and given the choice whether to accept her services. While the Chief expects no different result, fundamental due process, as well as Air Force regulations, requires it. The new PDRB should formally document its two required determinations in accordance with AFI 36-3209.

A copy of the complete additional evaluation, with attachments, is at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATIONS:

Counsel responded that the applicant has had worsening of his prior injury to the disc. He provides a rebuttal statement from the applicant, previously submitted letters from doctors, and other documents. Counsel advises that in May 1998 the VA increased the applicant's rating from 40% to 60%.

Counsel's and applicant's complete responses, with attachments, are at Exhibit I.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice to warrant granting the applicant's requested relief. Applicant's contentions are duly noted; however, we do not find these uncorroborated assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden of having suffered either an error or an injustice. In view of the above and absent persuasive evidence to the contrary, we find no compelling basis to recommend granting the relief sought.

4. However, we note the Chief, General Law Division of HQ USAF/JAG, pointed out that the applicant was denied due process---although not in the manner alleged by his counsel---and is therefore entitled to partial relief. The Chief advises that, contrary to AFI 36-3209, the applicant was not informed of the PDRB and his right to submit matters for consideration prior to its convening. While the Chief expects no different result, fundamental due process, as well as regulation, requires a new PDRB. The Chief also noted that the judge advocate detailed to assist the applicant in March 1966 was the same attorney who authored an opinion for HQ AFRES/JA in September 1995 recommending the applicant's 1995 injury be found EPTS. We agree with the Chief's conclusion that the applicant should be afforded a new PDRB, with notice in advance and an opportunity to be heard before the PDRB makes its decision, afforded the assistance of a counsel different from the one who assisted him in March 1996, and that the PDRB should formally document its required determinations in accordance with AFI 36-3209. Therefore, we recommend the applicant's records be corrected as indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that a new Physical Disqualification Review Board (PDRB) be convened in accordance with AFI 36-3209 to determine whether he should be administratively discharged; that he be provided the assistance of counsel different from the one who assisted him in March 1996; that he be notified in advance and given an opportunity to be heard before the PDRB makes its decision; and that the PDRB formally document its required determinations in accordance with AFI 36-3209.

It is further recommended that the results of the PDRB be forwarded to the Air Force Board for Correction of Military Records at the earliest practicable date so that all necessary and appropriate actions may be completed.

The following members of the Board considered this application in Executive Session on 7 January 1999, under the provisions of AFI 36-2603:

Mr. Thomas S. Markiewicz, Panel Chair
Ms. Rita J. Maldonado, Member
Ms. Peggy E. Gordon, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 18 Dec 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, HQ ARC/SGP, dated 25 Mar 98, w/atchs.
Exhibit D. Letter, AFBCMR, dated 20 Apr 98.
Exhibit E. Letter, Counsel, dated 18 May 98, w/atchs.
Exhibit F. Letter, AFBCMR Medical Consultant, dated 7 Aug 98.
Exhibit G. Letter, HQ USAF/JAG, dated 26 Oct 98, w/atchs.
Exhibit H. Letter, AFBCMR, dated 6 Nov 98.
Exhibit I. Letter, Counsel, 3 Dec 98, w/atchs.

THOMAS S. MARKIEWICZ
Panel Chair

DEPARTMENT Of THE AIR FORCE
AIR FORCE RESERVE COMMAND

23 Mar 98

MEMORANDUM. FOR SGP
ATTN: [redacted]

FROM: HQ AFRC/JAG
Bldg 220, 2d Street
Robins AFB GA 31098-1635

SUBJECT: [redacted]

1. You've asked that we review your 13 March 98 written advisory to SAF/MIBR regarding [redacted] application to correct his military records, seeking disability processing in connection with a back injury (more precisely, two back injuries). As explained below, I've reviewed your advisory and find it responsive and legally sufficient. Moreover, I believe the evidence supports the conclusions previously reached by HQ AFRES/SGP (now, HQ AFRC/SGP), explained fully below.

2. Facts:

a. [redacted] a back [redacted] in August 1993 while deployed to and or milit uty in Arajuno, cuador. a this 199 back injury was incurred il ning military duty o suggestion of misconduct by [redacted] it was indisp incurred "In Line of Duty." In January 1994 [redacted] underwent surgery for this 1993 "In Line of D bac injury.

b. There is evidence which can support the conclusion [redacted] January 1994 surgery fully resolved his 1993 back injury, leaving him qualified for worldwide reserve military duty. [However, [redacted] has now asserted that he continued to experience back pain and discomfort following the January 1994 surgery intended to correct his 1993 "In Line of Duty" back injury.]

c. In February of 1995 [redacted] injured (or re-injured) his back when he fell at his non-military, civilian job. I'll address [redacted] 1995 back injury first, then his 1993 back injury, for reasons I believe will become obvious.

3. [redacted] Feb 1995 Injury/Re-Injury to His Back Was Not LOD/Was EPTS:

a. *An LOD Determination Was Not* Appropriate: AFI 36-2910, "Line of Duty (Misconduct) Determination" declares *at* paragraph 1.2.2. that a "LOD" (Line of Duty) determination *is* appropriate when members of the U.S. Air Force Reserve "incur or aggravate an injury, illness, or disease *while* performing active duty for training [ADT] or

ATCH 7

while *on* inactive duty training [IDT], including while traveling to or from such duty." In other words, the relevant inquiry is temporal: "Was the member performing duty at the time the event which caused the injury (or the event which aggravated the injury) occurred?" Here, there is no question that as a factual matter, [redacted] was neither performing ADT nor performing IDT *at the time* he fell while at his civilian, non-military job in Feb 1995 and injured his back (nor was he traveling to or from such duty.) Therefore, an LOD determination was not appropriate as to the Feb 1995 injury to MSgt [redacted] back resulting from that Feb 1995 fall.

b. *"Existed Prior to Service" (EPTS) Determination Was Appropriate:* AFI 36-2910, Atch 1, Sec. C. "Terms" shows the meaning of the term "Existed Prior to Service" (and the acronym, "EPTS.") Both refer to "a disease or injury, or the underlying condition causing it, [which] existed before the member's entry into military service, or between periods of service, and was not aggravated by service." To the extent that [redacted] injury, disease, or the underlying condition following his Feb 1995 fall *was caused* by *his Feb 1995 fall while on his* civilian, *non-military* job (and not caused while he was performing military duty), any such injury, disease, or underlying condition was appropriately declared to be "EPTS—LOD not applicable", as explained fully in AFI 36-2910, para 1.6.1.1. (Added)(AFRES Supplement.) Put another way, all injuries and resulting medica1 conditions caused or aggravated by [redacted] Feb 1995 fall are necessarily "EPTS" because they were not caused or aggravated while [redacted] was performing military duty on the day of his Feb 1995 fall.

c. *Ineligible for Disability Processing:* [redacted] Feb *1995* back injury led *to* an 11 Mar *96* determination by HQ AFRES/SGP (now, HQ AFRC/SGP) that [redacted] was both medically disqualified for worldwide duty and ineligible for disability processing (the latter determination, [redacted] now disputes.) However, the rules governing Reserve members who are eligible for disability processing are consistent with those governing Line of Duty determinations. IAW AFI 36-3212, "Physical Evaluation for Retention, Retirement, and Separation", Chapter 8, para 8.2., only Reservists "who have impairments which were incurred *in line of duty* are eligible for disability processing." As shown above, any injury, condition, or "impairment" which resulted from [redacted] Feb 1995 fall was "not In Line of Duty." Therefore, [redacted] was "ineligible for disability processing", but only as to any such, "not In Line of Duty" injury caused by his Feb *1995* fall.

d. As explained, [redacted] Feb 1995 injury which was caused or aggravated by his Feb 1995 fall at his civilian, non-military job was not In Line of Duty and did not render him eligible for disability processing. The only remaining question is: "Did [redacted] 1993 back injury, which was incurred "In Line of Duty", warrant disability processing?"

4. [redacted] 1993 Back Injury/1994 Surgery:

a. [redacted] 1993 "In Line of Duty" back injury was followed by surgery in January 1994. Your written advisory's "Background" section summarizes the facts which ultimately led to a 22 Oct 94 post-surgery determination (four months before [redacted]

Feb *1995* "not In Line of Duty" injury) that [redacted] **was** medically qualified for military duty. Your advisory **then** concludes, "The member's military records show he never indicated **to** military medical authorities **that** he **was** having significant back problems until **May *95"*** (three **months after his Feb 1995** civilian, "not **in** Line of **Duty"** injury), after which he **was** still qualified to participate "in ***a*** limited status" until September **1995.** [My legal opinion of **27** Mar ***96*** fully explores the **documents** describing [redacted] **1994 surgery,** its aftermath, and contrasts it with [redacted] 1993 back injury, which **I'll** not repeat **here.]**

b. Following [redacted] 1993 back injury and January **1994** surgery, there were then no indications that his **recovery** from surgery **was** anything but normal. **Even** following his **Feb *1995* civilian, "not In Line** of Duty" injury, he continued to participate in **Reserve** duty until **19** Sep ***95.*** **These** facts support the conclusion that **at** least prior **to** his Feb **1995** fall on his civilian job, [redacted] recovered normally from his **1994 surgery** and **was** physically qualified to **perform Reserve** duty. **That** fact, of **course,** explains why [redacted] **was** not processed for disability after his **1994** surgery: there **was no** indication after his **1993** injury and **1994** surgery that any physical condition impaired his ability to perform his Reserve duty.

c. Finally here, the file contains **a** July **6,1995** letter from [redacted] M.D. (apparently, [redacted] treating physician) of the West Florida Medical Center Clinic, attached to which are several pages of "Progress Notes" printed on **"06/04/96".** Included among [redacted] **progress notes, written after** [redacted] **eb 1995 "not In Line** of **Duty"** injury at his civilian job, are these **two comments by** [redacted] dated, respectively, **3/30/95 and 4/13/95:**

(1) [redacted] **did** well except for occasional back discomfort and had occasional burning in his left foot until a fall on **2/17/95"** [the **date of his** civilian, "not In Line of **Duty"** injury]; and,

(2) "The patient's present **problem** is clearly related **to** the disc space below the old one and **is *therefore new and totally a result of his slip and fall on 2/17/95"*** [The **date** of [redacted] civilian, "not **In** Line **of Duty" injury.]**

5. CONCLUSION: I believe there is ample **support** for your prior and current conclusions that [redacted] 1993 **"In** Line of **Duty"** injury did not result in disability or warrant disability processing and that his Feb **1995** "EPTS—LOD not applicable" injury **("not** In **Line of** Duty") resulted in both his disqualification for further Reserve duty and his ineligibility for disability processing, in accord with the applicable directives identified above. If **you** think it might be helpful, **you** are free **to provide this legal** review (and **my** prior review) to the Board **along** with your advisory opinion.

6. Please contact me at 7-1579 should you have any questions regarding this memo.

Philip D. Donohoe
Director, General Law

August 7, 1998
97-03785

MEMORANDUM FOR AFBCMR

FROM: BCMR Medical Consultant
1535 Command Drive, EE Wing, 3rd Floor
Andrews **AFB** MD 20762-7002

SUBJECT: Application for Correction of Military Records [redacted]

Applicant's entire case file has been reviewed and **is** forwarded with the following findings, conclusions and recommendations.

REQUESTED ACTION: The applicant, a traditional reservist, seeks relief for his claim that a back injury in 1995 while at his civilian employment was an aggravation of **a** previous LOD injury suffered in 1993. The BCMR requests review of medical opinions rendered in this case.

FACTS: The applicant suffered a herniated disc while deployed in his reserve capacity in 1993. Medical evaluation showed a marked disc protrusion at the L5-S1 spinal level which was surgically corrected in early 1994 with no apparent residual limitations or symptoms. At the time the applicant had an annual physical examination performed in October 1994, he reported no symptoms referable to his back and was cleared for continued reserve participation. In 1995 he suffered another injury to his back, this time while at his civilian employment which he claims is an aggravation of his earlier LOD injury.

DISCUSSION: All evidence clearly indicates that the second injury in 1995 was **a** new injury which just happened to occur at the site of **a** previous injury. The applicant's post-operative course and reports following the initial injury, and, indeed, his own statement on a subsequent physical examination for continued military duty, indicate complete resolution of symptoms and findings relating to the original injury. By all indications, complete resolution of the initial injury was achieved by the surgery. The second injury, while occurring in the location of the first, was a new event, one which should not permit a LOD determination for disability reasons. As an analogy, one might consider a broken arm, which, after complete healing, **is** re-broken at a later date. The latter incident, obviously, has no relationship to the former, and the same reasoning applies in the case under consideration. **All** conclusions reached **by** HQ AFRC/SGP are valid, and disability consideration for the second injury should not be granted.

RECOMMENDATION: The BCMR Medical Consultant is of the opinion that no change in the records is warranted and the application should be denied.

FREDERICK W. HORNICK, Col., USAF, MC, FS
Chief Medical Consultant, AFBCMR
Medical Advisor SAF Personnel Council

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, DC

MEMORANDUM FOR AFBCMR

26 OCT 1998

FROM: **HQ** USAF/JAG
1420 Air Force Pentagon
Washington DC **20330-1420**

. ication [redacted] Docket 8

The applicant, a non-extended active duty (non-EAD) reservist, was transferred to the Retired Reserve for physical disqualification. He seeks instead to continue processing in the disability evaluation system so he may meet a physical evaluation board and be medically retired for disability. You have asked for our review and comments on two aspects of the subject application: HQ AFRC/JA's (formerly AFRES) interpretation of the term "existed prior to service (EPTS)" and the applicant's contention that he was denied due process in violation of AFIs 36-3209, *Separation Procedures for Air Force Reserve and Air National Guard Members,* and 36-3212, *Physical Evaluation for Retention; Retirement, and Separation.* We agree with HQ AFRC/JA's interpretation of **"EPTS"** but conclude the applicant was denied due process (although not in the manner alleged by his counsel) and is therefore entitled to partial relief as described below.

Background

The applicant's military organization was the [redacted] Civil Engineering Squadron, [redacted] In August 1993, while deployed to Ecuador on a short active-duty tour, he injured his back carrying a heavy ladder. The injury was diagnosed via magnetic resonance imaging (MRI) in December 1993 as an **L4-5** midline to left posterior large disc protrusion and an L5-S1 midline to right posterior disc herniation. The applicant underwent surgery in January 1994 for the disc herniation and his recovery appeared to be satisfactory. (The latter point he disputes; see below.) On 6 October 1995, a formal line of duty and misconduct determination was approved finding the injury "in line of duty."

The applicant is also a civilian employee at [redacted] AFB. On 17 February 1995, while TDY to Fort Belvoir in this capacity, he slipped on ice and fell, injuring his back again. Upon his return to [redacted] AFB, a military physician examined him and prescribed bed rest and motrin for pain. Five weeks later his private orthopedist, Dr. Hooper, ordered another MRI. This MRI showed mild scar tissue mid posterior **LA-5,** and a midline to right disc protrusion at L5-S1 (the site of his previous surgery). Dr. Hooper planned to treat the applicant with steroids, but canceled them about two months later because the applicant's condition improved. (Documents in the file refer to a third injury on 11 July 1996, but no details are provided. The applicant had surgery again in October 1996 to correct an L5-S1 disc herniation.)

Following the February 1995 injury, the applicant continued to perform both his civilian and Reserve jobs, although he complained of back and leg pain. In May 1995, he was placed on a P3 profile, which allowed continued Reserve participation but restricted him from heavy lifting. The profile was changed to P4 (disqualified for worldwide duty) in September 1995 and the applicant's case was referred to a medical evaluation board (MEB) under AFI 48-123, *Medical Examination and Standards.* The MEB in November 1995 established the diagnosis, "chronic low back pain with persistent L4-5 herniated nucleus pulposus; status post L5-S1 discectomy; recurrent L5-S1 small disc herniation," and recommended permanent disqualification from worldwide duty and referral to the USAF Physical Evaluation Board (PEB). The MEB report (AF Form 618, block 23) states the injury's date of origin was August 1993, that it was incurred while entitled to basic pay, and that it did not exist prior to service.

HQ AFRES/SGP reviewed the MEB report in December 1995 and rejected the recommendation to refer the case to a PEB. SGP determined "the [disqualifying] medical condition existed prior to service" and therefore the applicant was "not entitled to disability processing." HQ AFRES then convened a physical disqualification/discharge review board under *AFI* 36-3209, which found the appropriate medical authority made the medical disqualification determination and recommended administrative discharge. The applicant was informed of his right to request transfer to the Retired Reserve (under the then-current early retirement program) in lieu of discharge. After a delay of several months, during which he attempted unsuccessfully to convince SGP he should meet a PEB, he applied for transfer to the Retired Reserve and his application was approved. (His completed application is not in the file, but it must have been submitted and approved before the order, issued 3 October 1996 with an effective date of 31 October, was published.)

Meaning of "EPTS"

The applicant contends HQ AFRES/SGP "improperly resolved his case by first ruling that his medical condition existed prior to service." His argument equates "service" with "term of enlistment" (or consecutive enlistments). He asserts that because he had no history of back trouble before 1981, the date from which he has continuously been a member of the Air Force Reserve, his current service-disqualifying back problems cannot be said to have existed prior to his Reserve "service." Further, he says the 1995 injury was "simply an aggravation" of the 1993 injury, not a new or separate injury, and therefore it must retain the same character as the earlier injury, which was indisputably "in the line of duty" (*i.e.*, *not* EPTS). Finally, he asserts HQ AFRES/SGP had neither the authority nor the expert qualifications needed to render a decision that the 1995 injury existed prior to service.

HQ AFRC/JAG's March 1998 opinion concluded the EPTS determination was appropriate. They read the definition of EPTS in AFI 36-2910, *Line of Duty (Misconduct) Determination,* to exclude from the LOD process an injury incurred when the applicant was performing his civilian job (*i.e.*, ***not*** performing military duties), even though he was a member of the Reserve at the time. The opinion cites AFI 36-2910/AFRES Supplement, para 1.6.1.1 (added), which provides:

> . . . EPTS conditions include chronic diseases, illnesses, injuries, and illnesses or diseases with an incubating period that would rule out a finding that they were incurred during a unit training assembly (UTA), active duty for training (ADT), or tour of active duty. If the medical condition is EPTS, the next consideration is whether it was aggravated by military service. If it was, an AF Form 348, Line of Duty Determination, is accomplished. If not, an administrative LOD determination is appropriate with the determination "EPTS-LOD not applicable."

We agree with HQ AFRC/JAG. The LOD process is used for a number of purposes. One purpose is to determine qualification for retirement or separation for disability under 10 USC Chapter 61 (sections 1201-1221). Those statutory provisions restrict disability-based retirement or separation of reserve component members not on EAD to those whose disability is a result of (a) performing active duty or inactive-duty training, (b) traveling directly to or from such duty, or (c) an injury, illness, or disease incurred or aggravated while remaining overnight between successive periods of inactive-duty training. 10 USC 1204. A disability not meeting one of those criteria may be the basis for administrative separation for physical disqualification under 10 USC 12644, but not disability-based retirement or separation (with attendant benefits) under Chapter 61. AFRES's supplement to AFI 36-2910 and HQ AFRC/JAG's opinion ensure consistency between the meaning of the term "EPTS," which is a creature of *AFI* 36-2910, and Chapter 61, where that term does not appear. (*AFI* 36-3209, paragraph 4.14.3.5, uses the phrase "not incident to service" for this purpose.)

The applicant's focus on whether the 1995 injury is labeled an "aggravation" or "re-injury" of the 1993 injury versus a "new" or "separate" injury misses the mark. Even if it was an aggravation of a previous injury, such aggravation did not occur during a period of time that qualifies him for disability retirement under 10 USC 1204.

The real issue is whether his condition immediately prior to the 1995 injury was already service disqualifying, so that he would have been entitled to disability processing even if the 1995 injury had never occurred. On this issue HQ AFRES/SGP clearly found against him, and on the record you provided for our review that finding appears reasonable. HQ AFRES/JAG's 27 March 1996 opinion quoted Dr. Hooper's 3 February 1994 post-surgery assessment thus: "[The applicant's] maximum date of medical improvement will be on or about February 21, 1994. I anticipate no restriction on his activities at that time. His prognosis is good for complete recovery." A 6 March 1994 Physical Profile Serial Report remarked, "Uneventful recovery from disc surgery L-5 area—no restrictions," and gave the applicant a P1 profile. In his 22 October 1994 periodic physical, the applicant noted his back surgery but denied recurrent back pain. He was found fit for worldwide duty and given a P1 profile. Five days after the 1995 injury, the examining physician's report stated there was "no" concurrent or pre-existing injury, disease, or physical impairment, and "Pt had surgery lower back 94 Jan [with] complete resolution.'' Dr. Hooper's progress note of 30 March 1995 said "[The applicant] did well except for occasional back discomfort and had occasional burning in his left foot until a fall on 2/17/95." Finally, the MEB narrative, written in November 1995 after a review of the applicant's medical record, said that following surgery, the applicant had "initial resolution of the radiating pain to the lower extremity, and marked improvement of his low back pain." The narrative continues, "The

patient reinjured his back in February 1995. The reinjury. . . fail[ed] to resolve . . . and [the applicant] has remained disabled since the injury." (In an earlier paragraph, the MEB narrative says the applicant's *1993* injury resulted in his inability to return to duty and his continuous disqualification from worldwide duty since that time. This assertion lacks support in the record we reviewed; indeed, it is directly contradicted by the documents we cited above.)

Denial of Due Process, Part I

The applicant's second main contention is that AFRES violated AFIs 36-3209 and 36-3212 by making a "medical determination" that was reserved by regulation to either the doctor who examined the applicant for the MEB [redacted] or the MEB itself. The applicant quotes the following provision in AFI 36-3209 (October 1995 version), paragraph 4.14.3.5:

> Standing Physical Disqualification Review Boards. . . convened in physical disqualification cases are not a physical evaluation board nor are they a board of inquiry. Thus, the board is not qualified or authorized to make medical determinations. . . . The functions and duties of the board are limited to making findings and recommendations concerning whether the appropriate surgeon has made a medical determination of disqualification evidenced in the manner prescribed by AFI 48-123 and that the disqualification was not incident to service. If the disqualification is incident to service, processing is prescribed by AFI 36-3212, Physical Evaluation for Retention, Retirement, and Separation.

The applicant contends that when Dr. [redacted] 'recommended that [he] meet a PEB for his physical condition and *found* [him] unfit for worldwide duty" (emphasis in original), that this "amounted to a finding by a surgeon (per AFI 36-3212) that [he] had a duty incurred disabling injury, and that he needed to go to an MEB and then a PEB" (emphasis added). Under the applicant's theory, neither HQ AFRES/SGP nor the physical disqualification review board (nor the MEB, for that matter) had the authority to reject that finding and divert the applicant's case from the disability evaluation system to the administrative discharge process.

In our opinion the applicant misinterprets the instructions. To begin with, neither the surgeon who performs the examination and reviews the member's medical records nor the MEB itself can make a final determination that the member is unfit for duty. The MEB can find him fit, but in the disability evaluation system unfitness is for the PEB to decide. Although the instruction is not a model of clarity, AFI 36-3212, Table 8.1, outlines the MEB's three possible findings as follows: "physically qualified" with return to duty recommended; "questionable" physical qualification, with referral to a PEB; and "questionable" physical qualification with EPTS disability, with referral to a PEB unless the member waives it. It appears the MEB in this case chose the second course, citing the 1993 injury as the onset of the applicant's condition. (The MEB's failure to note the 1995 injury as EPTS may have resulted from Dr. [redacted] failure to address the applicant's military duty status at the time of the 1995 injury.) Thus, the applicant is wrong when he asserts no one could overrule Dr. [redacted] **"finding."**

More important, the applicant ignores AFI 48-123, paragraph 7.1.3, which vests authority in "the appropriate *ARC* [air reserve component] surgeon" to determine "medical qualification for continued military duty in the reserve components for members not on EAD ***and*** *not eligible for disability* ***processing"*** (emphasis added). Per paragraph 14.5 of that AFI, "HQ AFRES/SGP is the final authority in determining the medical qualifications for Unit-Assigned Reservists." This means an MEB on a unit-assigned reservist such as the applicant must be reviewed by HQ AFRES/SGP, and if it is determined the member is not eligible for disability processing, HQ AFRES/SGP is the "appropriate" surgeon to make the finding of physical disqualification pre AFI 36-3212, paragraph 4.14.3.5.

Of course, this analysis doesn't address the applicant's real concern, which is not the identity of the doctor making the physical disqualification determination but the substance of the determination that his condition doesn't qualify for disability processing and the identity of the official who makes that decision. (After all, he does not contest the determination of physical disqualification for duty.) For that we must look again at *AFI* 36-3209, paragraph 4.14.3.5. Under that paragraph, the two-member physical disqualification review board (PDRB) considers two issues: first, did the appropriate surgeon make a medical determination of disqualification evidenced in the manner prescribed by AFI 48-123?; second, is the disqualification incident to service *(i*.e., is it the result of an injury, illness, or disease incurred or aggravated during a qualifying period under 10 USC 1204)?

At a cursory glance, the documents in the fde might suggest that HQ AFRES/SGP, not the PRDB, made the final determination that the applicant didn't qualify for disability processing. SGP's 11 March 1996 letter to the PRDB says, "3. Disability processing in accordance with *AFI* 36-3612 [sic, should be 3212] is not authorized" and the board member's indorsements include no express findings on this issue. However, the board could not have recommended the applicant be "administratively discharged for physical disqualification" without first concluding disability processing was inapplicable. While it would have been more appropriate for SGP to phrase his position as a recommendation with supporting rationale, and for the board members to make express findings on the issue, we do not consider the practice used here to be fatally defective.

Denial of Due Process, Part II

Our review of the case fde, and of documents from the applicant's personnel records provided by HQ ARPC (attached), revealed a significant due process violation. Contrary to AFI 36-3209, the applicant was not informed of the PRDB and his right to submit matters for consideration ***prior*** *to* its convening. (The board members recorded their decisions on 11 and 19 March 1996. HQ AFRES/DPM notified the applicant by letter dated 21 March 1996 that "A [PRDB] has also reviewed your case and has concurred with this disqualification action. . . . [S]eparation action has been initiated . . . . You will [be discharged] unless you apply for transfer to the Retired Reserve.")

Putting aside the question whether the PRDB would likely have reached a different result even with the applicant's input, this failure to provide notice and an opportunity to be heard is such a fundamental violation of due process as to require the convening of a new PRDB.

We also note that the judge advocate detailed to assist the applicant in March 1996 was the same attorney who authored an opinion for **HQ AFRESIJA** in September 1995 recommending the applicant's 1995 injury be found **EPTS.** Nothing in the file suggests the applicant was informed of this attorney's prior involvement. When a new PRDB is convened, the applicant should be afforded the assistance of **a** different counsel, or should be informed, in writing, of [redacted] prior involvement and be given the choice whether to accept her services.

Conclusion

We find the applicant's contentions without merit and recommend denial of his application on those grounds. However, **we** conclude he **was** denied procedural due process and must be afforded a new **PRDB,** with notice in advance and an opportunity to be heard before the board makes its decision. While we expect no different result, fundamental due process, as well as our own regulations, requires it. The new PRDB should formally document its two required determinations in accordance with AFI 36-3209.

HARLAN G. WILDER
Chief, General Law Division
Office of The Judge Advocate General

Attachments:
1. Case File
2. Additional records (49 pgs)