ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-1999-00390

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

The applicant submits DD Forms 149 (four), with attachments, requesting the following:

1. His injuries be reflected as a result of a combat-related event, instrumentality of war, hazardous service or simulated combat service and he receive combat pay and other allowances payable to the date of his retirement.

2. His compensable disability rating be increased to 80 or 100 percent based on unemployability.

3. The Physical Evaluation Board (PEB) be rendered invalid because a Reserve officer was not a member.

STATEMENT OF FACTS:

In Apr 94, an Informal Physical Evaluation Board (IPEB) diagnosed the applicant with neck pain (minor) arm with weakness and numbness, status post October 1992, C5 – C6 discectomy and fusion, and Jun 93, C5 corpectomy and C4 - C6 fusion and instrumentation. They recommended the applicant's name be placed on the Temporary Disability Retired List (TDRL) with a compensable disability rating of 30 percent. The applicant nonconcurred and requested his case be referred to the Formal Physical Evaluation Board (FPEB). The FPEB recommended the applicant name be placed on the TDRL, with a compensable disability rating of 60 percent and a diagnosis of neck pain and right (minor) arm pain with weakness and numbness, status post Oct 92 C5-6 discectomy and fusion and Jun 93 C5 corpectomy and C4-6 fusion and instrumentation.

The applicant's name was placed on the TDRL, on 2 Aug 94, in the grade of major, with a compensable disability rating of 60 percent, under the provisions of Title 10, United States Code (USC), Section 1202.

Under the case, AFBCMR Docket No. BC-1994-00335, the applicant's record was corrected to reflect the following:

1. His AF Form 356, *Findings and Recommended Disposition of the Physical Evaluation Board (PEB)*, dated 27 May 94, was changed as follows:

a. Item 9B reflect "Yes" rather than "NA."
b. Item 9C reflect "Yes" rather than "NA."
c. Item 9D reflect "NA" rather than "YES."
d. Item 10B reflect "YES" rather than "NA."

2. AF Form 348, *Line of Duty Determination (LOD)*, dated 9 Jul 93, was changed to reflect "Aggravation of Spinal Injury" rather than "Pain, Left Foot."

3. AF Form 261, Line of Duty Report of Investigation, dated 4 Aug 93, was changed as follows:

a. The basis for Findings Section now reflects a medical diagnosis of "Aggravation of Spinal Injury" rather than "Strain of left foot."

b. The Action of the Reviewing Authority Section now reflects "Approved," rather than "Disapproved."

4. On 1 Jul 94, he was recalled to active duty by competent authority.

5. On 1 Aug 94, he was found unfit to perform the duties of his office, rank, and grade or rating by reason of physical disability incurred while entitled to receive basic pay; that the diagnosis in his case was neck pain and right (minor) arm pain with weakness and numbness, status post Oct 92 C5 - C6 discectomy and fusion and Jun 93 C5 corpectomy and C4 - C6 fusion and instrumentation, further surgery was pending, occasional bladder incontinence, disability rating of 60 percent VA code 5299-5293; that the disability was permanent; that the disability was not due to intentional misconduct or willful neglect; that the disability was not incurred during a period of unauthorized absence; that the disability was incurred during a period of national emergency; and that the disability was not received in line of duty as a direct result or armed conflict.

6. He was permanently retired by reason of physical disability, effective 2 Aug 94, under the provisions of Title 10, USC Section 1202, with entitlement to home of selection travel and transportation allowances.

Under the case, AFBCMR Docket No. BC-1999-00390, the applicant requested that his record be corrected to reflect that his compensable disability rating of 60 percent be changed to 75 percent on the basis of unemployability. However, after

considering the available evidence, the Board found insufficient evidence of error or injustice.

Under AFBCMR Docket No. BC-2007-00345 the Board corrected the applicant's record to extend his separation travel and transportation allowances to 31 Jan 02, based on his medical condition at the time of his disability retirement.

For an accounting of the facts and circumstances surrounding the applicant's disability retirement, and, the rationale of the earlier decisions by the Board, see the Records of Proceedings at Exhibit F.

The applicant submits a request for reconsideration contending that he has been totally disabled, with multiple surgeries, since 1991. According to The Department of Veterans Affairs (DVA) and the Social Security Administration (SSA) he is permanently and totally disabled with a compensable disability rating of 100 percent for unemployability.

His injuries were caused by or aggravated by wartime service in the Area of Responsibility (AOR) as a crewmember of a C-130 aircraft (weapons system), simulated combat training and wearing other combat gear. He was injured and reaggravated previous injuries while serving in the Persian Gulf War.

His disability rating, at retirement, should be changed to 100 percent due to unemployability, which can be granted by the service.

In support of his appeal, the applicant provides a personal statement and copies of extracts from his disability evaluation, including documentation that he believes was not available at the time of separation.

The applicant's complete submission, with attachments, is at Exhibit G.

THE AIR FORCE EVALUATION:

The AFBCMR Medical Consultant recommends denial of the applicant's request for designating his cervical spine injury as *Combat-related* or the result of an *Instrumentality of War,* and denial of assignment of a 100 percent total disability rating retroactive to the date of his unfit finding.

The Medical Consultant has provided an extensive factual history to facilitate the Board's decision of whether to grant Instrumentality of War and/or to grant a 100 percent total disability rating from the time of the applicant's initial unfit finding (1994) or at the time of his removal from the TDRL (1996). The applicant has presented a plausible argument

supporting the establishment that he sustained a cervical spine injury or worsening of a previous cervical spine injury in 1991 after tumbling from a military unique vehicle (or uniquely configured or deployed for military use), which the Consultant concedes was an Instrumentality of War.

The question confronting the Board is whether the applicant's injury was the *direct* result of the Instrumentality of War. In the case under review, the applicant reportedly turned his vehicle off-road to allow the passage of a convoy, whereupon the vehicle assumed a tilted position, following which he exited the downward side door of the vehicle, fell, and injured himself. One could argue that it was the applicant's error in judgment not the Instrumentality of War that caused the fall; particularly since the vehicle was no longer in motion at the time. With reference to the applicant's contention for a 100 percent disability rating, the Medical Consultant acknowledges the reference of record made to a questionable reason why the Department of Veterans Affairs (DVA) has a higher statistical award of total disability ratings when compared to Military Departments. However, the allegation is not proof of an error or injustice that invalidates the decision of the military rating agency at the time of adjudication.

The Medical Consultant is aware of the policies governing *total* disability ratings, as outlined in 38 C.F.R, also known as the *Veterans Administration Schedule for Rating Disabilities (VASRD)*, and the variety of means of obtaining such a rating decision. While the applicant implicitly alleges the Department of Defense (DOD) rarely, if ever, considers awarding *total* disability ratings, this option was indeed available to military physical evaluation boards (PEBs), as pointed out by the applicant in a submitted extract from the since rescinded DoD Instruction (DODI) 1332.39, showing the award is made when a medical condition "renders it impossible for the average person suffering the same medical condition to engage in a substantially gainful civilian occupation: In the case under review, neither PEB considered the applicant's cervical spine condition and unilateral upper extremity neurological deficit rendered it "impossible" to engage in substantially gainful employment, given his proven cognitive skills in leadership and training, and the accommodations available to him under Title I of the Americans With Disabilities Act of 1990. Likewise, there are no objective evidence supplied to show the DVA assigned separate disability ratings for other specific conditions, other than the 60 percent rating, until 6 Oct 09.

Redirecting attention to the applicant's TDRL re-evaluation reflecting increased incontinence, several times during each day, the Consultant opines consideration should have been for formally assessing this as either a separate unfit finding or designating it as NOT unfitting with its own disability rating code on the AF Form 356. However, both the Military Department and the DVA appear to have subsumed the sequelae of the

applicant's cervical spine injury (at the maximum rating of 60 percent) under the unifying rating code for *Intervertebral Disc Syndrome;* although we see the DVA has ultimately assigned a separate disability ratings for bowel incontinence, urinary incontinence, and for lumbar degenerative disc disease as recent as 2009. The Consultant opines there is insufficient objective evidence supplied to show these were individually unfitting conditions at the time of placement and release from the TDRL; as would have been best reflected through physical profile documents, intervening medical progress notes, or their inclusion on the applicant's AF Form 618, *Medical Board Report* document as disqualifying medical conditions.

In conclusion, the Medical Consultant opines the applicant has not met the burden of proof that his cervical spine injury, believed to have first occurred in 1989 [errantly diagnosed as a shoulder injury) and which was aggravated in 1991, was the *direct* result of an *Instrumentality of War.* With respect to the determination of the requested *total* disability rating, the Consultant opines that the DVA decision, that of the Social Security Administration, and that made by the PEBs are not binding upon each other. The Board nevertheless has the authority to grant the applicant a 100 percent total disability rating and/or find his cervical spine injury either *Combat-related* or the result of an *Instrumentality of War* independent of the advisory opinion provided.

The complete AFBCMR Medical Consultant evaluation is at Exhibit H.

APPLICANT'S REVIEW OF THE AIR FORCE EVALUATION:

EXAMINER'S NOTE: The BCMR Medical Consultant evaluation, dated 24 Mar 11 was mailed to the applicant on 5 Oct 11. However, the applicant provided additional documents for review prior to this mailing. The applicant responded to the 24 Mar 11 evaluation by the BCMR Medical Consultant and his response with the previously submitted documentation was provided to the BCMR Medical Consultant for review.

In the additional documentation, the applicant maintains that servicemembers are entitled to protection in their retirement by an award of unemployability; therefore, he is entitled to a 70 percent level of compensation.

He notes that Air Force officials (BCMR Medical Consultant has briefed the President, Veterans Affairs Disability Benefits Commission (VADBC) on the subject of unemployability, explaining the differences in numbers of awards by the Air Force and the DVA. He notes in his briefing that the BCMR Medical Consultant explained the variances of awards by the two organizations were

a matter of “different physician training.” However, he did not state the Air Force does not actually make such awards. In this respect, the applicant notes, in researching this through Freedom of Information Act (FOIA) requests, he has found out that the BCMR Medical Consultant did not tell the VADBC that the Air Force actually does not make any findings of unemployability for servicemembers at all. A statistically insignificant number of around just 12 members in over a decade has received this protection, yet he has provided adequate proof that he qualifies for this protection.

In addition, through his FOIA request, he was not provided any record of the Board’s consideration of unemployability for total disability, nor any written information or guidance. However, he did find two briefings of the last two AFBCMR Training Conferences, where the word “unemployability” does not even appear and if the response to the FOIA is accurate these two briefings appear to be the only guidance to the Board, so, he is unaware as to how servicemembers can be protected by the provisions of this law, if the subject of unemployability is not even mentioned.

While he understands the difference between the two laws governing the Military Disability Evaluation Systems (MDES) and the DVA, how can both agencies differ so widely in their evaluation of the same “snapshot in time,” at the time of retirement? (Exhibit I)

In addition, the applicant submitted supporting documentation to corroborate his contentions that his LOD injuries were worsened by the care he received from the VA and the inadequacies of the first surgery at Bethesda. He maintains that these findings should have been reflected in his Air Force medical evaluation for permanent and total disability and should have been separately rated at the PEB.

Additionally, the applicant submitted further documentation to corroborate his contentions for combat-related injuries and illness associated with Agent Orange; and amended his request to include acute peripheral neuropathy due to an instrumentality of war.

He respectfully disagrees with several recommendations of the Advisory Opinion and notes that it makes no objection to the backdating of the requested relief, which he maintains should be backdated to the date of his original retirement because he was clearly totally and permanently disabled at that time and the Air Force failed to allow the PEB and AFBMCR to be even superficially informed regarding the unemployability rating and his eligibility for it.

Additionally, he notes that the evaluation:

-Fails to address several of the issues for which relief was sought, specifically, Agent Orange exposure and its related illnesses, plus other injuries and illnesses.

-Ignores justifications detailed in his appeal.

-Is in factual error regarding numerous conclusions.

-Concludes that his appeal has enough justification to permit the Board to give him the benefit of the doubt.

Further, he notes, that because of his duties during deployments and the Gulf War, he maintains that his cervical spine injury was aggravated and post-surgical and DVA medical care worsened his injuries and illnesses. The aircraft and previous fall from a military vehicle are evidence that his disabilities should be combat-related, because they are instrumentalities of war. He maintains that the Air Force's record with consideration of unemployability is inconsistent with law and policy and he should be granted a compensable disability rating of 100 percent based on unemployability.

The applicant's complete responses, with attachments, are at Exhibit K.

ADDITIONAL AIR FORCE EVALUATION:

The BCMR Medical Consultant recommends granting the applicant relief by amending the record to reflect that he was placed on the Temporary Disability Retired List (TDRL), effective 2 Aug 94, with a 60 percent disability rating and remained so until he was removed from the TDRL and permanently retired with the assignment of a total [100 percent] disability rating under the *individual unemployability* provision of 38 C.F.R. and the provision of the since rescinded DoDI 1332.39, paragraph 6.5, *Total Disability Rating,* effective 28 Mar 96. He notes that this supplemental advisory analysis is in response to the applicant's rebuttal letter to the Board. The applicant maintains that he should have received a 100 percent disability rating due to *unemployability* backdated to his date of retirement and that his medical condition(s) be determined to have been the direct result of an *Instrumentality* of *War.* Setting the stage of the applicant's petition is evidence supplied to him via FOIA which demonstrated that the Air Force, in a disproportionate manner, has granted far fewer *total* disability rating awards for *unemployability,* as compared with the DVA.

The BCMR Medical Consultant notes that fundamentally, the applicant's petition for a *total* disability rating appears to be largely based upon the "unemployability" decisions previously rendered by other federal agencies, the DVA and the Social Security Administration (SSA); and the implicit allegation that the Military Department failed to do so because it "[does] not like issuing *unemployability* ratings," or words to that effect.

The Medical Consultant concedes the opinions from other sources supporting the applicant's petition are compelling that he may have been reasonably *unemployable* during the timeframe from 1994 to 1996 (the latter date when he was removed from the TDRL). However, the Medical Consultant would prefer to reach a consensus via an independent review of the applicant's actual service medical documentation, e.g., MEB narrative summary, applicable progress notes leading to the MEB and the assigned military profile restrictions, notwithstanding the reputable sources of the opinions provided [National Naval Medical Center, a VA Medical Center, Johns Hopkins and Massachusetts General Hospital] and his military TDRL reevaluation. For this reason, the Consultant opines that the collective probative value of the VA determinations coupled with the clinical assessment at the time of TDRL re-evaluation should be taken into consideration for granting the *unemployability* rating under the aforementioned provision of DoDI 1332.39 and existing provisions under Title 38 Code of Federal Regulations (C.F.R.), at the time of release from the TDRL.

We now know that, as a result of NDAA 2008 and the current Integrated Disability Evaluation System, the Military Department relinquishes all rating determinations to the DVA, is required to follow only VA or mutually agreed upon guidelines in rating determinations, but still only applies the disability rating decision to those conditions found unfitting for further military service. This remedy has removed the opportunity for future disparities between VA and Military Departmental rating decisions when evaluating the same patient, with the same reported disabilities, although operating under the same VASRD; but bearing in mind that the DVA assigns disability ratings to *all* conditions found service connected, without regard to their impact upon a member's retainability, fitness to serve, or PEB determinations. Based upon a preponderance of evidence, to include the applicant's reported worsening incontinence and the emergence of an intervening secondary affective disorder [and the failure of medical officials to obtain a recommended psychiatric evaluation], which likely contributed to his level of overall functional impairment, the Consultant finds it fair to change the rating at the time of the applicant's release from the TDRL and to apply the total disability rating due to *unemployability.*

The Medical Consultant opines the Service evidence does not adequately support a total disability rating at initial TDRL placement; particularly in the context of the applicant's demonstrated performance history during Service and prior to initial TDRL placement. Addressing the applicant's concern for failing to address other medical conditions reportedly present in his service treatment record, unlike the DVA, the MDES, operating under Title 10, U.S.C., is established to maintain a fit and vital fighting force and can by law, only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active

service or were the cause for career termination; and then only for the degree of impairment present at the time of separation and not based on future changes or worsening; unless such changes occurred in the condition(s) previously found unfitting, while in TDRL status. Although the applicant contends other medical conditions were not considered in his disability rating computation, which were reportedly documented in his service treatment record, there is insufficient evidence to demonstrate that any of these reported additional clinical symptoms interfered with his ability to perform assigned military service of a sufficient sustained level of restriction, e.g., "P4T" or "L4T" profile and duration [as would have been reflected on AF Form 422, *Physical Profile Serial Reports]* to warrant independent bases for separate unfit findings for termination of his military service.

In conclusion, the Medical Consultant opines the applicant has raised reasonable doubt in his favor, that he should have been considered for the *total* disability rating for *individual unemployability* at the time of removal from the TDRL and that his cervical spine injury, that occurred after falling out of a military vehicle and which required two surgeries, was the direct result of an *Instrumentality* of *War.* Should the Board agree with this analysis, the reader is advised that this does not establish a precedent, but would be based solely on the unique characteristics of the applicant's disabilities and evidence provided reflecting both significant mental and residual physical impairments that adversely affected his employability.

The complete BCMR Medical Consultant evaluation is at Exhibit L.

ADDITIONAL APPLICANT'S REVIEW OF THE AIR FORCE EVALUATION:

The applicant concurs with and accepts the recommendations and offers a minor observation regarding the opinion’s characterization of his service prior to being placed on the TDRL. He notes that, in fact, documents submitted to the Board establish that he was for nearly two years on Incapacitation Pay status, itself a disability situation for which he had to be unemployable to qualify. Further, he wish to offer another minor observation that the opinion discusses justification for providing an Instrumentality of War finding and seems to recommend that such a finding “could reasonably be considered.” However, no later discussion of this is made in the Recommendation section of page 5, so he concurs and accepts this opinion if that is actually its recommendation. Additionally, he notes, that some of the points raised in his appeal (such as not having a Reserve Component officer as a PEB board member) have not been touched upon but it now seems that all the total relief he could hope for has been recommended in the opinion.

The applicant's complete response is at Exhibit N.

THE BOARD CONCLUDES THAT:

Sufficient relevant evidence has been presented to demonstrate the existence of error or injustice warranting corrective action. After careful consideration of the applicant's complete submission, including his responses to the BCMR Medical Consultant's evaluations and based on the preponderance of evidence, we recommend partial relief. In this respect, we note the BCMR Medical Consultant has conducted an exhaustive review of the available evidence and we are in agreement with his opinion and recommendation that the additional documentation provides a reasonable basis to conclude that the applicant should be entitled to a compensable disability rating of 100 percent for individual unemployability subsequent to his release from the TDRL.

However, in considering the applicant's request that his conditions be reflected as a result of a combat-related event, instrumentality of war, hazardous service or simulated combat service; that his PEB be rendered invalid based on the make-up of the board's membership, we found no evidence that the PEB was conducted inappropriately or was not administered in accordance with the governing Air Force instructions and policy. Additionally, in our view, while we note the comments of the BCMR Medical Consultant, we are not convinced that the applicant's injuries were a direct result of a combat-related event or an instrumentality of war. Accordingly, we recommend the applicant's record be corrected only to the extent 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:

1. On 2 August 1994, he was not permanently retired by reason of disability under the provisions of Title 10 USC Section 1202, but his name was placed on the Temporary Disability Retired List (TDRL), with a compensable disability rating of 60 percent.

2. On 28 March 1996, his name was removed from the TDRL and he was permanently retired by reason of physical disability with a compensable disability rating of 100 percent.

The following members of the Board considered AFBCMR Docket Number BC-1999-00390 in Executive Session on 21 February 2012, under the provisions of AFI 36-2603:

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

Exhibit F.	Record of Proceedings, dated 30 Aug 00, w/exhibits.
Exhibit G.	DD Forms 149, dated 22 Oct 10, w/atchs.
Exhibit H.	Letter, AFBCMR Medical Consultant, dated 24 Mar 11.
Exhibit I.	Letters, Applicant, dated 27 Apr and 18 May 11, w/atchs.
Exhibit J.	Letter, AFBCMR, dated 5 Oct 11.
Exhibit K.	Letter, Applicant, dated 23 Oct 11, w/atchs.
Exhibit L.	Letter, AFBCMR Medical Consultant, dated 6 Jan 12.
Exhibit M.	Letter, AFBCMR, dated 10 Jan 12.
Exhibit N.	Letter, Applicant, dated 31 Jan 12.

Panel Chair