In the United States Court of Federal Claims

Case No. 02-585C
(Filed: June 2, 2006)
NOT TO BE PUBLISHED

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NORMAN WILLIAMS, JR., *
Plaintiff, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *
*

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Domenique Kirchner, Commercial Litigation Branch, Department of Justice, Washington, D.C., attorney of record for Defendant. With her on the briefs were ***Peter D. Keisler***, Assistant Attorney General, ***David M. Cohen***, Director, and ***Todd M. Hughes***, Assistant Director. ***Major Tiffany Dawson***, U.S. Air Force, and ***Major Tracey Rockenbach***, Air Force Legal Service Agency, of counsel.

Sarah Leigh Martin, law clerk.

OPINION

BASKIR, Judge.

The Plaintiff appeals a second determination by the Air Force Board for the Correction of Military Records that upon discharge from the Air Force, he was fit for worldwide service. Plaintiff seeks a finding that he was physically disabled due to chronic hepatitis at the time of his retirement.

Because the Board's decision was supported by substantial evidence in the record and was not arbitrary and capricious, the Defendant's Motion for Judgment on the Administrative Record is GRANTED.

I. BACKGROUND

Plaintiff Norman Williams is a former noncommissioned U.S. Air Force officer who served for 6 years and 11 months of active duty between August 22, 1968, until his honorable discharge on July 28, 1975. Various medical reports establish that Plaintiff probably contracted hepatitis C in 1971, during his tour in Vietnam.

Mr. Williams contends he should have been discharged with a medical disability by reason of his hepatitis. As we shall discuss in greater detail, a medical disability due to chronic hepatitis requires consideration of three elements – persistent symptoms, impairment of functions, and ability to perform one's duties. We begin by relating Mr. Williams' medical history while in the service.

A. Service Medical History

While serving in Vietnam during December 1971, Mr. Williams sought medical care for nausea, vomiting, and diarrhea. He subsequently sought additional care for similar symptoms in January, March, May, August and December 1972. Throughout this time, no specific diagnosis was given to Plaintiff and he was treated symptomatically.

During temporary assignment at Anderson Air Force Base in Guam in April 1973, he sought treatment for gastrointestinal complaints and was diagnosed with gastroenteritis. Laboratory tests showed elevated liver enzymes, which are evidence of inflammation or injury of liver cells. The physician estimated Mr. Williams' liver to be 14 centimeters in diameter, a normal size, and a note from the clinic entry reports Plaintiff had an unidentified liver virus. He was briefly hospitalized for his symptoms from April 24 to April 26, 1973. The physician noted a possible correlation between Plaintiff's symptoms and alcohol-induced gastritis (he had been drinking approximately one half pint of alcohol on the weekends and beer during the week), and his symptoms subsided with alcohol cessation. Testing done on April 25, 1973, found that Mr. Williams' enzyme levels had declined, but were still not normal.

On May 9, 1973, Plaintiff was first diagnosed with hepatitis, presumably viral and aggravated by his alcohol intake. He was instructed to return to duty and to appear for follow-up exams upon his return to home base. During a follow-up exam, Plaintiff's enzymes were again elevated and he had a mild degree of inflammation of the liver.

After returning from Guam, during a follow-up evaluation in August 1973, Mr. Williams was again found to have elevated enzyme levels consistent with more active liver inflammation. He was diagnosed with chronic hepatitis. Records indicate that during this time, he was experiencing some fatigue, which is a symptom of chronic hepatitis. He did not manifest other symptoms of liver disease at this time, and clinical tests of his liver function were normal. During another follow-up evaluation on

November 16, 1973, Plaintiff reported feeling better, except for a single bought of nausea, vomiting, and diarrhea. Plaintiff's enzyme levels had reduced to a mildly elevated level.

In December 1973, his physician reported that Mr. Williams had felt well since the last evaluation, save some mild cramping, and he had no complaints of fatigue. Test results again found mildly elevated enzyme levels. The physician again diagnosed Plaintiff with chronic persistent hepatitis with plans for observation and follow-up evaluations.

Mr. Williams complained of a few bouts of diarrhea on May 13 and August 13 of 1974. Both times, the physician diagnosed him with acute gastroenteritis. During an additional follow up on October 10, 1974, his liver enzymes were mildly elevated (but the lowest documented level yet). His physician concluded that his diagnosis was "probably benign chronic persistent hepatitis." Administrative Record ("AR") at 317, 356. Mr. Williams did not show other signs of chronic liver disease or impairment of liver function.

Between December 1974 and June 1975, there is no documented history of gastrointestinal complaints in Mr. Williams' medical record. However, in June 1975, Mr. Williams again sought care for gastrointestinal complaints, reporting nausea, vomiting, diarrhea, and stomach cramps.

At the expiration of his term of service, on July 28, 1975, Mr. Williams was separated from the Air Force with an honorable discharge. During his separation physical on December 5, 1974, medical personnel again diagnosed him with benign chronic persistent hepatitis, noting a history of elevated liver enzymes. His levels of bilirubin (an indicator of liver function), liver size, and body weight were normal, and there was an absence of clinical symptoms of chronic liver disease.

In a consultation sheet dated December 18, 1974, Plaintiff was found to have a history of elevated enzyme levels, but those levels had been decreasing over time. The consultation sheet further stated that there was no threat to Plaintiff of devastating hepatic disease at that time and that the patient did not show any signs of chronic liver disease, only chronic persistent hepatitis. The resulting Report of Medical Examination dated December 18, 1974, and supplemented by addendum on February 18, 1975, declared Plaintiff fit for worldwide duty and separation based on this evaluation and consultation.

B. Post-Discharge Medical History

Mr. Williams provided incomplete medical records for the years after his military service. In 1987, his gall bladder was removed, and his physician noted that he had a long history of upper gastrointestinal problems. His physician also indicated that he consumed alcohol before his most recent onset of nausea and vomiting.

In 1995, Mr. Williams underwent a liver biopsy and was officially diagnosed with

hepatitis C (chronic active hepatitis due to HCV), with some fibrosis. However, the scarring was mild and his liver showed normal synthetic function such as clotting factors, filtering, and bile duct function. In 1996, he had an abdominal ultrasound, which showed his liver at a normal size of 14 centimeters in diameter. In 1997, another ultrasound revealed that his liver size had increased to 20 centimeters. Both examinations showed elevated liver enzymes and inflammation of liver tissue, but again, the inflammation was mild and tests showed normal liver functioning.

Mr. Williams' gastroenterologist treated his hepatitis C with medication until 2000, at which time he determined that treatment was not successful. He concluded that Mr. Williams still had irritable bowel syndrome, noting, "I doubt that his symptoms are from the hepatitis C." AR at 357.

Mr. Williams was not diagnosed with hepatitis C during his military service because that particular virus was not discovered until 1989. Hepatitis C (HCV) is a virus that causes inflammation of the liver that can lead to scarring, and can cause cirrhosis and cancer of the liver. Passed mainly through contact with infected blood, the HCV virus can be contracted through sharing razors, contaminated intravenous injections, and blood transfusions before 1992. Prior to 1977, HCV was diagnosed generically as chronic hepatitis. After 1977 and until its discovery in 1989, HCV was referred to as non-A, non-B hepatitis.

By 1990, an HCV antibody test became available to identify exposure to the virus. Then in 1992, a highly sensitive antibody test was developed, which had a much lower false positive rate. Many people with HCV do not have symptoms. Those who do usually feel like they have the flu: fatigue, stomach pain or discomfort, fever, lack of appetite, and diarrhea. In rarer cases, symptomatic patients have dark yellow urine, light-colored stools, and jaundice. HCV progresses slowly and may take 20 to 30 years to cause serious liver damage, often without symptoms. Some patients have normal liver enzyme levels, even when tested on multiple occasions.

C. Military Service Record

Although he had chronic hepatitis, Mr. Williams performed well during his service in the Air Force. Mr. Williams received three performance reports between August 2, 1971, and May 2, 1974. On two of these reports, he achieved the highest rating possible at "firewall 9," including his last performance report before discharge. This last report also indicated that Plaintiff was taking a welding course at a local college. The report covering his service in Guam reflects that he worked long hours (12-hour days, 7 days per week), and did so competently and with a positive attitude.

During the period between February and November of 1973, he received a less favorable report due to an Article 15 non-judicial punishment for a physical altercation with a supervisor. This lower report showed that Mr. Williams' duty performance was otherwise satisfactory.

D. Administrative Review

On June 29, 2001, Mr. Williams applied to the Air Force Board for Correction of Military Records ("AFBCMR" or "Board") to convert his honorable discharge to one of medical disability, claiming that the infectious and serious nature of hepatitis C warranted a finding that he was disabled. His request was denied on January 11, 2002. The advisory opinion concluded that non-medical discharge was appropriate because at the time of his discharge Mr. Williams was fit for military service and capable of performing his duties.

On June 5, 2002, Mr. Williams, appearing *pro se*, appealed the decision to this Court. We found that the AFBCMR failed to apply the proper regulations in determining whether the Plaintiff was entitled to disability discharge. We remanded the case to the Board for correction of this error on November 30, 2004. Specifically, the Board had erroneously applied the current 2001 regulations governing fitness to serve in the military instead of those in effect at the time of Mr. Williams' separation in 1975. The Board had failed to search diligently for the proper governing regulations, or to consider the more detailed medical record provided by the Defendant at the Court's request. We required the Board to apply the governing regulations from the time of discharge and to consider the supplemented medical record.

The AFBCMR reconsidered the appeal of the Plaintiff on remand and affirmed its earlier determination on April 14, 2005. The Board found three regulations in effect during 1975 governing the discharge: (1) Department of Defense Directive 1332.18, *Uniform Interpretation of Laws Pertaining to Separation from the Military Service by Reason of Physical Disability*; (2) Air Force Manual 35-4, *Physical Evaluation for Retention, Retirement and Separation*; and (3) Air Force Manual 160-1, *Medical Examination and Medical Standards*. Applying the three regulations, the Board stated:

> [The] medical standards for chronic hepatitis at the time of applicant's discharge state that chronic hepatitis <u>may</u> be disqualifying for continued military service when there are persistent symptoms, <u>and</u> impairment of liver function. The symptoms and the impairment of liver function must have prevented the member from performing "the duties of his office, rank, grade, or rating in such a manner as to reasonably fulfill the purpose of his employment on active duty." As previously noted, evidence of the record indicates he performed his military duties in an exemplary fashion for over three years with chronic hepatitis.

AR at 3 (emphasis in original). The Board, applying this standard, affirmed its earlier determination, denying the change of record to medical discharge retirement.

Relying upon Mr. Williams' medical record and the February 1, 2005 opinion of the BCMR Medical Consultant, the Board concluded: (1) that any symptoms of liver disease Mr. Williams experienced were not "persistent," and many were likely due to other causes; (2) there was no evidence of impairment of liver function as a result of his chronic liver disease while in service; and (3) the record shows the applicant continued to perform his military duties excellently throughout his time of service. *See* AR at 3-4. Specifically, the Board found that his episodic diarrhea and abdominal cramping were

later diagnosed as irritable bowel syndrome and were not symptoms of mild chronic hepatitis, that his nausea and vomiting probably constituted alcohol-induced gastritis, and that his fatigue was intermittent and did not interfere with the performance of his duties. Although Mr. Williams experienced elevated liver enzymes, a sign of hepatitis, that is not evidence of liver function impairment.

Plaintiff, still acting *pro se*, filed his appeal with the Court on May 3, 2005, challenging the Board's second determination. On August 8, 2005, the Defendant filed a Motion for Judgment on the Administrative Record. The Plaintiff then retained counsel on October 27, 2005. Plaintiff filed a Cross-Motion for Judgment on the Administrative Record, and briefing was completed on February 10, 2006. Oral argument was held on May 23, 2006.

II. ANALYSIS

A. Jurisdiction and Standard of Review

It is well-established that the U.S. Court of Federal Claims has Tucker Act jurisdiction to review "military service determinations with monetary consequences." *Heisig v. United States*, 719 F.2d 1153, 1155-56 (Fed. Cir. 1983). The Federal Circuit has recently held that 10 U.S.C. § 1201, which allows the Secretary of the Air Force to authorize disability retirement pay for its members on active duty, confers Tucker Act jurisdiction on this Court. *Fisher v. United States*, 402 F.3d 1167, 1174 (Fed. Cir. 2005). However, the military is accorded great deference in "determining the suitability of a commissioned officer." *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986). Accordingly, the Court may overturn a decision of the AFBCMR only if it was "arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Haselrig v. United States*, 333 F.3d 1354, 1355 (Fed. Cir. 2003) (citing *Wronke*, 787 F.2d at 1576); *accord Fisher*, 402 F.3d at 1180. The Plaintiff must meet this standard with "cogent and clearly convincing evidence." *Wronke*, 787 F.2d at 1576 (quoting *Dorl v. United States*, 200 Ct. Cl. 626, 633 (1973)).

This standard of review is identical in terminology to the one set forth in the Administrative Procedures Act ("APA"). *See* 5 U.S.C. § 706(2)(A). Under this standard, the reviewing court may consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (interpreting the APA).

More specifically, an agency is arbitrary and capricious if it: 1) "relied on factors which Congress has not intended it to consider," 2) "entirely failed to consider an important aspect of the problem," 3) "offered an explanation for its decision that runs counter to the evidence before the agency," or 4) the decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In short, the court must look to see whether the agency considered the relevant factors and made a rational decision. *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000).

The arbitrary and capricious standard is a narrow one. It is not proper for a court to substitute its own judgment for that of the agency. *Citizens to Preserve Overton Park*, 401 U.S. at 416. If reasonable minds could differ, then the agency was not arbitrary and capricious in rendering its decision. *Heisig*, 719 F.2d at 1156. An agency's decision should be upheld under this standard if "the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Likewise, "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

B. Standards for Medical Disability Discharge

Pursuant to the Court's remand, the Board identified and applied to Mr. Williams' record the three regulations, cited earlier, that were in effect in 1975:

> 1) Department of Defense Directive 1332.18, *Uniform Interpretation of Laws Relating to Separation from the Military Service by Reason of Physical Disability* (Sep. 9, 1968) (hereinafter, "DOD Dir. 1332.18"). AR at 362.
>
> 2) Air Force Manual 35-4, *Physical Evaluation for Retention, Retirement and Separation* (Jan. 28, 1969, and as amended, May 27, 1971; May 4, 1972; and Mar. 21, 1973) (hereinafter, "AFM 35-4"). AR at 388.
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> 3) Air Force Manual 160-1, *Medical Examination and Medical Standards* (Apr. 6, 1971, and as amended Jul. 1, 1973) (hereinafter, "AFM 160-1"). AR at 397.

See AR at 357-58, Def. Br. at 13.

The Board applied these regulations correctly, with two possible exceptions. At one juncture in his report, the Board's Medical Consultant cited a 1965 version of AFM 35-4, as amended in 1966, which was superseded in 1969. *Compare* AR at 358, *with* AFM 35-4, AR at 388 ("Supersedes AFM 35-4, 10 August 1965."). At another point, the Medical Consultant cited a 1976 edition of AFM 35-4. *See* AR at 358. It does not appear that these regulations are different in any serious respect from the contemporaneous versions, as both parties conceded at oral argument. However, we shall ignore these suspect citations of authority and not rely upon them for our conclusion.

According to DOD Dir. 1332.18, a service member is eligible to be separated by reason of disability if the member is "unfit, because of physical disability, to perform the duties of his office, grade, rank or rating." DOD Dir. 1332.18 ¶ IV.A.1, AR at 363. Similarly, AFM 160-1 dictates that members are unfit because of physical disability

when "such conditions render them unable to perform the duties of their office, grade, or rank in such a manner as to reasonably fulfill the purpose of their employment on active duty." AFM 160-1 ¶ 5-10.a.5, AR at 408.

The regulations list hepatitis as a physical disability. DOD Dir. 1332.18 Encl. 2 ¶ 1.e, AR at 379; AFM 160-1 ¶ 5-10.a.5, AR at 415. More specifically, the physical disability "Hepatitis, chronic" is defined as follows:

> When, after a reasonable time following the acute stage, symptoms persist, and there is objective evidence of impairment of liver function.

DOD Dir. 1332.18 Encl. 2 ¶ 1.e, AR at 379; *accord*, AFM 160-1 ¶ 5-10.a.5, AR at 415. The presence of a listed physical disability is neither a necessary nor sufficient condition for a finding of unfitness. DOD Dir. 1332.18 ¶ V.A.2, AR at 364-65; AFM 160-1 ¶¶ 1-1.c.1, 5-1.c.1.a, AR at 401, 408. Rather, the examining officer must make a finding that the member cannot perform his required duties "in such a manner as to fulfill reasonably the purpose of his employment on active duty." DOD Dir. 1332.18 ¶ V.A.2, AR at 365; *accord*, AFM 160-1 ¶ 5-1.c.1.a, AR at 408. Such an inability often, but not always, is caused by a listed physical disability. *See* DOD Dir. 1332.18 ¶ V.A.2, AR at 364-65; AFM 160-1 ¶ 5-1.c.1.a, AR at 408. In making such a determination, the examiner must consider the effect of the disability "both from the standpoint of how the disabilities affect the individual's performance, and requirements which may be imposed on the service concerned to maintain and protect him during future duty assignments." DOD Dir. 1332.18 ¶ V.A.1.a, AR at 364.

According to AFM 160-1, continued satisfactory performance of duties by a member who is being processed for separation for a reason other than disability creates a presumption that the member is fit for military service. AFM 160-1 ¶ 5-1.c.2.c.2, AR at 409. This presumption may be overcome by clear and convincing evidence to the contrary. *Id.*

In general, reasonable doubt about a member's fitness is defined as follows:

> A reasonable doubt is one which exists when the evidence does not satisfactorily prove or disprove the claim. It is a substantial doubt (not specious) and within the range of probabilities as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or contradictions in the evidence.

DOD Dir. 1332.18 Encl. 1 ¶ H, AR at 375-76. All reasonable doubt must be resolved in favor of the service member. *Id.* at ¶ V.B.2, AR at 367.

C. Review of the Board's Decision

As the Defendant summarizes in its brief, the Board and Medical Consultant based their conclusions on three primary findings – 1) Mr. Williams showed no persistent symptoms of chronic hepatitis, 2) the record showed no impairment of Mr. Williams' liver function, and 3) Mr. Williams' infection did not have a negative impact

on his work performance. Def. Br. at 15-16. We shall review these findings applying the standards we have just reviewed.

First, however, we consider the Plaintiff's argument that according to the regulations, Mr. Williams could be found unfit due to physical disability even if the first and second of these findings are accurate. Pl. Br. at 10. That is, even if Mr. Williams did not show persistent symptoms of hepatitis and impairment of liver function, he could be found unfit generally. Plaintiff asserts that the regulations establish that having a listed disability is not a necessary precondition to a finding of unfitness, Pl. Br. at 10, contrary to the Defendant's argument, Def. Br. at 15.

The Plaintiff is correct that having a listed disorder is not a necessary condition to a finding of unfitness due to disability. The regulations state that the lists are not inclusive of all potentially disabling disorders. *See* DOD Dir. 1332.18 ¶ V.A.2, AR at 364-65; AFM 160-1 ¶ 5-1.c.1.a, AR at 408. Whether or not a member has a listed disability, the essential inquiry is always whether the symptoms prevented the member from satisfactorily performing his duties. DOD Dir. 1332.18 ¶ IV.A.1, AR at 363; AFM 160-1 ¶ 5-1.c.1.a, AR at 408.

Nevertheless, Mr. Williams *was* diagnosed with chronic hepatitis, and the Board's assessment of the effect, if any, of Mr. Williams' hepatitis on his job performance was essential to its conclusion that Mr. Williams was not unfit for military service. That analysis remains relevant to this Court's inquiry into whether the Board's conclusion was arbitrary and capricious or unsupported by substantial evidence in the record. We will therefore address each of the Board's findings in turn.

1. Persistent symptoms of chronic hepatitis

The Board endorsed the Medical Consultant's conclusion that according to his record, Mr. Williams did not show persistent symptoms of chronic hepatitis at the time of his fitness determination. AR at 5, 360. By "symptom," the Board and the parties mean objective manifestations of an illness as experienced by a patient. The Board acknowledged that Mr. Williams experienced a variety of "non-specific gastrointestinal symptoms . . . on an intermittent basis" during his military service, including nausea, vomiting, diarrhea, and abdominal cramping, as well as fatigue. AR at 3. The Board and Medical Consultant concluded that these symptoms were either not associated with hepatitis in his case or were not persistent. AR at 3-4.

Of these symptoms, the Medical Consultant concluded that diarrhea and abdominal cramping are not usual symptoms of chronic hepatitis. AR at 360. Based on evidence in the record, this conclusion was incorrect. AR at 460. However, after his military service, Mr. Williams was diagnosed with irritable bowel syndrome, which commonly causes diarrhea and abdominal cramps. In addition, Mr. Williams reported diarrhea and abdominal pain in 1987, which were diagnosed, along with nausea and vomiting, as cholecystitis due to gall stones. AR at 356. The Medical Consultant,

therefore, ruled out Mr. Williams' symptoms of diarrhea and abdominal cramps, finding that they were likely attributable to irritable bowel syndrome and gall stones, not hepatitis.

The Medical Consultant also found that alcohol consumption was the probable cause of Mr. Williams' nausea and vomiting, which can be symptoms of hepatitis. AR at 360. According to his medical records, Mr. Williams reported and sought treatment for nausea and vomiting after periods of moderate to heavy alcohol consumption. AR at 355. He was prescribed an anti-anxiety drug that is used for prevention of alcohol withdrawal symptoms, and his decrease in alcohol use correlated with a reduction of symptoms. *Id.* Based on the findings of the attending physician, the Medical Consultant concluded that Mr. Williams' episodes of nausea and vomiting were caused by alcohol-induced gastritis, not hepatitis. AR at 360.

According to the Medical Consultant's opinion, fatigue is the only symptom from those Mr. Williams reported that was not likely caused by some other condition. The Medical Consultant noted that chronic fatigue is a common symptom of chronic hepatitis. AR at 356. Mr. Williams experienced fatigue simultaneously with an increase in liver enzyme levels. AR at 360. After a few months, Mr. Williams reported no longer feeling fatigue; this improvement corresponded with a decrease in liver enzyme levels. *Id*. Based on the record, the Medical Consultant characterized Mr. Williams' fatigue as "transient." *Id.*

The Plaintiff argues that he experienced a "combination of symptoms [of hepatitis] persistently," and that the Medical Consultant erred in analyzing and explaining each symptom in isolation. Pl. Br. at 16. Although the Board's characterization of Mr. Williams' symptoms was perhaps uncharitable, it was not arbitrary and capricious for the Board to conclude that Mr. Williams did not suffer persistent symptoms of chronic hepatitis. The Medical Consultant made rational conclusions, based on substantial evidence in the record, that the symptoms were attributable to irritable bowel syndrome, gall stones, and alcohol consumption, and that the only symptom likely caused by hepatitis, fatigue, was short-lived. The Court may not substitute its judgment for that of the Board.

2. Impairment of liver function

The Board also concluded, based on the Medical Consultant's opinion, that Mr. Williams' liver functions were not impaired at the time of his discharge. This finding is based on substantial evidence in the record and is not arbitrary and capricious.

The liver performs a number of different bodily functions. A variety of tests are employed to determine if one or another of these functions is normal. A person's liver functions are measured by serum albumin levels, bilirubin levels, accumulation of toxins in the blood, liver size upon examination, and clinical findings of liver disease. AR at 356-57, 361. If a liver biopsy is performed, functions such as restriction of blood flow,

clotting, and bile production can be assessed. Cirrhosis (substantial fibrosis or scarring) often results from hepatitis, constitutes an impairment of liver function, and leads to a decrease in liver size.

Elevated liver enzymes indicate inflammation of liver tissue or injury to liver cells and are "consistent with" a diagnosis of chronic hepatitis. AR at 355-56 (explaining that chronic hepatitis in the early 1970s was diagnosed based on liver enzyme elevations and symptoms of liver disease). They do not, however, constitute impairment of the liver function, unless the inflammation is "extensive and severe." AR at 361. Increased levels of liver enzymes lead to an increase in liver size, as compared with the decrease in liver size caused by scarring. Chronic inflammation can eventually lead to scarring, which in turn decreases the liver size and interferes with liver functions such as blood flow. *Id.*

According to the records of his examinations, Mr. Williams did not experience an impairment of liver function. Between the dates of his diagnosis and discharge, his serum albumin and bilirubin levels were normal, his liver size was normal, and there were no clinical findings of liver disease. AR at 356. A biopsy in 1995, 20 years after his discharge, showed mild scarring. In 1996, his liver size was normal (the same as it was in 1975). By 1997, his liver size had increased due to inflammation (not scarring), and tests showed that his bile ducts, blood flow, and clotting were all functioning normally. To date, therefore, the only evidence of impairment of liver function is the mild scarring indicated by a biopsy in 1995, 20 years after Mr. Williams' discharge from the Air Force.

Mr. Williams experienced mildly elevated liver enzymes beginning at the time of his hepatitis diagnosis. These enzyme levels increased to a moderate level in 1973, but they again decreased to a mildly elevated level within a few months. This manifestation appeared consistently in his medical records, and in 2000, he continued to have mild elevation of liver enzymes, similar to the levels shown while he was in the service. As discussed above, an increase in liver enzymes alone does not indicate an impairment of liver function. Therefore, the Board was not arbitrary and capricious in determining that the presence of this circumstance did not constitute such an impairment.

3. Performance of duties

Regardless of whether Mr. Williams was diagnosed with chronic hepatitis, some other listed disability, or some disability or combination of disabilities not listed in the regulations, the crucial inquiry is whether his condition prevented him from satisfactorily performing his duties and fulfilling the purpose of his office, grade, rank, or rating. DOD Dir. 1332.18 ¶ IV.A.1, AR at 363; AFM 160-1 ¶ 5-1.c.1.a, AR at 408. Based on Mr. Williams' records and the Medical Consultant's opinion, the Board concluded that at no time during his service was Mr. Williams' job performance less than satisfactory; in fact, for the most part it was "exemplary." AR at 3.

Specifically, the record shows that from the time Mr. Williams likely contracted

hepatitis in 1971, until his discharge in 1975, he received three performance reports. AR at 354. On two of the three reports, Mr. Williams received a "firewall 9," which is the highest possible rating. The other report, in 1973, showed that Mr. Williams' performance of duties was "satisfactory," a reduced rating due to "some difficulty with supervisors." AR at 356. In one of the reports covering 1972, his supervisor stated that Mr. Williams worked long hours, and "[m]eets all his obligations, his bearing and behavior on and off duty are of the highest Air Force Standards." AR at 355. He did not miss any duty time in 1973 for medical reasons outside of appointments and one 2-day hospitalization, and in 1974, his performance report stated that he was taking a welding course in addition to fulfilling his military duties.

Based on this, it cannot reasonably be concluded that Mr. Williams performed his duties less than satisfactorily. All of his performance reports before and after he contracted hepatitis show his performance levels ranging from satisfactory to exemplary. He did not miss duty time for medical reasons, other than medical appointments and one 2-day hospitalization, and he was able to balance his military duties with a welding course. Indeed, it may have been arbitrary and capricious for the Board to conclude otherwise, given that the Plaintiff has not pointed to any evidence in the record that counters this conclusion.

The Court is mindful that it may seem unjust to rule against Mr. Williams as a direct result of his "exemplary" service. Nevertheless, it is clear that the gravamen of a fitness determination is satisfactory service, and that continued service creates a presumption of fitness. AFM 160-1 ¶ 5-1.c.2.c.2, AR at 409; *see also Blum v. United States*, 231 Ct. Cl. 739, 742-43 (1982) (member's continued voluntary, competent performance militated against a finding of unfitness). AFM 160-1 explains:

> The law that provides for disability retirement and separation exists primarily for the purpose of maintaining a fit and vital force. It is not the intent of this law to bestow compensatory benefits on those whose nondisability separation or retirement is imminent and who have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical problems that have not actually precluded the performance of such duty. Disability compensation for rateable service[-]connected defects that have not precluded active service is provided under a separate law which is administered by the Veterans Administration. Upon retirement or separation the member is eligible to apply to the Veterans Administration for benefits to which he may be entitled under the laws governing the functions of that agency.

AFM 160-1 ¶ 5-1.c.2.c.3, AR at 409-10 (internal citations omitted). In this case, Mr. Williams' continued competent service is well documented and is evidence that supports the Board's conclusion that he was fit for military service. There is, in fact, no contrary evidence.

4. The contagious nature of hepatitis C

The Plaintiff argues that the Board was arbitrary and capricious in failing to take into account the contagious nature of chronic hepatitis in assessing Mr. Williams' fitness to serve in the Air Force. Pl. Br. at 13. In fact, Mr. Williams contends that his original complaint to the Board was the examiner's failure to account for his contagiousness, and that the Board has been arbitrary and capricious in continuing to ignore his contention. Plaintiff cites a U.S. Supreme Court case holding that an employer may refuse to hire a person with hepatitis C because of the danger the employee poses to himself and others. Pl. Br. at 14; *see also Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002).

In response, the Defendant contends that hepatitis C is spread through contact with blood, not by casual contact, as detailed in the record. Def. Rep. at 17. There is substantial evidence to support the conclusion that Mr. Williams was not a danger to those around him. Also, Defendant disputes the applicability of *Chevron* to this case.

Neither the Board's nor the Medical Consultant's opinions mentions the possible contagious nature of Mr. Williams' illness. However, the Defendant correctly states that there is evidence in the record that hepatitis C is not easily spread to others – there must be contact with infected blood. AR at 485, 488; *see also* AR at 479 (hepatitis C is not spread through casual contact). As such, the rate of transmission is low. *See* AR at 479 ("Health care workers have a 1.8% risk of acquiring HCV after a contaminated needlestick."). The Plaintiff does not identify any special circumstances that would increase the likelihood that Mr. Williams, an Air Force mechanic, would transmit the disease to others. Without giving any reason to treat Mr. Williams' position uniquely, the Plaintiff seems to be arguing for a general rule that all persons with hepatitis C should be considered unfit for duty in the Air Force because of its contagious nature, an argument that cuts too deeply.

Furthermore, the Plaintiff does not adequately support his argument that the safety of others is an aspect of Mr. Williams' ability to perform his job. The only regulation that Plaintiff cites is DOD Dir. 1332.18. That provision states, in relevant part, that a member who has been found unfit for duty may nevertheless continue on active duty in a limited manner if he does not jeopardize the health of himself or others. DOD Dir. 1332.18 ¶ V.H.2., AR at 372. This provision only applies to those who have been determined to be unfit and yet desire to continue on active duty. It does not imply anything about the subset of members who are fit for active duty, or those who are unfit and wish to be separated.

The *Chevron* case does help the Plaintiff. In *Chevron*, the Supreme Court analyzed whether a regulation that allowed an employer to refuse to hire a person if he was a threat to the safety of himself or others violated the Americans with Disabilities Act. 536 U.S. at 78. The challenge was based on the argument that the plaintiff allegedly posed a health risk to himself because he had hepatitis C, which could be aggravated by the chemicals present in the employee's workplace. *Id*. at 76, 79. The

case does not suggest that hepatitis C poses a universal health risk to others in the workplace. Indeed, the employer did not invoke the "others" prong of the regulation, but argued that the plaintiff himself was at risk. *Id.* at 79.

On remand, the Court of Appeals analyzed whether the defendant had established that employment would be medically risky for plaintiff, but did not address the risk he might pose to others. *Echazabal v. Chevron U.S.A., Inc.*, 336 F.3d 1023 (9th Cir. 2003).

5. Referral to a Physical Evaluation Board

Finally, the Plaintiff contends that he should have been referred to the Disability Evaluation System at the time of his discharge exam. In support of his argument, Plaintiff cites section 5-21 of AFM 160-1, which provides that "General and Miscellaneous Conditions and Defects" can qualify as medical conditions or physical defects that may render a member unfit for duty if:

> a. The individual is precluded from a reasonable fulfillment of the purpose of his employment in the military service, or
>
> b. The individual's health or well-being would be compromised if he were to remain in the military service, or
>
> c. The individual's retention in the military service *would prejudice the best interests of the Government. Questionable cases will be referred to physical evaluation boards for a determination of unfitness*.

AFM 160-1 ¶ 5-21, AR at 421 (emphasis added). Plaintiff posited at oral argument that a proper consideration of the "best interests of the Government" should include the contagiousness of Mr. Williams' disability and his individual circumstances, and warranted a referral to a physical evaluation board in this case.

Of course, Mr. Williams had chronic hepatitis, not some general or miscellaneous condition, and we presume that those who drafted the regulations discussed throughout this opinion took the "best interests of the Government" into account in setting the specific standard for chronic hepatitis. Also, in December 1974, Mr. Williams was given a standard separation physical exam, and it was determined that he was medically qualified for worldwide service. Those examining him did not consider his case questionable and did not refer him for further evaluation. The Medical Consultant and the Board reviewed the record and came to the same conclusion. For the reasons provided in this opinion, it is clear that the Board's conclusion was reasoned and based on substantial evidence in the record. Therefore, the fact that Mr. Williams was not referred to a physical evaluation board does not render the Board's decision arbitrary and capricious.

The Plaintiff also cites Air Force Regulation ("AFR") 160-43, which provides that "medical examiners, medical evaluation boards or medical staff agencies" will clinically evaluate a member whose qualifications are "questionable" due to a listed condition,

including chronic hepatitis. Pl. Br. at 18; AFR 160-43 ¶ 5-1.d.2, AR at 438-39. According to Plaintiff, he was not referred for such examination. Pl. Br. at 19. AFR 160-43 superseded AFM 160-1, quoted above, and represents a change in policy. Although in 1975 only the "questionable" cases involving general or miscellaneous conditions were referred to a physical evaluation board, all "questionable" cases, involving any listed physical disability, warranted "expeditious clinical evaluation" beginning in 1976. *Compare* AFM 160-1 ¶ 5-21, AR at 421, *with* AFR 160-43 ¶ 5-1.d.2, AR at 438-39; *see also* AFR 160-43 ¶ 1-4.e, AR at 433 (Medical Board processing, "with possible case referral to the Informal Physical Evaluation Board," is warranted if "doubt remains" about an individual's fitness). But because AFR 160-43 was issued on June 21, 1976, almost a year after Mr. Williams' discharge, *see* AFR 160-43, AR at 426, it is not applicable to his case. In any event, his fitness was never questionable.

III. CONCLUSION

In short, the Board was not arbitrary and capricious in determining that Mr. Williams was fit for duty upon his retirement in 1975. Although Mr. Williams may have experienced intermittent symptoms of chronic hepatitis, the Board rationally concluded that they were not persistent and that there was no evidence of an impairment of his liver function. And despite any symptoms he experienced, it is uncontroverted that his performance in the Air Force was more than satisfactory.

Therefore, the Defendant's Motion for Judgment on the Administrative Record is hereby GRANTED, and the Plaintiff's Cross-Motion is DENIED. Accordingly, the Clerk of the Court is ordered to dismiss the case with prejudice. Each party shall bear its own costs.

IT IS SO ORDERED.

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LAWRENCE M. BASKIR
Judge