

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Marvin Krislov

Subseries: Steve Neuwirth

OA/ID Number: 8191

FolderID:

Folder Title:

Gays in the Military - Benefits: VA Scale and Fitness for Military Case Law

Stack:

S

Row:

113

Section:

3

Shelf:

9

Position:

3

Mom -

There are the cases I've
found so far.

The bottom line is that the
VA Scale Rating does not mean
that service member is not fit
for military duty.

These cases seem to arise in
the context of people trying to
get benefits, but they're still
applicable as far as what VA
Scale means

- C

I'll keep looking for different
angles.

EXECUTIVE OFFICE OF THE PRESIDENT LAW LIBRARY
Room 528 OE0B
x53397

- ☐ Immediate
☐ Brief
☐ Research

Name: _____

Initials: _____

Agency: _____ Office: _____

Date Rec'd: _____

Room No: _____ Phone: _____

Date Due: _____

Information Requested:

PHOTOCOPY
PRESERVATION

Findings of Fact

1958, Mr. Lewis supplied defendant's representative with a copy of an advertising sheet mentioning adoption of nylon mesh air flow pockets by the U.S. Army and Air Force after 9 years' testing. Mr. Lewis had been shown a sample of shorts with ventilating pockets by defendant's representative.

11. On October 30, 1958, Mr. Lewis wrote to the Department of the Army as follows:

* * * * *

Please be advised that the license granted to the Government above identified, termination of which was refused by the Government on November 30, 1955, is hereby cancelled by me.

* * * * *

12. On November 3, 1958, Mr. Lewis was advised by letter from the Office of General Counsel, Department of the Army, as follows:

Your letter of October 30, 1958, has been carefully considered in connection with the license agreement of August 12, 1949 under your Patent No. 2,420,486.

The agreement grants the Government an irrevocable license under the patent for the life of the patent. The agreement specifies that the contract is binding upon you.

Under the circumstances, your letter of October 30, 1958, can not be considered as a cancellation of the agreement.

This letter is being sent directly to you rather than to your attorney, because no negotiations with him are justified by the circumstances.

13. On August 26, 1959, Mr. Lewis wrote to General H. Parks, Army and Navy Export Service, concerning the sale of garments having his patented pocket construction, and advised that his license with the Government permitted the Government to have garments with mesh pockets made by any manufacturer, and that he would be pleased to license the Post Exchange to do likewise, including the right to sell. On September 1, 1959, Mr. Lewis wrote a letter to the Office of General Counsel, Department of the Army, in which he requested a ruling on whether his license agreement with the Government grants the same privileges to what is generally known as the Post Exchange. A reply dated September 19, 1959, from the Patents Division, Department of the Army, indicated that there were no known court decisions

Syllabus

on the question raised and that it would be inappropriate to express an opinion.

14. The following military specifications, entitled "Shorts, Men's, Cotton," were issued by defendant:

MIL-S-14212 (QMC), December 19, 1955

MIL-S-14212A (QMC), July 25, 1956

MIL-S-14212B (QMC), March 31, 1958

MIL-S-14212C, October 19, 1959.

The first two of these military specifications recite that the pockets may be "cloth, nylon, netting," or may be "cloth, cotton, drill." The third specification recites that the material for pockets "shall be cloth, nylon, netting." The fourth specification recites that the material for pocketing "shall be cloth, cotton, silesia." None of these military specifications refers to the "Patent Release and License Contract." The specifications do not require that shorts manufactured thereunder bear any patent license notice or patent marking. As noted in defendant's letter of acceptance quoted in finding 5, such a reference was requested. The use of a patent notice was not required by the terms of the "Patent Release and License Contract" set forth in finding 4. Over 6 years elapsed between the request for inclusion of a patent notice and the issuance of the first military specification authorizing pockets made from netting.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made part of the judgment herein, the court concludes as a matter of law that the "Patent Release and License Contract" is valid and subsisting, and judgment is entered to that effect, and therefore plaintiff's petition is dismissed.

GILBERT P. SNELL v. THE UNITED STATES

[No. 29-60. Decided November 13, 1964]

ON THE PROOFS

Military pay; retired pay (disability); arbitrary and capricious denial of retirement.—Plaintiff sues to recover disability retired pay. He claims he should have been paid from the date of his dis-

Syllabus

charge from the Army without disability benefits, on the ground that the Secretary of the Army acted arbitrarily. It is held that although a Disposition Board and a Physical Evaluation Board found plaintiff unfit for military service in a degree which would have warranted his retirement under the provisions of section 402 of the Career Compensation Act of 1949, 63 Stat. 816, the contrary conclusions of the Physical Review Council and the Physical Disability Appeal Board were supported by sufficient evidence to preclude a holding by the court that the Secretary's action in denying plaintiff disability retirement with pay was arbitrary or capricious.

Military pay; retired pay (disability); entitlement to disability retirement; Veterans Administration determination; generally.—A determination by the Veterans Administration as to a former serviceman's degree of disability for the purposes of a Veterans Administration pension, is not dispositive of that man's fitness or unfitness for military duty.

Armed Services ⇨ 13.5(5)

Military pay; retired pay (disability); entitlement to disability retirement; incapacity (fitness) for military service; how determined.—In determining whether a member of the armed forces is unfit for military service and eligible for disability retirement with pay, that member's age, grade and branch of service at the time of his relief from active duty are factors to be taken into consideration by the Secretary, acting through his medical boards. Where the secretary finds that an officer of middle age is suffering from mild or moderate ailments but is physically fit for military duty commensurate with his age, grade and branch of service, and the record reveals that the officer actually did perform his duties in a proper manner prior to his release from active duty, and his civilian work in an equally acceptable manner thereafter, there is no ground for finding the Secretary's determination of fitness for service arbitrary.

Armed Services ⇨ 13.5(5)

Military pay; retired pay (disability); entitlement to disability retirement; incapacity (fitness) for military services; arbitrary and capricious determination of; what constitutes.—Where military boards disagree on the issue of whether an officer is unfit for military service and is entitled to disability retirement, and where the record before the boards lends support to either conclusion, an ultimate finding by the Secretary of the particular service, supported by the findings of two boards out of four, adverse to the officer's claim for disability retirement, cannot

Opinion of Commissioner

be said to be arbitrary or capricious. *Nichols v. United States*, 158 Ct. Cl. 412.

Armed Services ⇨ 13.5(5)

Fred W. Shields for plaintiff.

Charles M. Munnecke, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DAVIS and COLLINS, *Judges*, and WHITAKER, *Senior Judge*.

PER CURIAM: This case was referred pursuant to Rule 45 (since April 1, 1964, Rule 57) to Herbert N. Maletz, a trial commissioner of this court, with directions to make findings of fact and recommendations for conclusion of law. The commissioner has done so in a report filed October 24, 1963. Exceptions to the commissioner's findings were taken by the plaintiff, briefs were filed by the parties, the case was submitted to the court on oral argument of counsel and thereafter supplemental memoranda were filed by the parties. Since the court is in agreement with the findings and recommendation of the trial commissioner, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case. Plaintiff is therefore not entitled to recover and his petition is dismissed.

OPINION OF COMMISSIONER

This is a suit for recovery of physical disability retirement pay under the provisions of section 402 of the Career Compensation Act of 1949, 63 Stat. 816 (1949), 37 U.S.C. § 272 (1952).¹ Plaintiff, a retired Army Reserve Officer, was re-

¹ This section provides in part that "Upon a determination by the Secretary of the Army) . . . (1) that a member of a Reserve component . . . entitled to receive basic pay . . . who has been called or ordered to extended active duty . . . in excess of thirty days, is unfit to perform the duties of his office, rank, grade, or rating, by reason of physical disability incurred while entitled to receive basic pay; (2) that such disability is not due to the intentional misconduct or willful neglect of such member and that such disability was not incurred during a period of unauthorized absence of such member; (3) that such disability is 30 per centum or more in accordance with the standard schedule of rating disabilities in current use by the Veterans' Administration; (4) that such member has completed at least eight years of active service . . .; and (5) that accepted medical principles indicate that such disability may be of a permanent nature . . . such members shall be entitled to receive disability retirement pay."

Opinion of Commissioner

leased from active duty in December 1954, not by reason of physical disability, at which time he had arthritic ailments involving his knees and back. The issue in the case is his claim that the determination of the Secretary of the Army that he was fit for military duty at the time of his release and, therefore, not entitled to disability retirement pay, was arbitrary and capricious.

Plaintiff was born in 1899. He enlisted in the Army in 1918; served in World War I as an enlisted man; enlisted in the Illinois National Guard in 1928; and was commissioned as a Reserve Officer in 1932. He served on extended active duty as an officer from March 1941 to December 11, 1954, when he was relieved not by reason of physical disability, and reverted to Reserve status until September 1, 1959, when he retired. During this time he received successive promotions to the rank of Lieutenant Colonel.

While on extended active duty, plaintiff had various staff, administrative and command assignments, including a detail with the Air Force from 1942 to 1945 as Assistant Director of Training at Sheppard Field, Texas. On his last tour of active duty, he served overseas in Korea and Japan from about January 1953 to May 1954. In Korea his duties were administrative; in Japan he had assignments as a deputy camp commander, camp commander and post inspector. In May 1953 plaintiff requested a three-year extension of active duty beyond June 30, 1954, when his current tour of duty would expire. The request was denied by the Secretary of the Army in November 1953 because plaintiff was then over-age in grade, having attained the age of 54.

Beginning in 1945, plaintiff had recurrent attacks of low back pain, with a particularly severe attack in March 1954 which required his hospitalization for about a month. He also had recurrent attacks of pain in his upper back and neck, accompanied by headaches and blackout spells; pain in both knees; and pain in his right elbow. Despite these ailments, during his last tour of active duty from January 1953 to April 1954, he performed his assignments (some of which involved considerable physical activity) conscientiously, thoroughly and in a most satisfactory manner. His

Opinion of Commissioner

efficiency reports for that period indicate that he was in good physical condition and physically qualified for the performance of his duty. The reports reflect such comments as "physically qualified", "in excellent physical condition", and "no physical defects noted". Plaintiff's last commanding officer overseas indicated that he possessed the physical qualities expected for his grade and length of commissioned service; he also commented that plaintiff "was hospitalized for 26 days during the period of this report (February 12, 1954 to April 25, 1954), suffering from physical difficulties with his back and knee which handicap him in the performance of duties expected of an officer of his rank."

Plaintiff returned to the United States in May 1954 and in the following month was admitted to the United States Naval Hospital, Great Lakes, Illinois, preliminary to his release from active duty. On August 12, 1954, a Disposition Board at the Hospital noted that his admission diagnosis was arteriosclerosis, owing to the fact that he had experienced blackouts prior to entering the hospital. It also noted that the blackouts were of an orthopedic nature related to an arthritic condition in plaintiff's spine. The Board reported that a physical examination at the hospital disclosed that plaintiff had moderate osteoarthritis of the cervical and dorsal spine; minimal osteoarthritis of the lumbar spine; and marked osteoarthritis of both knees. It diagnosed plaintiff's condition as degenerative joint disease, multiple, due to unknown cause; it found that the disease originated in 1945; that plaintiff was incapacitated for further military duty on July 22, 1954; that the cause of incapacity was incident to service; and that the disability was permanent. The Board recommended that plaintiff appear before a Physical Evaluation Board.

Plaintiff appeared before a Physical Evaluation Board at Fort Sheridan, Illinois, on October 19, 1954. In addition to testifying in person, he introduced a sworn statement from his last commanding officer overseas describing his physical condition and concluding with the comment that "A fair estimate of the percentage of disability to perform duties to which he has been assigned, because of his physical

Case law

VA rating scale
and fitness for
military duty

Opinion of Commissioner

condition, would be from 35% to 40%." The Physical Evaluation Board diagnosed plaintiff's condition as osteoarthritis, degenerative, with X-ray confirmation of swelling, limitation of motion and muscle spasm, multiple joints involvement, and found that plaintiff was unfit and that such unfitness was 40 per cent disabling and of a permanent nature.²

On October 25, 1954, the Army Physical Review Council disapproved the findings of the Physical Evaluation Board and substituted a new finding that plaintiff was considered physically fit on the basis that "The evidence of record does not reveal the presence of any disability to a degree which would preclude the performance of active military duty."

On November 4, 1954, plaintiff submitted a rebuttal to the findings of the Physical Review Council, including therein an extensive report of a private orthopedic specialist relative to his examination of plaintiff. This report substantially confirmed the diagnosis of the Great Lakes' Hospital and concluded that plaintiff had moderate osteoarthritis of the cervical and dorsal spine; minimal arthritis of the lumbar spine; and moderate arthritis of both knees. The matter was then referred to the Army Physical Disability Appeal Board, which, on November 12, 1954, concurred in the finding of the Army Physical Review Council that plaintiff was fit for active military duty. This action was subsequently approved by the Secretary of the Army and plaintiff was relieved from active duty on December 11, 1954, not by reason of physical disability, and assigned to a reserve unit.

After his release from active duty, plaintiff filed a claim with the Veterans Administration for disability compensation. The claim was allowed and he received disability payments based on a 40 percent disability rating, with a diagnosis of osteoarthritic joint disease involving the cervical and lumbar spine, and arthritis of the right knee.³

² Osteoarthritis of the type plaintiff was suffering from is a progressive disease typically occurring after the age of 45. See Veterans Administration, *Schedule for Rating Physical Disabilities* (1945), p. 22.

³ This determination by the Veterans Administration is, of course, not dispositive of plaintiff's fitness or unfitness for military duty. See e.g., *Holliday v. United States*, 128 Ct. Cl. 647, 649 (1954); *Uhley v. United States*, 137 Ct. Cl. 275, 281-82, 147 F. Supp. 497, 501 (1957); *Patten v. United States*, 161 Ct. Cl. 131, 135 (1963).

Opinion of Commissioner

Also after his release from active duty, plaintiff returned to his former civilian occupation as a letter carrier with the Post Office Department in Springfield, Illinois. While on that job, he was able to perform his duties in excellent fashion and, in fact, received a commendation from the Postmaster in 1956 for his outstanding performance in having served his route in exceptional time. In March 1958 plaintiff was retired from the Post Office for physical disability, the nature of which is not disclosed by the record.⁴

On June 30, 1955, plaintiff applied to the Army Board for Correction of Military Records for correction to reflect retirement for physical disability. Pursuant to the request of the Correction Board, the Surgeon General submitted the following opinion to the Board:

* * * * *

2. The records substantiate that this officer has osteoarthritis of moderate degree involving the cervical, dorsal spine, and knees, bilaterally; minimal of lumbar spine. The records indicate that the arthritis caused minimal interference with the motion of the joints involved and indicate further that the ineffectiveness resulting from occasional exacerbations while in the service were not of a degree sufficient to materially affect the performance of duty.

3. While the records substantiate that this officer did have some physical defects at the time of his separation from the service, it is believed that the records substantiate the opinion that had not this officer been separated for other reasons, his physical defects were not of such degree as would have precluded further military service.

4. The opinion is rendered, based upon the evidence of record, that at the time this officer was separated from the service he did not have physical defects of such nature or degree as would have warranted his retirement because of physical disability under the rules, regulations, laws, or policies then in effect.

In March 1956 the Correction Board, without a hearing, determined that insufficient evidence had been presented to

⁴ The fact that plaintiff's condition may have deteriorated subsequent to his release from (active military) service is not of itself determinative of the issue before (this court) * * *. That issue is whether the Secretary's decision as to plaintiff's fitness for duty at the time of his release from active service was arbitrary or capricious. *Johnston v. United States*, 157 Ct. Cl. 474, 478 (1962).

Opinion of Commissioner

indicate probable material error or injustice and denied plaintiff's application for a review of his records.

On the basis of these facts, it cannot be found that the Secretary of the Army's determination that plaintiff, at the time of his release from active duty in December 1954, was fit for military service, was arbitrary or capricious or unsupported by substantial evidence.⁵ While it is without dispute that plaintiff had moderate osteoarthritis of the knees and of the upper and lower spine, there is substantial evidence to support the conclusion that these defects were not of a degree sufficient to incapacitate him for further military duties commensurate with his age, grade and rank. For one thing, the evidence shows that save for a 26-day period of hospitalization, plaintiff, during his last tour of duty in Korea and Japan, was able to perform satisfactorily all his assignments, including those that required physical exertion. Thus it appears that his performance of duty was such that he could be reasonably considered to have been fit for military duty when released. Nor is it without significance that upon his release from active duty, plaintiff was able to resume his job as a letter carrier with the Post Office (a job which, of course, required considerable physical activity) and to perform his duties in such a manner that he received a commendation from the Postmaster for outstanding performance.

When plaintiff was released from active duty, he was 55 years of age. "Of course a man (of this age) is by no means as vigorous as a man of 25 or 30. As age advances, a certain amount of arthritis is to be expected, and the Army of course does not call upon a man of this age to do the same things that a younger man would be called upon to do." *McEaddy v. United States*, 152 Ct. Cl. 311, 313 (1961). See also *Patton v. United States*, 161 Ct. Cl. 131, 135 (1963); *Gordon v. United States*, 162 Ct. Cl. 740 (1963); *Johnston v. United States*, *supra*.

⁵The statute charges the Secretary with responsibility for making the determination as to who is fit or unfit for military service and, accordingly, this court has held time and again that it would not disturb that determination unless it was arbitrary or capricious or unsupported by substantial evidence. See e.g. *Thompson v. United States*, 156 Ct. Cl. 158, 161-62 (1962), and cases cited; *Johnston v. United States*, *supra*, and cases cited; *Furlong v. United States*, 153 Ct. Cl. 557, 563 (1961), and cases cited.

Findings of Fact

Based on the evidence there is room for a reasonable difference of opinion as to the conclusions to be drawn from the substantially undisputed facts as to plaintiff's physical condition, and more particularly as to whether his osteoarthritis had progressed to such a degree as to render him unfit for further military service. This difference of opinion is reflected in the favorable findings of the Disposition Board and the Physical Evaluation Board as contrasted with the adverse findings of the Physical Review Council, the Physical Disability Appeal Board and the Board for Correction of Military Records. But the fact that there is reasonable ground for disagreement with the Secretary's determination does not mean that the determination was arbitrary or capricious. *Nichols v. United States*, 158 Ct. Cl. 412, 415 (1962); *Hendrick v. United States*, 150 Ct. Cl. 437, 445 (1960). For here, in summary, the record establishes that plaintiff had at the time of his release from active service certain ailments which may in large measure have been compatible with his age. In light of this circumstance and the evidence showing the manner of plaintiff's performance of duty prior to and immediately after his release from active duty, it cannot be found that the Secretary's determination of fitness for active service lacked rational basis or was unsupported by substantial evidence.

FINDINGS OF FACT

1. Plaintiff is a citizen of the United States and a resident of Springfield, Illinois.

2. Plaintiff was born on August 18, 1899. He first enlisted in the Regular Army on July 26, 1918, and was honorably discharged on February 15, 1919. On January 15, 1928, he enlisted in the Illinois National Guard and was honorably discharged on December 11, 1931. He was federally recognized as a Second Lieutenant, Infantry, Illinois National Guard on January 24, 1932, and on February 25, 1932, was concurrently appointed as a Second Lieutenant, Infantry, Officers' Reserve Corps. He was federally recognized as First Lieutenant, Infantry, Illinois National Guard on March 19, 1933, and on April 28, 1933, was concurrently ap-

Findings of Fact

pointed as a First Lieutenant, Infantry, Officers' Reserve Corps. On August 6, 1934, plaintiff accepted an appointment as First Lieutenant, Infantry, National Guard of the United States, which terminated his appointment in the Officers' Reserve Corps. He was federally recognized as a Captain, Infantry, Illinois National Guard on October 28, 1938, and appointed on December 5, 1938, as a Captain, Infantry, National Guard of the United States.

On March 5, 1941, plaintiff was called to active duty and was promoted to Major, Army of the United States, on February 1, 1942. On August 14, 1947, he accepted an appointment as Lieutenant Colonel, Infantry, Officers' Reserve Corps, which appointment terminated his appointments as a Captain, Infantry, in the Illinois National Guard and the National Guard of the United States. He was appointed as a Major, Army of the United States, on June 30, 1948; promoted to Lieutenant Colonel, Army of the United States, on September 7, 1950; and appointed Lieutenant Colonel, Infantry, United States Army Reserve, on November 22, 1952.

Plaintiff was relieved from active duty on December 11, 1954, not by reason of physical disability, and his appointment as Lieutenant Colonel, Army of the United States, terminated at that time. He was transferred to the Retired Reserve on January 31, 1955, and placed on the Army of the United States Retired List in the grade of Lieutenant Colonel on September 1, 1959. He is presently a Lieutenant Colonel, Army of the United States, Retired, and Lieutenant Colonel, Retired Reserve.

3. Plaintiff's active service was as follows:

(a) July 26, 1918 to February 15, 1919, as an enlisted man.

(b) Four tours of duty as an enlisted man in the period July 28, 1928 to August 13, 1931, totalling 60 days.

(c) Fourteen tours of duty as an officer in the period from August 6, 1932 to March 1, 1941, totalling 273 days.

(d) Extended active duty as an officer from March 5, 1941 to December 11, 1954.

4. (a) In 1942 plaintiff was detailed to the Air Force and during the period 1942-45, served as Assistant Director of

Findings of Fact

Training at Sheppard Field, Texas, in which capacity he conducted the physical training program, among other things. About 1944 he injured his left knee playing volley ball. He was told by a medical officer that he should be placed on some restricted duty; however, he continued his physical training activities. When the knee became particularly troublesome, plaintiff used elastic bandages and took physiotherapy treatments. The left knee continued to bother him intermittently from that time on with pain and swelling.

(b) In the summer of 1945, while picking up a footlocker, plaintiff felt a pain in the lower part of his back. On his arrival at Fort Bliss several days later, he reported to the station dispensary because of his continuing back pain and was treated with a procaine injection which gave him relief. At that time he was disabled about one week. Plaintiff had four recurrences of the low back pain in the period from 1949 to 1952. Each of these attacks lasted about 10 days and usually occurred when plaintiff twisted his back or lifted objects. On one of these occasions, he was treated at the Veterans Administration Hospital in Jackson, Mississippi; on the other three instances, he was treated by local doctors. Treatment consisted of local heat to the back and rest in bed.

(c) Around 1948 plaintiff's right knee began to ache at times although apparently to a lesser degree than his left knee. Plaintiff has not been bothered by swelling in the right knee.

(d) Beginning around 1952 plaintiff had episodes of blacking out; he also suffered recurrent pains in his upper back and neck. These pains occurred once or twice a week and usually started in the morning and subsided in the afternoon. Heat treatments and aspirin served to alleviate the pain to some extent.

5. (a) At the beginning of 1953 plaintiff was stationed in Korea, serving first as a staff officer, administrative, with the 8th Army and later as a Supply Expeditor with the United Nations Command. In this latter assignment, it was necessary for him to travel throughout South Korea by jeep, train and plane. In January 1953, while in Pusan,

Findings of Fact

Korea, plaintiff's left knee became very painful. The knee was swollen and its motion restricted. Plaintiff went to the hospital in Pusan for relief of the pain. Because of his knee condition, he was given a profile III.

(b) Plaintiff remained in Korea until April 1953, during which time he obtained treatment about two or three times a week for his knee.

6. In the latter part of April 1953, plaintiff was transferred to Japan. He served with Military Government for several weeks, then was assigned to the Camp Schimmelpfennig Regional Camp Command which had control of all camps in northern Japan. While with that command he served as Regional Command Executive Officer, Deputy Regional Commander, Camp Commander of Camp Matsushima (one of the camps in the Regional Command) and Post Inspector at Camp Schimmelpfennig.

7. On May 25, 1953, plaintiff filed a "Request for Renewal of Category Statement", i.e., an application for continuance of his active duty for an additional three years beyond June 30, 1954, when his current tour was about to end. This request was denied by the Secretary of the Army on November 4, 1954. No reason was given for the denial, but it was commonly understood that officers overage in grade (as was plaintiff who had attained the age of 54 in August 1953) would not be extended.

8. Also in November 1953 plaintiff had a recurrence of acute low back pain. The post surgeon recommended hospitalization but plaintiff, who was then a Camp Commander, did not feel that he should absent himself from his duties. For this reason, after a few days' rest in bed, he was back on the job.

9. Plaintiff's duties as a Post Inspector, which he assumed about December 1953, required him to do a considerable amount of walking and travelling about. During this period he was frequently troubled by pain in his knees, particularly the left, and by pain in his low back.

10. (a) In March 1954 plaintiff had a particularly severe recurrence of low back pain and was hospitalized for about one month in the Army Hospital at Sendai, Japan, where he was given heat treatments and confined to a bed which had

Findings of Fact

a bed board installed therein. While in the hospital, he injured his elbow trying to shift his weight in bed. The doctors did not operate on the elbow, believing that it might "clear up" ultimately; however, the elbow condition still causes plaintiff a considerable amount of pain.

(b) The Sendai Hospital's diagnosis of plaintiff on discharge was:

- (1) Osteoarthritis, spine, both knees, right elbow;
- (2) Osteoma,⁶ right elbow;
- (3) Myositis,⁷ lumbosacral spine, chronic.

11. During April and May 1954, plaintiff was stationed at Camp Drake, Tokyo, awaiting shipment back to the United States for retirement processing. While at this installation he received heat treatments for his back.

12. (a) On plaintiff's efficiency report for the period from January 10, 1953 to April 27, 1953, the rating officer noted in part that plaintiff "is mentally and physically qualified". The endorsing officer made the following comment on this efficiency report:

Subject officer is mentally alert, in excellent physical condition, and is exemplary in his habits.

(b) On plaintiff's efficiency report for the period May 22, 1953 to December 17, 1953, the rating officer checked the "Yes" box in response to the question "Does this officer possess the physical, mental, and moral qualities expected for his grade, branch, and length of commissioned service?" The rating officer also commented that he was "in good physical condition."

The endorsing officer added the following comment:

No mental, moral or physical defects noted * * *

(c) On plaintiff's efficiency reports for the periods December 18, 1953 to February 11, 1954, and February 12, 1954 to April 25, 1954, the rating officer checked the "Yes" box in response to the question "Does this officer possess the physical, mental, and moral qualities expected for his grade, branch, and length of commissioned service?"

⁶ An osteoma is a tumor composed of bone tissue. See Dorlands *Illustrated Medical Dictionary* (23d ed.) 1957.

⁷ Myositis is the inflammation of a voluntary muscle. Ibid.

Findings of Fact

(d) On the latter efficiency report (for the period from February 12, 1954 to April 25, 1954), the rating officer added the following comment:

He (plaintiff) was hospitalized for 26 days during the period of this report, suffering from physical difficulties with his back and knee which handicap him in the performance of duties expected of an officer of his rank.

(e) The rating officer for plaintiff's efficiency reports covering the periods May 22, 1953 to December 17, 1953 and February 12, 1954 to April 25, 1954, was Colonel Niels I. Poulsen, Commanding Officer, Camp Schimmelpfennig, Regional Camp Command. Colonel Poulsen was the endorsing officer on plaintiff's efficiency report covering the period from December 18, 1953 to February 11, 1954.

(f) The efficiency reports covering the period January 10, 1953 to April 25, 1954 reflect that plaintiff performed his duties conscientiously, thoroughly and in a most satisfactory manner.

13. (a) Plaintiff returned to the United States in May 1954 and on June 22, 1954 was admitted to the United States Naval Hospital, Great Lakes, Illinois, for physical evaluation preliminary to his release from active duty. A Disposition Board at the hospital on August 12, 1954, noted that plaintiff's admission diagnosis was arteriosclerosis, owing to the fact that he had experienced a blackout prior to entering the hospital. The Board also noted that it was later determined at the hospital, however, that the blackouts were of an orthopedic nature, related to an arthritic condition in plaintiff's cervical spine.

(b) On August 12, 1954, the Disposition Board at the Great Lakes Hospital reported as to plaintiff's physical condition. This report may be summarized as follows:

(1) *Lower Back.* Slight lumbar scoliosis; hips level; hips show a full range of motion in all directions without pain; good range of forward bending with perhaps 10 degree limitation; moderate osteoarthritis dorsal spine; minimal osteoarthritis lumbosacral spine.

(2) *Upper Back and Neck.* Full range of flexion, extension, right and left rotation and lateral bending of the neck; moderate osteoarthritis cervical spine. (At the time of the examination, plaintiff complained of

Findings of Fact

pain and stiffness when turning his head to the right.)

(3) *Left Knee.* Limitation of flexion, with flexion going to 75 degrees; knee painful; plaintiff unable to squat; slight effusion (escape of fluid); audible crunching and crepitation (grating or crackling sensation) of the patella (kneecap) when the knee was flexed or extended; full extension of the knee; ligaments intact and strong; fullness of the popliteal space (space at back of knee joint); faint rounded calcified densities in the region of the posterior compartment in all likelihood representing loose bodies within the joints; osteochondromatosis (multiple tumors composed of bone and cartilage) of the left knee with marked osteoarthritis.

(4) *Right Knee.* Limitation of flexion, with flexion going to 60 degrees; crepitation, but less than in left knee; full extension; ligaments intact and strong; fullness of the popliteal space; marked osteoarthritis. (At the time of the examination, plaintiff stated that his right knee didn't bother him.)

(5) *Right Elbow.* Prominent olecranon (bony prominence) on both elbows; right olecranon painful upon palpitation but no motion of the bone could be elicited; elbows showed a full range of flexion and extension and a full range of pronation and supination.

14. The Disposition Board at the Great Lakes Hospital diagnosed plaintiff's condition as degenerative joint disease, multiple, due to unknown cause. (In non-technical terms, the Board described the disability as "Pain in joints"). It found the disease originated approximately in 1945; that plaintiff was incapacitated for military duty on June 22, 1954; and that the cause of incapacity was incident to service. The Board further noted that the disability was permanent and recommended that plaintiff appear before a Physical Evaluation Board.

15. (a) After further observation and treatment at the Great Lakes Hospital, plaintiff appeared before a Physical Evaluation Board at Fort Sheridan, Illinois, on October 19, 1954. In addition to the report of the Disposition Board, the Physical Evaluation Board considered plaintiff's testimony that his joint disease rendered him unable to perform his duties a substantial part of the time and his further testimony that as a result of exercises his back no longer bothered him. It also considered a sworn written statement, dated

Findings of Fact

April 17, 1954, from Colonel Niels I. Poulsen, plaintiff's former commanding officer at Camp Schimmelpfennig. This statement read as follows:

This is to certify that Lt. Col. Gilbert P. Snell (Inf.) O-293940 has been a member of my command from May 1953 until the present date.

In reviewing Col. Snell's records at the time he reported for duty, it was evident that he had a physical handicap sufficient to classify him as Profile III, with specific reference to a handicapped knee. His profile statement revealed a swollen left knee which condition was stated as restricting him to duty which did not require prolonged marching or standing. This restriction has been carefully considered during his assignment to my command and every effort has been made to assign him to duties that would not aggravate his condition.

Colonel Snell is 54 years of age, big, strong and robust, and appears to be without physical defect, but it soon became apparent to me that whenever he was on assignments making detailed inspections of areas and troops which required his being on his feet and doing considerable walking, he showed an increased lameness and impaired locomotion in his movements. His duties during assignment to this headquarters have been varied, including Regional Command Executive Officer, Deputy Regional Commander, Camp Commander of a camp, Regional Inspector, all of which are of a nature requiring considerable inspection work which must be accomplished on walking tours involving at times the major part of a day. I recall on several occasions Colonel Snell has expressed having considerable pain in his knees and back at which times I directed that he take it a little easier in an effort to be considerate of his condition.

Several months after his arrival, it became evident to me he was having difficulty and upon inquiry I learned he had injured his back while stationed at Sheppard Field, Texas, seven or eight years ago and has had several recurrences subsequent to that time. His condition, from his explanation to me, is apparently a recurrence and the aggravation of the old injury.

Colonel Snell's duties have involved close association with me and during the past winter greater difficulty was evidenced. I again recommended that he enter the hospital and have consideration given to his condition. Colonel Snell has been reluctant to leave his duties but

Findings of Fact

finally, during the past month of March, he entered the hospital where he was given observation and treatment for the greater part of a month and is still, though back on the job, returning daily to the hospital for treatment.

Because of his condition, Colonel Snell has the appearance of a man older than he actually is because of his disability which affects his movements, gait and ability to function in military activities, the greater part of which require an individual to be capable of getting up and around actively.

The purpose of this statement is to set forth my knowledge of conditions that are evident to me and are a definite handicap to Colonel Snell in the performance of his duties and other activities requiring physical mobility. It is plainly evident that any future undertaking Colonel Snell may be interested in, either in or out of the military service, will necessarily have to be restricted because of his inability to perform duties or activities that will require much use of his legs. The back condition has given him considerable difficulty in the past four months particularly and, at his age, it is plainly a considerable physical handicap. A fair estimate of the percentage of disability to perform duties to which he has been assigned, because of his physical condition, would be from 35% to 45%.

(b) As set forth in findings 12(b), 12(d), and 12(e), Colonel Poulsen was the rating officer on plaintiff's efficiency reports covering the periods May 22, 1953 to December 17, 1953 and February 12, 1954 to April 25, 1954. In the first of these reports Colonel Poulsen indicated that plaintiff possessed the physical qualities expected of his grade, branch, and length of commissioned service, and also commented that plaintiff was "In good physical condition". On the second efficiency report covering the period February 12, 1954 to April 25, 1954, Colonel Poulsen again indicated that plaintiff possessed the physical qualities expected of his grade, branch and length of commissioned service. However, he added the comment that plaintiff "was hospitalized for 26 days during the period of this report, suffering from physical difficulties with his back and knee which handicap him in the performance of duties expected of an officer of his rank." See finding 12(d).

16. The Physical Evaluation Board concluded that plaintiff was suffering from arthritis, degenerative, with X-ray

Findings of Fact

confirmation of swelling, limitation of motion and muscle spasm, multiple joints involvement, VA Code No. 5003. The Board further concluded that plaintiff's disability had originated in 1945; was incurred in time of war or national emergency; was not the result of intentional misconduct or willful neglect; was not incurred during a period of unauthorized absence; was the proximate result of the performance of duty and incurred in the line of duty; that he became unfit for further military service on June 22, 1954; that the disability was permanent and was rated at 40 percent.

17. Code No. 5003 of the Veterans Administration *Schedule for Rating Disabilities* (1945), as amended by Extension 7 (July 6, 1950), reads in part:

Arthritis, hypertrophic, degenerative arthritis, or osteo-arthritis.

A substantiated degenerative arthritis, as distinguished from localized hyperostosis and other changes about the joint due to direct or intermittent trauma, congenital deformities, supernumerary parts, etc., or postural deformities, shall receive a minimum rating of 10%, or, if there is a satisfactory history of exacerbations from time to time, 20%. The following ratings are therefore authorized:

With X-ray evidence of involvement of two or more major joints, or two or more minor joint groups, with occasional incapacitating exacerbations—20%

With X-ray evidence of involvement of two or more major joints or two or more minor joint groups—10%

NOTE.—The 20% and 10% ratings above will not be utilized in rating other diseases of bones, joints, and muscle, rated by analogy. Other ratings will be authorized in the range 10% to 100% based on the extent of involvement, assuming minimum 10% for each major joint or group of minor joints presenting X-ray confirmation of the disease and also swelling, limitation of motion or muscle spasm or other evidence of painful motion.

18. On October 20, 1954, the record of the proceedings of the Physical Evaluation Board was forwarded to the Army Physical Review Council for review. An attached state-

Findings of Fact

ment indicated that plaintiff did not desire to file a rebuttal to the findings of the Physical Evaluation Board. On October 25, 1954, the Physical Review Council disapproved the finding of the Physical Evaluation Board that plaintiff was unfit for duty. The Review Council stated:

The evidence of record does not reveal the presence of any disability of a degree which would preclude the performance of active military duty. Member is considered to be physically fit.

Plaintiff was informed of this action by a communication dated October 26, 1954, and advised that he might file a rebuttal prior to final action being taken on his case.

19. On or about November 4, 1954, plaintiff filed a rebuttal to the findings and decision of the Physical Review Council which read in pertinent part:

1. The evidence in this matter consists of X-rays, physical examination records, and my own statements and those of other witnesses, which are a matter of record, all of which show that I am disabled from performing my military duties. There is no written word in the basic communication, spoken word, X-rays, or examination, which in any way controverts the findings and evidence of the Physical Evaluation Board.

2. The finding of the Army Physical Review Council is not only contrary to all of the evidence and exhibits in this matter, but seems to be an arbitrary decision not based upon any material or competent evidence. I would like to invite the Council's attention to the letter dated 17 April 1954 signed by Colonel Niels I. Poulsen which is attached to the Physical Evaluation Board proceedings as Exhibit G. This letter from the Commanding Officer at my last duty station clearly indicates that I am unfit to perform the duties of a Lieutenant Colonel of the Infantry.

3. I herewith submit a written statement of Dr. Duane A. Willander, 203 W. Carpenter Street, Springfield, Illinois, dated November 2, 1954, together with a statement of his education, training, and qualifications, of a private examination that I had made on November 2, 1954, at my own expense, in support of my contentions. Said documents are attached hereto and are by reference made a part of this, my rebuttal statement. Dr. Willander's report, Inclosure No. 2, is based upon X-rays taken at

Findings of Fact

Memorial Hospital, Springfield, Illinois. Said X-rays are the property of the Hospital and are in its possession. However, this rebuttal statement over my signature will authorize any medical officer, or their agent, of the Armed Forces of the United States to examine said X-rays at any time. Attached hereto and by reference made a part of this rebuttal statement are the findings of Dr. Edward E. King, Rhentenologist at Memorial Hospital, Springfield, Illinois, interpreting said X-ray films (Inclosure No. 3.)

4. It is my contention that this is easily verified at the present time by a swelling that now exists in my left knee joint and leg muscles and the atrophy which is present, all of which is due to less than normal amount of walking and activity, and which would be much greater if I were required to walk, or use my legs in normal active duties. All of this is borne out by Dr. Willander's report and it is certain will be further borne out by any other type of examination that may be conducted.

20. (a) The statement of Dr. Willander, an orthopedic specialist, which plaintiff submitted in rebuttal, contained the results of a physical examination he had given plaintiff. Dr. Willander's findings as to the plaintiff's physical condition were, in summary, as follows:

(1) *Lower Back.* Dorsal and lumbar curves normal; on palpitation no tenderness over spine; on forward flexion fingertips came within one inch of the floor; no evidence of lumbar paravertebral muscle spasm with forward flexion; right and left lateral flexion, normal; right and left lateral turnings, 80 percent of normal; moderate osteoarthritis, dorsal spine; minimal osteoarthritis, lumbar spine.

(2) *Upper Back and Neck.* Extension and flexion of the neck, normal; right and left lateral cervical bendings, 80 percent of normal; left cervical turning, 80 percent of normal; right cervical turning, 70 percent of normal; moderate osteoarthritis, cervical spine.

(3) *Left Knee.* No noticeable limp; patello femoral crepitation; skin over knee more lax than over right knee; audible and palpable crepitation with extension and flexation; cruciate and collateral ligaments stable; no excess of fluid in knee joint; some apparent thickening of knee and some apparent atrophy (wasting) of the left thigh and calf presumed secondary to repeated episodes of swelling and disability in the left knee; moderate osteoarthritis.

Findings of Fact

(4) *Right Knee.* Patello—femoral crepitation, less than left; audible and palpable crepitation with extension and flexion, less than left; moderate osteoarthritis.

(5) *Right Elbow.* Osteophyte (bony growth) formation on right olecranon process.

(b) Dr. Willander's report stated that plaintiff's history, the physical findings and the X-ray findings would be compatible with a diagnosis of:

1. Osteoarthritis, moderate, cervical spine.
2. Osteoarthritis, moderate, dorsal spine.
3. Osteoarthritis, moderate, both knees.
4. Osteoarthritis, minimal, lumbar spine with possible early degeneration of the L5 S1 intervertebral disc.
5. Osteophyte formation olecranon process, right elbow.

21. On November 10, 1954, the proceedings of the Physical Evaluation Board, the Army Physical Review Council, together with plaintiff's rebuttal, were referred for review to the Army Physical Disability Appeal Board. On November 12, 1954, that Board concurred in the findings of the Physical Review Council that plaintiff was fit for active military service. This action was approved by the Secretary of the Army on November 15, 1954, and a communication advising of this action was sent to plaintiff's commanding officer with the request that he send a copy to plaintiff.

22. On December 11, 1954, plaintiff was relieved from active duty not by reason of physical disability and assigned to a Reserve Unit, his Reserve commission remaining in effect. On August 31, 1959, having attained the age of 60, he was retired pursuant to the provisions of 10 U.S.C. §§ 1331 and 1337 and was paid at the rate of \$296.28 per month from September 1, 1959.

23. After his release from active duty, plaintiff resumed his former civilian employment as a letter carrier with the Post Office Department in Springfield, Illinois, effective February 1, 1955. His route consisted of a single block in the business section of Springfield, but was the heaviest route in town as regards the number of pieces of mail that had to be delivered. It was not necessary for him to carry a mail satchel since he was furnished by the Post Office

Findings of Fact

Department a three-wheeled nonmotorized cart in which the satchel was placed. Such carts are now in fairly common use. One of plaintiff's duties was to sort the mail for his route each morning. On occasion, during the performance of this task, he felt a "blackout" spell coming on and he had to sit down or lie down for 10 to 20 minutes before resuming work. On occasion, when he felt one of these spells coming on, he obtained a substitute to take over his route for the day. He never "blackened out" at work. Plaintiff's knees bothered him quite a bit at night after work, but did not particularly interfere with his duties. From time to time plaintiff was obliged to take sick leave. This was necessitated on several occasions because of injuries sustained on the job. On June 12, 1956, plaintiff received a letter from the Postmaster stating that during specified periods in October 1955 and March 1956 he had serviced his route in exceptional time. The letter commended plaintiff "very highly" on his "outstanding performance". Plaintiff was retired from the Post Office Department effective March 25, 1958, for physical disability, the nature of which is not disclosed by the record.

24. (a) Shortly after his release from active duty, plaintiff made a claim with the Veterans Administration for disability compensation. The Veterans Administration rated plaintiff 40 percent disabled from December 12, 1954, with a diagnosis of:

5003 Osteoarthritic joint disease, involving spine, cervical, lumbar spine with tenderness L-4 and L-5, and arthritis, right knee, occipital neuritis secondary to spondyl-arthritis

(b) In subsequent ratings and examinations the diagnosis has been substantially the same and the ratings have varied from 40 percent to 50 percent, his last rating being 50 percent from August 23, 1957.

25. On June 30, 1955, plaintiff applied to the Army Board for Correction of Military Records for correction to reflect retirement for physical disability. In his application he requested that the Board consider the findings of the Physical Evaluation Board with supporting statements, his rebuttal to the findings of the Physical Review Council and

Findings of Fact

any other pertinent evidence in his military file. He also authorized consideration of the findings of the Veterans Administration on his disability claim.

26. Pursuant to the request of the Correction Board, the Surgeon General on February 20, 1956, submitted the following opinion to the Board:

1. The records in the case of Gilbert P. Snell, O293940, have been carefully reviewed.

2. The records substantiate that this officer has osteoarthritis of moderate degree involving the cervical, dorsal spine, and knees, bilaterally; minimal of lumbar spine. The records indicate that the arthritis caused minimal interference with the motion of the joints involved and indicate further that the ineffectiveness resulting from occasional exacerbations while in the service were not of a degree sufficient to materially affect the performance of duty.

3. While the records substantiate that this officer did have some physical defects at the time of his separation from the service, it is believed that the records substantiate the opinion that had not this officer been separated for other reasons, his physical defects were not of such degree as would have precluded further military service.

4. The opinion is rendered, based upon the evidence of record, that at the time this officer was separated from the service he did not have physical defects of such nature or degree as would have warranted his retirement because of physical disability under the rules, regulations, laws, or policies then in effect.

27. (a) On March 21, 1956, plaintiff was advised that the Army Board for Correction of Military Records had, on March 7, 1956, determined that insufficient evidence had been presented to indicate probable material error or injustice, and accordingly had denied the application for review.

(b) Plaintiff was not afforded an opportunity to appear before the Correction Board.

28. (a) The record establishes that at the time of his release from active duty plaintiff was suffering from moderate osteoarthritis of the cervical and dorsal spine; minimal osteoarthritis of the lumbar spine; and moderate osteoarthritis of both knees.

Syllabus

(b) Considering plaintiff's age, grade and length of service, there is room for reasonable difference of opinion as to whether plaintiff's physical defects were of such degree as to render him unfit for further military service. This is reflected in the conclusion of the Disposition Board and the Physical Evaluation Board, on the one hand, that plaintiff was unfit for further military service, whereas the Army Physical Review Council, the Army Physical Disability Appeal Board and the Army Board for Correction of Military Records concluded that plaintiff's defects were not of such degree as to preclude further military service.

(c) On the basis of the complete record before this court, it cannot be found that the action of the Army Physical Review Council, the Army Physical Disability Appeal Board and the Army Board for Correction of Military Records was arbitrary or capricious or not supported by substantial evidence.

CONCLUSION OF LAW

On the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and his petition is dismissed.

JOHN A. SMITH v. THE UNITED STATES

[No. 294-63. Decided November 13, 1964]

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Unjust conviction statute.—Plaintiff, presently serving sentences totalling 8 years in the Federal Reformatory in Lorton, Virginia, sues to recover \$5,000 under 28 U.S.C. sections 1495 and 2513, giving this court jurisdiction to render judgment on claims for damages by persons unjustly convicted of an offense against the United States and imprisoned, upon a showing that such person's conviction had been set aside on the ground of innocence evidenced by a certificate to that effect by the court, or by a pardon. It is held that plaintiff's petition fails to make allegations essential to bring the case within the purview of statute, and the exhibits accompanying defendant's motion for summary judgment reveal that plaintiff could not sustain an action under the statute in any event. Petition dismissed.

Per Curiam

Unjust conviction claim for damages; pleading and practice; petition.—A petitioner seeking damages under the unjust conviction statute, 28 U.S.C. 1495, 2513, must allege and prove that his conviction has been reversed or set aside on the grounds specified in the statute or that he has been pardoned upon the stated ground of innocence and unjust conviction.

United States $\Rightarrow$ 77

Unjust conviction claim for damages; reversed or set aside; generally.—28 U.S.C. section 2513 provides that any person suing for damages under section 1495 of Title 28 must allege and prove, among other things, that his conviction had been reversed or set aside on the ground that he was not guilty of the offense of which he was convicted. Where the Supreme Court reverses an order of the Court of Appeals denying a convicted criminal leave to prosecute his appeal in *forma pauperis*, the reversal does not comply with the terms of the unjust conviction statute and does not form a proper basis for a claim thereunder.

United States $\Rightarrow$ 77

John A. Smith, pro se.

LeRoy Southmayd, Jr., with whom was Assistant Attorney General John W. Douglas, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

PER CURIAM: This case was referred pursuant to Rule 37(e), since April 1, 1964, Rule 54(b), to Richard Arens, a trial commissioner of this court, with directions to make his recommendation for conclusion of law on defendant's motion for summary judgment. The commissioner has done so in an opinion filed February 14, 1964. Plaintiff sought review of the commissioner's opinion and recommendation for conclusion of law to which the defendant filed a reply and the case was submitted to the court on oral argument by the plaintiff, pro se, and counsel for defendant. Since the court is in agreement with the opinion and recommendation of the trial commissioner, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case. Plaintiff is therefore not entitled to recover. Defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

Findings of Fact

ments within the meaning of the law, nor are they considered initiation fees, since the enjoyment of membership rights and privileges are in no way affected by making or refusing to make such loans.

We have given careful consideration to the evidence submitted in this case, and also to the contentions advanced by the attorney on behalf of his client. It appears that while the purchase of debentures by members of the Winter Club, Inc., apparently was not a condition precedent to membership in the club, the purchase of such debentures granted to the purchaser certain privileges not enjoyed by members who did not purchase debentures, namely, reduced annual dues and cancellation of an otherwise required entrance fee. On that basis, purchasers of debentures have certain rights and privileges differing from other classes of members and, in accordance with the clearly defined position of the Service, they comprise a separate class of membership, regardless of whether they are so designated. In addition to Revenue Ruling 55-576, mentioned above, see also Revenue Ruling 281 (C.B. 1953-2, 344).

In view of the above, it is held that amounts paid for debentures by members of the Winter Club, Inc., represent initiation fees as defined above, and that the tax imposed by section 4241(a)(2) of the Code applies thereto. Since the evidence clearly indicates that each \$1,000.00 bond entitled its owner to a 20 percent reduction in dues for life, it is our conclusion that the tax applies to the amounts paid for debentures by the members who thus acquired the 20, 40, 60 or 80 percent reduction in dues. A member who purchased one debenture and acquired a 20 percent reduction in dues for life, is liable for tax on the purchase price of one debenture; a member who purchased two debentures and acquired a 40 percent reduction in dues for life is liable for tax on the purchase price of two debentures; and so on through the purchase price of four debentures.

The 12 members who purchase five debentures, however, and became entitled to membership for life, without further payment of dues, would be required to pay only the dues tax paid by the active resident annual members with respect to dues or fees, other than assessments. There would be no tax in their case on the amount paid for the five debentures, as under the law no tax was levied on the amount paid for life membership.

Syllabus

According to the evidence submitted in the case, the same tax has been paid by debenture-holding members as by nondebenture-holding members. This was not correct as the tax should have been based upon the various amounts actually paid by such members as dues. Therefore, those members who enjoyed a 20 percent remission in dues should likewise have paid 20 percent less in tax. Proportionate reductions in dues would similarly apply to the holders of 2, 3, or 4 debentures whose dues were remitted by 40, 60 or 80 percent, respectively.

16. This suit is timely filed, i.e., within two years of the date of the formal rejection by the Commissioner of plaintiff's timely filed refund claim. Jurisdiction to hear and determine this cause at this time is conferred upon this court by sections 6532(a) and 7422(a) of the Code. Jurisdiction of the subject matter is conferred upon this court by section 1491 of Title 28, United States Code.

17. Plaintiff is and always has been the sole owner of the claim here sued upon, and no assignment or transfer thereof, or any part thereof, or interest therein, has been made by plaintiff.

18. No action on plaintiff's claim has been taken by the Congress of the United States, or by any Department of the Government, except as hereinbefore set forth.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

FRANKLIN W. PATTEN v. THE UNITED STATES

[No. 498-59. Decided March 6, 1963]

ON THE PROOFS

Military pay; disability retired pay.—Plaintiff, a Reserve officer released to inactive duty not for physical disability and without disability retirement pay on January 17, 1956, sues to recover disability retired pay from such date on the ground that he was then unfit for duty by reason of physical disability incident to extended active service. It is held that, on the basis of the

Opinion of the Court

record in this case, there appears to be nothing wrong with the determination of the Correction Board that no injustice or error had occurred in connection with plaintiff's release not by reason of physical disability, plaintiff not being in worse shape than most men of his age at the time of such release. Petition dismissed.

Military pay; retired pay (disability); entitlement to pay; fitness for military service; Veterans Administration rating.—The particular armed service involved is the one to determine whether or not a person is fit or unfit for military duty. The fact that the Veterans Administration finds the same person more or less disabled on the basis of its standards is immaterial.

Armed Services ⇨ 13.5(5)

Military pay; retired pay (disability); fitness for military service; how determined.—In determining whether a member of the Armed Forces is fit or unfit for military service, that member's age, grade and branch of service must be taken into consideration.

Armed Services ⇨ 13.5(5)

Guy Emery for plaintiff. *Emery and Wood* were on the briefs.

Edgar H. Twine, with whom was *Acting Assistant Attorney General Joseph D. Guilfoyle*, for defendant.

Before JONES, *Chief Judge*; WHITAKER, *Judge*; LARAMORE, *Judge*; DURFEE, *Judge*; and DAVIS, *Judge*.

WHITAKER, *Judge*, delivered the opinion of the court:

In his petition plaintiff claims that, when he was released from active service on January 17, 1956, he was unfit for military duty and should have been discharged for physical disability. He sues for the retired pay he would have been entitled to had he been so discharged.

Plaintiff had a long Army career. He served for a few months in World War I; then, from 1920 to 1926, he served in the North Dakota National Guard. In the meantime, on June 1, 1922, he had been appointed a second lieutenant in the Army Reserve Corps. On August 18, 1940 he was called to active duty and served until March 1, 1948. He was again

Opinion of the Court

called to active duty on November 15, 1948, and served until January 17, 1956.

April 30, 1955 was plaintiff's 55th birthday. He was then a lieutenant colonel. Under Army regulations, ordinarily, when a lieutenant colonel in the Reserve Corps arrived at age 55 he could no longer continue in that grade, but, since plaintiff was then in the hospital, he was continued on active duty until January 17, 1956, when it was expected his physical examination would have been completed.

Plaintiff entered the hospital " * * * for evaluation of his cardiac status * * *." He was found to have auricular fibrillation, which seems to be a rapid twitching of the muscular walls of the auricle of the heart. He also complained of arthritis in his hip and toe, and of deafness. Plaintiff was given various examinations over a period of three months, both of his heart and for his arthritis.

On May 28, 1955, the Rheumatology report stated, in part:

Pt. seen again and hip injected with 1½ cc hydrocortone. Re-evaluation of his condition was made. It is thought that this patient is able to perform military duty consistent with his age and grade.

On June 21, 1955, the Cardiology report stated, in part:

Recommendation: It is felt that from a cardiovascular standpoint, this individual can be considered physically fit for full military duty.

On July 25, 1955, when plaintiff was given leave from the hospital, the doctors' progress notes recited, in part:

25 Jul * * *

Pt. has been fully evaluated & also observed almost 3 months to note any change or progression in his symptoms.

No disabling or disqualifying defects noted. Considered qualified for general military service—can perform duty commensurate with his age and grade. 3 Dec 55 Patient returned to duty today. States he still has some trouble with his right hip.

* * *
Ht—sounds good—no abnormal rhythm. No murmurs * * *

Opinion of the Court

On the same day (July 25, 1955) a narrative summary of plaintiff's hospitalization was filed, giving the "history of the present illness," the "past history," the "physical examination," the "laboratory and x-ray studies," the "consultations," the "course in hospital," and the "Diagnoses". The diagnosis of the heart trouble was "cured", and the arthritis of the hip and left great toe and deafness were all said to be "moderate".

Plaintiff was recalled to the hospital in the first part of January 1956 for final examination prior to separation. The diagnosis arrived at as a result of the final examination on January 12, 1956, was the same as the previous one.

Plaintiff was released from active duty not by reason of physical disability. He was not sent before a physical evaluation board, and it is not alleged that he requested to be.

On the day after his discharge, he was rated 50 percent disabled by the Veterans' Administration, as a result of which he has been drawing disability compensation since October 8, 1957, of \$111.50 per month, but in a somewhat smaller amount prior thereto.

Although at the time of his discharge plaintiff did not request a hearing before the Physical Evaluation Board, on October 15, 1956, ten months later, he requested the Army Board for Correction of Military Records to correct his records to show he had been discharged for physical disability. This request was denied. He renewed it about two years later, and this request was also denied.

In the trial of the case in this court before Trial Commissioner Day, plaintiff introduced a highly qualified internist by the name of William Travis Gibb, who testified that plaintiff was suffering from auricular fibrillation and advanced arteriosclerosis, osteoarthritis, and a tendency toward asthma. Dr. Gibb, who had naval service during World War II, testified that in his opinion plaintiff was not fit for full military duty, but perhaps was fit for limited duty.

Defendant introduced two doctors of high professional qualifications, Drs. Hall and Metz. Dr. Hall testified that plaintiff's heart condition did not render him unfit for military duty, and Dr. Metz testified that his arthritis did not render him unfit. Neither side offered testimony with respect to his deafness.

Opinion of the Court

After three months of extended and apparently thorough examination, the Walter Reed Hospital authorities thought plaintiff fit for military duty. Plaintiff himself thought so, because prior to his release he had requested retention on active duty for two years. Plaintiff made no protest when he was released not for physical disability. The Correction Board on two occasions, two years apart, found that no injustice had been done plaintiff in not releasing him for physical disability, and on the trial of this case in this court two doctors, who had not been connected with the case previously, examined the records and testified they did not show that plaintiff was unfit for duty.

On the other hand, we have the testimony of Dr. Gibb, who thought plaintiff was perhaps fit for limited duty, but not for full duty, and the fact that the Veterans' Administration had rated plaintiff 50 percent disabled. We are not persuaded that these two things counter-balance the testimony offered by defendant, which we have detailed above. With respect to the Veterans Administration's rating, see *Holliday v. United States*, 128 Ct. Cl. 647. It is for the Army to determine who is unfit for military duty. If it acts fairly, competently, and conscientiously, plaintiff is without redress in this court. There is insufficient evidence that it failed to do so. Indeed, there is no allegation that it acted arbitrarily or capriciously.

Even at 55 years of age many men feel some twinges of arthritis, the walls of their arteries lose some of their resilience, their hearing becomes somewhat less acute. It would not be easy for them to walk 50 miles in 20 hours, perhaps impossible, but, still, they are not ready to be "turned out to pasture." Their minds are still keen, their knowledge and experience invaluable. They may even have acquired a little wisdom. They are not expected to do the arduous physical chores of the young, but they have the capacity to plan and to direct, upon the efficiency of which the success of the Army depends.

In the winter of 1941, Winston Churchill, the Prime Minister of Great Britain, and one of the truly great men of all time, wrote a letter to his Secretary of War, with reference to an order of a Division Commander of the British Army, re-

Findings of Fact

quiring all members of the Division "from generals to privates" to run seven miles cross-country, in which he said:

A colonel or a general ought not to exhaust himself in trying to compete with young boys running across the country seven miles at a time. The duty of officers is no doubt to keep themselves fit, but still more to think for their men and to make decisions affecting their safety or comfort.

Who is the general of this division, and does he run the seven miles himself? If so, he may be more useful for football than war. Could Napoleon have run seven miles across country at Austerlitz?

Plaintiff is now receiving some \$525 monthly in retirement pay and veterans' benefits. We do not think he is entitled to more on the ground that he was physically disabled at the time of his discharge.

Plaintiff's petition is dismissed.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff enlisted in the Army of the United States on October 30, 1918, and served on active duty therein until December 14, 1918. He enlisted in the North Dakota National Guard on December 6, 1920, and served until March 28, 1926. He was appointed second lieutenant, Officers Reserve Corps, on June 1, 1922. He was called to active duty as a Reserve officer on August 18, 1940, and served as such until March 1, 1948, when he was relieved from active duty, not by reason of physical disability. He was recalled to active duty November 15, 1948, and served until January 17, 1956, when he was relieved from active duty not by reason of physical disability. On that date he held rank as lieutenant colonel, Armor, United States Army Reserve. The plaintiff's date of birth was June 20, 1900.

2. The plaintiff by this action seeks to recover retired pay at the rate of 75 percent of the basic pay of an officer of his grade and length of service because he says " * * * that on January 12, 1956, he was unfit for military service by reason of atrial paroxysmal fibrillation, arthritis of right hip joint,

Findings of Fact

arthritis of inter-phalangeal joint of his left great toe, and deafness, all incurred in line of duty and incident to his extended active service. * * * " No allegation is made that any action by anyone in effecting his release from active duty was arbitrary or capricious.

3. Plaintiff was transferred to the Retired Reserve on June 19, 1956, and placed on the Honorary Retired List on February 10, 1958. On June 20, 1960, plaintiff, on his 60th birthday, was granted retirement pay pursuant to Title III, Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, 1087. Plaintiff has never received retirement pay for physical disability.

4. Plaintiff was relieved from active duty because he had attained the maximum age in the grade of lieutenant colonel as established by the Reserve Officer Personnel Act of 1954, 68 Stat. 1147, and the implementing regulations. Section 326 of the Reserve Officer Personnel Act, *supra*, which was enacted on September 3, 1954, provided that the maximum age for active status in the Reserve would be established as 55. Immediately thereafter certain aspects of this legislation were implemented by D.A. Message 552357 (September 29, 1954) which established a maximum age of 55 at which mandatory release would be required for non-regular officers in the grade of lieutenant colonel and below. Those lieutenant colonels who were not qualified for retirement under Title II of the Army and Air Force Vitalization and Retirement Equalization Act, 62 Stat. 1084, by age 55, would be separated commencing April 30, 1955. Plaintiff was in this category and thus was originally scheduled for separation on April 30, 1955. On that date he was undergoing hospitalization and it was necessary to retain him on active duty beyond his previously scheduled release date so that he could be given full treatment consistent with his illness. Upon his release from the hospital on January 16, 1956, he was separated from active duty in accordance with the age and grade policy referred to above.

5. When plaintiff entered upon extended active duty with the Army in 1940, he was in good health. Subsequent to plaintiff's entry upon extended active duty, he was hospitalized with malarial fever, tertian. He also suffered an infec-

Findings of Fact

overpayment of excess profits tax of \$4,354.92, of which the taxpayer was notified by letter from the Internal Revenue Agent in Charge, Greensboro, North Carolina, dated March 11, 1948. March 29, 1948, the taxpayer filed a Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of the overpayment thus determined.

7. On April 29, 1948, the Commissioner of Internal Revenue approved the decision of the Excess Profits Tax Council and issued a formal notice to the taxpayer by registered mail advising that the determination of its final excess profits tax liability, for 1941, disclosed an overpayment in the amount of \$4,354.92 and the disallowance of the balance of its claim for refund filed September 9, 1944.

8. The Commissioner of Internal Revenue thereafter refunded the overpayment referred to in finding 7 above (Schedule No. 135571) in the amount of \$4,354.92 but did not refund the interest paid in the amount of \$1,082.63, which had previously been collected. This interest payment, made pursuant to the assessment described in finding 4 above, was the interest collected on the "potential" deficiency in excess profits taxes for 1941 after the Excess Profits Tax Council had held and decided that section 722 of the Internal Revenue Code was applicable.

9. August 25, 1949, the taxpayer filed a claim for refund demanding refund of the interest of \$1,082.63, on the grounds that payment of this interest on the 1941 excess profits tax deficiency, determined while the case was under consideration by the Excess Profits Tax Council, was illegally and erroneously collected and retained.

10. March 1, 1951, the taxpayer was notified by registered mail of the disallowance of its claim for refund of \$1,082.63.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law plaintiff is entitled to recover.

The entry of judgment is suspended to await the filing of a stipulation by the parties showing the amount due plaintiff, computed in accordance with this opinion.

Opinion of the Court

GEORGE A. HOLLIDAY v. THE UNITED STATES

[No. 575-53. Decided June 8, 1954]

On Plaintiff's and Defendant's Motions for Summary Judgment

Pay and allowances; retired pay of Army officer.—Plaintiff, an Army officer, on his own application, was placed on the retired list as of September 1, 1950, as an officer who had reached the age of 60 with 20 years or more of satisfactory Federal service. He sues for the difference between the amount received as retired pay on account of age and the amount he would have received if retired on account of disability. The defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

Army and Navy ⇨ 13 (12)

Same; jurisdiction.—The United States Court of Claims cannot determine who is fit or unfit in the military service.

Courts ⇨ 448

Same; decisions of military authorities.—In the instant case, even if it were within the province of the court to review the decisions of the military authorities, it could not say these decisions were wrong. The Army Medical Center's conclusion that the plaintiff, a Reserve officer, should revert to inactive status was apparently based on the fact that plaintiff's usefulness was impaired by frequent hospitalizations, although his ailments did not permanently disable him. The Veterans' Administration's decision that plaintiff was entitled to 40 percent disability compensation was under a different statute, apparently administered more liberally.

Army and Navy ⇨ 13 (12)

Mr. John H. Coffman for plaintiff. *Mr. F. O. Willenbacher* was on the brief.

Mr. John R. Franklin, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues for the retired pay of an officer retired for disability incurred in military service. He is receiving the retired pay, lesser in amount, of an officer retired after 20 years of service.

The plaintiff served in the National Guard from 1909 to 1911, and in the United States Army in 1918. In 1930 he

Opinion of the Court

was commissioned a Major in the Officers Reserve Corps (Specialist), and in 1942 entered upon extended active duty with the Army Air Corps. He was promoted to Lieutenant Colonel in 1947. In October 1948, he was hospitalized and a Medical Disposition Board, on January 24, 1949, made findings as to various incapacities of the plaintiff, and recommended that he be ordered to appear before an Air Force Retiring Board. The Medical Disposition Board found that the several incapacities were incident to the plaintiff's military service, but found that none of them constituted a disability for military service, and found further that the plaintiff was qualified for overseas service. The Board's recommendation was that the plaintiff "be ordered to appear before an Air Force Retiring Board for administrative purposes."

The plaintiff appeared before an Air Force Retiring Board which, on March 9, 1949, found that he was not permanently incapacitated for active service. On June 6, 1949, by Special Orders of the Army Medical Center, Washington, D. C., it was ordered that the plaintiff revert on June 8, 1949, to inactive duty "Not by reason of physical disability." On July 24, 1950, the plaintiff applied for retirement on account of age, and was placed on the Retired List as of September 1, 1950, as an officer who had reached the age of 60 and had had 20 years or more of satisfactory Federal service. In that status he has received retirement pay at the rate of \$127.99 per month. If he had been retired for physical disability incident to service his retired pay would have been 75 percent of his active-duty pay.

From June 9, 1949, at least until his retirement for age and length of service on September 1, 1950, the plaintiff received compensation from the Veterans' Administration on the basis that he was 40 percent disabled.

The plaintiff applied to the Air Force Board for the Correction of Military Records. That Board, on June 3, 1953, advised the plaintiff that the facts shown in his record and presented in his application did not justify a hearing and review of his case.

The Medical Disposition Board and the Air Force Retiring Board evidently concluded that the plaintiff, although

Syllabus

he had several ailments, was not permanently disabled for military service and the Retiring Board therefore did not recommend that the plaintiff be retired for physical disability. Even if it were within our province to review these decisions, we could not say that they were wrong. The Army Medical Center's conclusion that the plaintiff, a Reserve Officer, should revert to inactive status was, apparently, based upon the fact that the plaintiff's usefulness was impaired by frequent hospitalizations, although his ailments did not permanently disable him. The Veterans' Administration's decision that the plaintiff was entitled to compensation on the basis of 40 percent disability was made under a different law, apparently administered more liberally.

The foregoing recital does not present an entirely logical or consistent pattern of conduct by the Government, as a whole, toward the plaintiff. A court cannot, however, undertake to determine who is fit or unfit to serve in the military forces. We therefore see no basis on which the plaintiff can recover, and we grant the defendant's motion for a summary judgment. The plaintiff's petition is dismissed.

It is so ordered.

LARAMORE, *Judge*; WHITTAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

BREESE BURNERS, INC. v. THE UNITED STATES

[No. 50191. Decided June 8, 1954]

On the Proofs

Patents; license to use for duration of war and 6 months thereafter; consideration.—In August 1942 the Government requested the plaintiff, a research and sales organization, to undertake to develop an oil burner for use in Army tents. Prior to May 19, 1943, plaintiff developed such a burner and submitted it to the Army for testing, and it was conditionally accepted, with modifications. In June 1943 the Army requested a royalty-free license covering the patents used in the manufacture of the tent stoves. Later, on September 3, 1943, plaintiff was notified it was to be awarded a contract for oil burners, and on September 4, a license was again requested. The license not having been sub-

above, herein, and relating to the title which one received when he purchased at a Government sale.

Persisting, then, in our assumption that we are dealing with devices relating to the national defense, the plaintiff's title and possession were completely vulnerable. All that was needed to destroy them was an official demand that possession be surrendered. The refusal of the demand would have been a serious crime. The plaintiff did not refuse. Was he entitled to compensation for the property which he surrendered? If a statute makes unlawful the possession of narcotics, or spirituous liquors, or firearms, and they are seized by lawful authority, the possessor is not entitled to compensation for their loss, unless a statute provides for compensation. We suppose that the same is true of national defense devices which it is unlawful to keep.

If the possessor who has no right to keep possession of the property has come into its possession as a result of a mistake by Government officials in selling the property to him, he has an urgent equity in the direction of getting a refund of his direct out-of-pocket expenditures in the abortive transaction. In the instant case that thought would apply to lot No. 23, which the plaintiff bought at the Government sale. We think it would also apply to the goods bought by the plaintiff from Fair Radio Sales which had just bought them at the same Government sale. We assume that the Government is willing to do what Government counsel in their brief say is "the most that plaintiff would be entitled to."

If there is a genuine controversy as to whether the articles here in question related to the national defense, so that the parties cannot stipulate the answer to that question, the case will have to go to trial, the trial to be limited to that issue. If that issue is resolved without trial, the court will consider the case further upon motion of either party.

The motions of both parties are denied, with leave to renew in the event that a stipulation is made as to the relation of the articles in question to the national defense.

It is so ordered.

DURFEE, *Judge*; LARAMORE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

JOHN A. FURLONG v. THE UNITED STATES

[No. 324-54. Decided May 3, 1961]

ON THE PROOFS

Military pay; disability retired pay.—In an action by plaintiff, a former officer in the Army, to recover disability retired pay to which he claims he is entitled because of the alleged arbitrary action of the Army Retiring Board in failing to recommend his retirement for disability with pay, and the alleged arbitrary refusal of the Army Board for the Correction of Military Records to grant him a hearing and to correct his record, it is *held* that plaintiff has failed to show that on the basis of the medical records which were before the Retiring Board, that board acted arbitrarily in finding that plaintiff was fit for military service; and on the basis of the records presented to the Correction Board, that board was not arbitrary in concluding that a hearing was not justified. Petition dismissed.

Military pay; disability retired pay; rating of disabilities—Veterans Administration Schedule.—The basis on which the Veterans Administration determines that a former military person is disabled and entitled to veterans' disability benefits, is not the same as the basis on which a Retiring Board determines that a military person is unfit for further military service by reason of physical disability. A former military person may be eligible for disability benefits from the Veterans Administration and still not have been disabled for further military duty at the time of his separation from military service.

Armed Services $\S$ 13.5(5), 23.4(1)

Military pay; disability retired pay; entitlement—how determined; Reserve Officers Evaluation Board.—The finding of the Reserve Officers Evaluation Board that a former member of the military services who had been discharged not by reason of physical disability, was, at a date subsequent to such discharge, not fit for active military service in the Korean conflict, does not establish that such member was entitled to retirement for physical disability at the time of his earlier discharge.

Armed Services $\S$ 13.5(5)

Military pay; disability retired pay; entitlement—how determined; Army regulations on appointments.—Standards set forth in the Army regulations covering original appointment or recall to active duty are not applicable to disability retirement situations, and a man might be considered sufficiently fit to remain on active duty but at the same time would not qualify for an original appointment.

Armed Services $\S$ 13.5(5), 23.4(1)

Syllabus

Military pay; disability retired pay; correction of military or naval records; arbitrary and capricious refusal to correct—what constitutes.—Where the only new evidence presented to a Correction Board being asked to correct a former officer's record to show him retired for physical disability, is evidence that the Veterans Administration had increased the former officer's disability rating, the board was not arbitrary in refusing to reopen the officer's case.

Armed Services ⇨ 13.5(5)

Military pay; disability retired pay; Court of Claims—jurisdiction; action of Secretary or Retiring Board—review of.—In a claim for disability retired pay where there has been no application to the Correction Board, the court must first determine whether or not the action of the Retiring Board in not recommending disability retirement was arbitrary, and if it was not, the court does not have jurisdiction to proceed further. The Secretary of the particular service has been authorized by Congress to grant or withhold disability retirement, and it is only where his action is in willful disregard of a person's rights or is contrary to law that the court has jurisdiction of the claim.

Armed Services ⇨ 13.5(5), 23.4(1)

Military pay; disability retired pay; evidence—expert medical testimony.—In a suit to recover disability retired pay based on an allegation that the Retiring Board had acted arbitrarily in refusing the plaintiff disability retirement with pay, the court will admit expert medical evidence which was not before the Retiring Board at the time of its action to show that the plaintiff's condition at that time was such that no fair and impartial body could have given credence to the testimony before it.

Armed Services ⇨ 13.5(5)

Military pay; disability retired pay; Court of Claims—jurisdiction; action of Secretary or Retiring Board—review of.—In a suit to recover disability retired pay based on the claim that the service Secretary involved had acted arbitrarily in not having sent the plaintiff before a retiring board, it would be competent to show by extrinsic evidence in this court that the plaintiff's condition at that time was such that no fair man or board could have concluded that plaintiff was not entitled to a hearing before a retiring board.

Armed Services ⇨ 13.5(5)

Military pay; disability retired pay; Court of Claims—jurisdiction; Correction Board—review of determination; new evidence—when admissible.—One of the functions of a Correction Board is to remove injustices and a Retiring Board might have unwittingly and in good faith done a former officer an injustice in not recommending him for retirement. Thus, where it appears that if the Retiring Board had heard certain testimony

Opinion of the Court

which plaintiff offered to produce before the Correction Board the Retiring Board would have acted in plaintiff's favor, it is incumbent on the Correction Board to hear such evidence to determine whether an injustice has been done. If the Correction Board arbitrarily refuses to grant such a hearing or, having given the hearing, arrives at a conclusion that no fair tribunal could have reached, the Court of Claims has jurisdiction to hear and determine the matter, looking to all the evidence available to determine whether the plaintiff was entitled to retirement for physical disability.

Armed Services ⇨ 13.5(5), 13.0(1)

Military pay; disability retired pay; administrative record—finality of; new evidence in court—admissibility of.—In a case for disability retired pay where the claim is that the Secretary, or one of the service boards, acted arbitrarily in not granting the plaintiff disability retirement with pay, evidence not before the Secretary or the boards when the earlier determinations were made is admissible in the trial in this court but is without probative value unless it shows that the actions complained of were in fact arbitrary and capricious.

Armed Services ⇨ 13.6(2)

John Geyer Tausig for plaintiff.

Edgar H. Twine, with whom was *Assistant Attorney General William H. Orrick, Jr.*, for defendant. *Paris T. Houston* was on the brief.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff, a former Army reserve officer, sues to recover disability retired pay from July 18, 1946, to date, less disability compensation received from the Veterans Administration. He claims the action of the Army Retiring Board, which declined to discharge him for physical disability, and the action of the Correction Board in refusing to set aside the action of the Retiring Board, were arbitrary and capricious.

On September 12, 1945, plaintiff, a staff supply and logistics officer in the Pacific Theatre, was wounded by a 30-caliber bullet, which struck him in the abdomen and lodged in his left hip. An exploratory operation was performed but it was decided not to remove the bullet. He was returned to duty on October 2, 1945.

The bullet wound healed, apparently without complications; however, on January 7, 1946, plaintiff was admitted to

Opinion of the Court

Lovell General Army Hospital in Boston for further consideration of the advisability of removing the bullet. After X-raying and otherwise thoroughly examining plaintiff, the chief of the orthopedic service determined that the disability from the bullet was negligible, that the bullet was not a disturbing factor, and that an attempt to remove it might be more disabling than to leave it alone. On February 25, 1946, plaintiff was released from the hospital for general service. On April 29, 1946, he returned to the hospital this time complaining of burning eyes and rectal soreness. He remained there two months, during which time he was given numerous tests and examinations, including X-rays. There was no change in the conclusion that it was inadvisable to remove the bullet. There were no significant psychiatric or neurological findings developed, and on May 31, 1946, plaintiff was again returned to general service.

On July 18, 1946, plaintiff was honorably discharged from the service in the grade of captain, not because of physical disability, but because he had accumulated sufficient points to be eligible for discharge.

After his discharge, plaintiff's physical condition having grown worse, he filed a claim on August 13, 1946, with the Veterans Administration. Plaintiff's ailments at this time were diagnosed by that agency as follows:

- Conjunctivitis.
- Astigmatism.
- Otomycosis.
- Deviation of the nasal septum, right, mild.
- Arthritis, cervical spine suspected (X-ray opinion).
- Metallic foreign body, anterior to the neck of the left femur.
- No evidence of pulmonary disease.

Later, on November 4, 1946, plaintiff was given a special orthopedic examination by the Veterans Administration, when his condition was diagnosed as:

1. Probably arthritis, cervical spine, by X-ray evidence.
2. Ulcer, peptic, active, lesser curvature of stomach.
3. Foreign body (metallic), soft tissue, left femur.

As a result, on December 4, 1946, plaintiff was given a combined 40 percent disability rating from July 19, 1946, the

Opinion of the Court

day after he was discharged. Thirty percent was allowed for the bullet wound and scar, and 10 percent for the arthritis of the cervical spine.

About 10 months later, on October 1, 1947, the Veterans Administration again examined plaintiff, but his combined disability rating was continued unchanged at 40 percent.

On March 5, 1948, at the request of the Disabled American Veterans Administration, the Veterans Administration reopened plaintiff's case and gave him a further physical examination. X-rays showed no significant changes in his condition. While no precise diagnosis was made of the cause of the recurring fever, of which plaintiff was complaining, blood smears for malarial parasites were negative. A neurological examination revealed in part:

* * * Aside from a slight restriction in the full elevation of the straight legs ultimately, there is a certain amount of diminution in the power of extension in the left lower extremity, where there is a difference of $\frac{1}{2}$ " in circumference in the measurements above the knee (the left measures $14\frac{1}{2}$ " just above the knee whereas the right at that level measures 15"). At mid-thigh the left measures $19\frac{1}{2}$ "; the right 20". The right anterior thigh is much more acute in its perception of pinprick than the left anterior thigh, where there is hypesthesia [impairment of sensation] to pinprick and rather suggests that there may have been some injury to the left anterior crural nerve at the time the patient was wounded. The measurements of the lower extremities, below the knees correspond. The upper abdominal reflexes are quite lively and about equal, but the lower abdominal is not responsive. The right lower abdominal reflex is very dull. The left cremasteric [muscle that draws up the testis] is very dull; right cremasteric dull. The patellas [kneecaps] are very dull; equally so. Achilles not responsive on either side. No Babinski or ankle clonus. Gait is steady. Station is good. No incoordination of finger movements. Other objective neurological findings are essentially negative.

It was determined that, in addition to the injury to the anterior crural nerve, as set forth above, plaintiff suffered from a psychoneurotic disorder and anxiety reaction.

As a result of this examination, on July 23, 1948, plaintiff was given an additional 20 percent disability rating from

Opinion of the Court

July 19, 1946, for the nerve condition of his leg, and 10 percent for the peptic ulcer from February 8, 1947, to July 31, 1947, but zero percent from August 1, 1947.

In the meantime, on January 3, 1947, after his discharge on July 18, 1946, plaintiff began trying to get his case before an Army retiring board. On February 25, 1948 he was advised that his request would be granted, if a physical evaluation at Murphy General Hospital indicated it was justified. During May 1948 plaintiff was examined at Murphy General Hospital, as an outpatient. The radiologic, orthopedic, neurologic and psychiatric reports made were all negative. On June 11, 1948, the examining neuropsychiatrist stated in his report that there was "no evidence for [sic] either any neurologic or psychiatric disease."

After reports of the results of the examinations, on June 24, 1948, a disposition board at Murphy General Hospital, after considering plaintiff's clinical records, laboratory findings, physical examination and history of complaints, found that plaintiff was fully qualified for full military duty, but, nevertheless, it ordered him to appear before a retiring board.

On August 3, 1948, plaintiff entered the hospital as a patient and remained there until August 9, in order that observations could be made to determine the cause of his fever. However, his temperature remained normal, and the cause of his fever was not established.

Plaintiff appeared before an Army retiring board, which met at Murphy General Hospital, on August 6, 1948. This board determined that plaintiff was physically qualified for "full military duty, with a waiver for history of peptic ulcer of duodenum discovered after relief from active duty." The Surgeon General and the Secretary of the Army concurred and found that plaintiff was physically qualified for general military service as of the date of his discharge on July 18, 1946.

This action plaintiff says was arbitrary and capricious.

On August 13, 1953, plaintiff requested the Army Board for Correction of Military Records to correct his records to show that he was permanently incapacitated for active service on July 18, 1946. On May 14, 1954, plaintiff's request was denied without a hearing.

Opinion of the Court

Plaintiff filed his petition in this court on August 5, 1954, alleging that the actions of the Retiring Board, the Correction Board, and the Secretary of the Army were arbitrary and capricious. He says there was no evidence to support the findings of the boards and, indeed, that their findings were contrary to the evidence. He says that at the time he appeared before the Retiring Board he was disabled on account of an injury to the anterior crural nerve caused by the bullet in his thigh, and was also disabled by arthritis, and by a peptic ulcer of the duodenum, and that he suffered from recurrent fevers of undetermined origin.

We do not think that plaintiff has sustained his burden of showing by cogent and clearly convincing evidence that the Retiring Board was arbitrary or capricious in finding that he was not incapacitated for active service. There is, of course, a strong presumption that the Retiring Board and the Secretary faithfully discharged the duties imposed upon them by law. Only clearly convincing proof can induce us to hold that a retiring board or the Secretary had arbitrarily or capriciously denied an officer retired pay to which he was entitled. Bad faith will not be attributed to them, unless we are clearly convinced of it. Absent a showing of arbitrary or capricious action, we have no jurisdiction to review the action of the Retiring Board and the Secretary. We cannot substitute our judgment for theirs as to who is fit to serve in the Army. *Bowman v. United States*, 142 Ct. Cl. 367; *Johnson v. United States*, 138 Ct. Cl. 81, cert. denied, 355 U.S. 850; *Woodford v. United States*, 138 Ct. Cl. 228, cert. denied, 355 U.S. 861; *Uhley v. United States*, 137 Ct. Cl. 275; *Girault v. United States*, 133 Ct. Cl. 135; *Prichard v. United States*, 133 Ct. Cl. 212; *Beamish v. United States*, 130 Ct. Cl. 767; *Holliday v. United States*, 128 Ct. Cl. 647; *Spencer v. United States*, 121 Ct. Cl. 558, cert. denied, 344 U.S. 828. It is only where the decision of the board is clearly unsupported by substantial evidence or when there was a non-compliance with applicable laws and regulations that this court may interfere with the findings of the board. *Towell v. United States*, 150 Ct. Cl. 422.

In the present case plaintiff's proof falls far short of convincing us that the actions of the Retiring Board and

Opinion of the Court

the Secretary were in willful disregard of plaintiff's rights, or, in other words, that they were arbitrary and capricious. Plaintiff's complete medical and clinical records were submitted to the board. Two Army medical officers, who had examined plaintiff at Murphy General Hospital, testified that in their opinion plaintiff was not permanently incapacitated for active service, and that any further treatment was not indicated. This was in accord with the findings of the Disposition Board. In response to a question by a member of the Retiring Board, one of the doctors testified that there was no evidence of a peptic ulcer, no history suggestive of it, and that there were no symptoms which would have been sufficient to warrant the making of a G.I. (gastrointestinal) series. He stated that if an ulcer did exist, it must have been after plaintiff's release from active service. The conjunctivitis was described as mild, and he stated that the alleged arthritis was not indicated by X-ray.

The only contrary evidence was plaintiff's own testimony. He summarized his disabilities as including recurring fever, variocoele, conjunctivitis, dermatitis, prostatitis, arthritis of the cervical spine, ulcers, and the bullet wound. The doctors said that none of these things, if they really existed, were disabling.

Plaintiff, in rebuttal, testified that the Army doctors all had ignored his complaints of gastric trouble since 1944, but, strangely enough, he said that while a personal physician thought his symptoms indicated ulcers, a G.I. series made on February 20, 1945, was negative.

Not only would it appear that the actions of the Retiring Board and the Secretary were not arbitrary or capricious, but we hardly see how, on the basis of the evidence before them, they could have arrived at any other determination.

Plaintiff undertakes to support his allegation that the finding was arbitrary and capricious by showing, first, what the findings of the Veterans Administration were; second, by showing that he was rejected for military service in Korea in 1951; and, third, by testimony of certain doctors introduced before a commissioner of the court, in which they testified to what they thought plaintiff's condition must have been when he was discharged.

Opinion of the Court

So far as the action of the Veterans Administration is concerned, we have many times held that the basis for its action is different from the basis upon which a retiring board determines whether or not an officer is entitled to retirement for physical disability, and that a finding by the Veterans Administration, that a plaintiff is disabled, does not show that the finding of the Retiring Board, that he was not entitled to retirement for physical disability, is arbitrary or capricious or even erroneous. *Holliday v. United States, supra*; *Wales v. United States*, 132 Ct. Cl. 765; *Johnson v. United States, supra*. After all, jurisdiction to determine a person's entitlement to retirement is vested by law in the Retiring Board, and not in the Veterans Administration.

Nor does the finding of the Reserve Officers Evaluation Board on April 21, 1951, that plaintiff was not fit for active service in Korea, show that he was entitled to retirement for physical disability in 1946. Five years had elapsed since plaintiff's retirement. His condition then is not shown to have been the same as it was when he was retired in 1946. Besides, the standards for original appointment or for recall to active duty are considerably higher than they are for retention on active duty. *Towell v. United States, supra*. An officer is not given an original appointment unless he is fully qualified physically to perform all the duties of the office; whereas, if he is already in the service and becomes disqualified to perform some duties, he still may be able to perform others sufficiently well to justify his retention.

All the testimony before the Retiring Board and the Secretary, except plaintiff's own testimony, indicated he was still qualified to discharge at least some of the duties of his office.

No additional evidence was presented to the Correction Board to warrant a hearing by it, except the increase in plaintiff's disability rating by the Veterans Administration, after the hearing before the Retiring Board. This did not require a reopening of the case, in our opinion. The Veterans Administration rating, which dated back to the date of plaintiff's discharge, was, first, 40 percent; and not until two years later was it increased to 60 percent. This was not a sufficient indication that the Retiring Board had

Findings of Fact

made an error, in declining to discharge plaintiff for physical disability and, hence, to warrant the Correction Board, seven years later, to reopen the case.¹

Plaintiff introduced before our Trial Commissioner the testimony of certain doctors who gave their opinions of what plaintiff's condition had been thirteen years before the date of their examination of him. When we weigh such testimony against the testimony of the Army doctors who gave their opinions of plaintiff's condition based upon examinations just made, the scales are weighted heavily in favor of the latter testimony.

The admissibility of such testimony is doubtful, anyway; but we suppose it is competent to show that the evidence before the board was so incredible that no one undertaking to arrive at a fair and impartial decision could have given it credence. The testimony introduced in this case falls far short of this.

Plaintiff is not entitled to recover, and his petition will be dismissed.

It is so ordered.

DURFEE, *Judge*; LARAMORE, *Judge*; MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Marion T. Bennett, and the briefs and arguments of counsel, makes the following findings of fact:

1. Plaintiff, a married citizen residing at Wollaston, Massachusetts, and employed as a civilian armed guard, was inducted into the United States Army as an enlisted man on March 17, 1942. He had no physical disabilities at the time, but his physical examination noted that prior to his induction he had had an appendectomy and a herniorrhaphy. In this suit plaintiff seeks retirement denied him for alleged physical disabilities incurred in the military service. The amount of recovery if any is reserved under rule 38(c).

¹ The Veterans Administration finally gave plaintiff a rating of 70 percent disability, but this was not until about five years after his discharge.

Findings of Fact

2. Plaintiff applied for appointment as a commissioned officer and on August 6, 1942, was given a physical examination. He was found physically qualified and was commissioned a second lieutenant, Army of the United States October 31, 1942.

3. Plaintiff served thereafter in the Pacific Theater as a staff supply and logistics officer. On July 18, 1946, he was honorably separated from the service in the grade of captain. His demobilization was not for physical disability but rather because he had accumulated sufficient points.

4. During the course of plaintiff's active military service in the Fiji Islands he was treated on September 15, 1942, for dysentery, bacillary, acute.

In January 1943 plaintiff suffered from varicocele, a varicose enlargement of the veins of the spermatic cord and underwent a varicocelectomy of the same on February 8, 1943. He was discharged to duty improved on February 24, 1943.

On July 4, 1943, plaintiff consulted medical outpatient service for a flushed and feverish condition, headache, nausea, pains in the chest and abdomen, and weakness in his knees. He referred to his dysentery attack of the previous year. On July 11, 1943, reference is made again to a flushed and sick feeling in the stomach and to pains resulting from vomiting alcohol five days previously. No disease was found.

On June 8, 1944, plaintiff was admitted to a station hospital in New Caledonia and the progress notes made at the time state:

For the past three months has had tendency to have temperature elevation up to 99.7° or 99.8°—makes him feel sick in his stomach & have little discomfort & some nausea in the * * * eve.—sometimes when he stands he feels weak, dizzy—occasional slight cough—has headaches & has been treated in nose & throat clinic for (?) sinusitis—frontal headaches frequently.

Plaintiff's temperature chart showed his temperature to have remained in normal range until he was again released to duty on June 15, 1944, with the diagnosis of "no disease."

Plaintiff's medical record continued to accumulate and on March 1, 1945, discomfort from his varicocele was again noted.

Robert E. WILLIAMS

v.

The UNITED STATES.

No. 276-67.

United States Court of Claims.

Jan. 24, 1969.

Proceeding by former enlisted man in Marine Corps for disability retirement pay allegedly due him. The Court of Claims held that failure of Navy to adopt disability rating given Marine Corps enlisted man by Veterans Administration as basis for retiring him for physical disability was not arbitrary, especially when opinion of surgeon general provided reasonable explanation as to why rating enlisted man received under Veterans Administration schedule had no bearing on his ability to perform his duties.

Plaintiff's motion for summary judgment denied and defendant's cross motion for summary judgment granted, and plaintiff's petition dismissed.

1. Armed Services $\Rightarrow$ 23.4(1)

In absence of clear showing that board determination is arbitrary, capricious, unsupported by substantial evidence, or not in compliance with applicable laws and regulations, court will not interfere with determinations by military concerning fitness for duty.

2. Armed Services $\Rightarrow$ 23.4(1)

Failure of Navy to adopt disability rating given Marine Corps enlisted man by Veterans Administration as basis for retiring him for physical disability was not arbitrary, especially when opinion of surgeon general provided reasonable explanation as to why rating enlisted man received under Veterans Administration schedule had no bearing on his ability to perform his duties.

3. Armed Services $\Rightarrow$ 23.4(1)

Fact that Marine Corps enlisted man suffered from ailment for which he received compensation from Veterans Administration did not entitle him to dis-

ability retirement pay from Marine Corps.

4. Armed Services $\Rightarrow$ 23.4(1)

Marine Corps enlisted man seeking disability retirement pay failed to establish that Navy had acted arbitrarily in issuing enlisted man's general discharge without retirement pay after finding him fit for duty.

Robert E. Williams, pro se.

Charles M. Munnecke, Washington, D. C., with whom was Asst. Atty. Gen. Edwin L. Weisl, Jr., for defendant.

Before COWEN, Chief Judge, and DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

PER CURIAM:

Plaintiff seeks disability retirement pay allegedly due him because of a disability existing at the time of his release from military service on January 10, 1963. Plaintiff, an enlisted man in the Marine Corps, was hospitalized on May 26, 1958, when it was diagnosed that he was suffering from tuberculosis of the lymph glands of his neck. On February 29, 1959, a Physical Evaluation Board found plaintiff unfit because of tuberculosis, "100% disabling—may be permanent." Plaintiff was then, on March 16, 1959, placed on the Temporary Disability Retired List.

In a periodic examination on January 13, 1961, a Medical Board concluded that there was no indication of active tuberculosis. On June 8, 1962, a second Medical Board stated in summary that plaintiff had "no significant clinical findings of active tuberculosis." A Physical Evaluation Board on September 26, 1962, found plaintiff unfit for duty because of "tuberculosis, inactive, 50% disabling, which may be permanent." The Physical Review Council did not concur and found that because plaintiff's condition had been inactive for a sufficient period of

time, he was fit for duty. Plaintiff filed a rebuttal which was considered by the Navy Physical Disability Review Board before it concurred with the Physical Review Council's finding that plaintiff was fit for duty.

Plaintiff was removed from the Temporary Disability Retired List on December 17, 1962, and given an opportunity to re-enlist. On January 10, 1963, he received a general discharge without disability retirement pay.

On February 15, 1963, plaintiff applied to the Board for Correction of Naval Records to have his records corrected to reflect retirement for physical disability. In response to a request for an opinion concerning the plaintiff's application to the Correction Board, the Surgeon General noted that at the periodic physical examination in June 1962, plaintiff was found to be in good health, required no treatment, had no significant residual effects and was, therefore, fit for duty. He further noted that the Veterans Administration (VA) ratings had dropped from 100 percent to 30 percent, effective from June 8, 1965, with zero percent from June 8, 1970.¹ He also stated that:

[T]he section of the VA Schedule for Rating Disabilities which relates to the time and percentage increments for tuberculosis has not changed since 1945, prior to the advent of any antibiotic or chemotherapeutic medications. Since their advent, and with the increasing evidence of their efficacy, it can be categorically stated that at the present time the vast majority of individuals with minimal tuberculosis are retained on active duty under treatment, with return to a full duty status, usually after one year. In the instant case, the disease was not only minimal, but was non-pulmonary, i. e., not contagious, and the fact that a rating could be assigned under the terms of the Schedule has no bearing on the

issue of petitioner's ability to perform his duties without jeopardizing his health or that of others. [Letter from the Chief, Bureau of Medicine and Surgery to the Chairman, Board for Correction of Naval Records, dated August 8, 1963.]

Plaintiff's application was accordingly denied by the Correction Board on October 28, 1963.

[1] On plaintiff's request for reconsideration, the Surgeon General submitted an additional opinion in which he reached the same conclusion as in his original findings quoted above. Reconsideration was denied by the Correction Board on January 8, 1964, and plaintiff eventually filed this suit.

From the foregoing, it is readily apparent that plaintiff's claims were given thorough and proper review by the administrative boards involved. It has long been the rule that in the absence of a clear showing that a board determination is arbitrary, capricious, unsupported by substantial evidence, or in noncompliance with applicable laws and regulations, this court will not interfere with determinations by the military concerning fitness for duty. *Stephens v. United States*, 358 F.2d 951, 174 Ct.Cl. 365 (1966); *Wesolowski v. United States*, 174 Ct.Cl. 682 (1966); *Furlong v. United States*, 153 Ct.Cl. 557 (1961). Plaintiff offers no evidence of arbitrary or capricious action by the military boards involved, and shows no violation of a relevant law or regulation.

[2, 3] Plaintiff's claim that the Navy acted arbitrarily when it failed to adopt the disability rating given him by the Veterans Administration as a basis for retiring him for physical disability cannot be sustained. It is well established that such a rating by the Veterans Administration is not binding on the Navy, which operates under separate statutory authority. The fact that plaintiff suf-

¹ VA ratings are based on the number of years the tuberculosis is inactive. Using 1959 as the date of initial inactivity, plaintiff's rating was diminished by the Veterans Administration as provided for

in the Veterans Administration Schedule for Rating Disabilities, Code 7710, to a zero rating for a period expiring with 11 years of inactivity.

ferred from an ailment for which he received compensation from the Veterans Administration did not entitle him to disability retirement pay. *Johnson v. United States*, 149 F.Supp. 648, 138 Ct.Cl. 81, cert. denied 355 U.S. 850, 78 S.Ct. 69, 2 L.Ed.2d 54 (1957) and cases cited therein. Moreover, the opinion of the Surgeon General quoted above provided a reasonable explanation as to why the rating plaintiff received under the Veterans Administration Schedule for Rating Disabilities had no bearing on plaintiff's ability to perform his duties. Therefore, we cannot find that the action taken on his applications was arbitrary or capricious.

[4] Plaintiff also contends that the Secretary of the Navy acted arbitrarily in issuing plaintiff's general discharge, but plaintiff offers no support for this claim. Furthermore, plaintiff has not shown nor have we found in the record any violation of an applicable statute or regulation in the issuance of his general discharge.

Accordingly, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and plaintiff's petition is dismissed.



56 CCPA

**Application of Charles H. FUCHSMAN.
Patent Appeal No. 8044.**

United States Court of Customs
and Patent Appeals.

Jan. 16, 1969.

Appeal from Patent Office Serial No. 474,185. The Court of Customs and Patent Appeals, Kirkpatrick, J., held that

* Senior District Judge, Eastern District of Pennsylvania, sitting by designation.

1. The board consisted of Dracopoulos and Lidoff, Examiners-in-Chief, and Stone,

claims 11-15 of application for patent for ferrous sintered article and method therefor should not have been rejected, but claims 1-10 and 16-20 were properly rejected for obviousness.

Affirmed in part and reversed in part.

Patents ¶18

Claims 11-15 of application for patent for ferrous sintered article and method therefor should not have been rejected, but claims 1-10 and 16-20 were properly rejected for obviousness. 35 U.S.C.A. § 103.

Milton L. Simmons, Cleveland, Ohio,
for appellant.

Joseph Schimmel, Washington, D. C.
(Fred W. Sherling, Washington, D. C.,
of counsel) for the Commissioner of
Patents.

Before WORLEY, Chief Judge, and
RICH, ALMOND, BALDWIN and
KIRKPATRICK,* Judges.

KIRKPATRICK, Judge.

This appeal is from a decision of the Patent Office Board of Appeals¹ affirming the examiner's rejection of all the claims (1 through 20) of application serial No. 474,185, filed July 22, 1965, for "Ferrous Sintered Article and Method Therefor."

The invention relates to the production of articles formed of sintered, iron powder. A mixture is provided of relatively pure powdered iron with about 0.1 to about 0.9 parts by weight of elemental powdered copper and about 0.1 to about 0.6 parts by weight of elemental powdered sulphur. The mixture is compacted into a formed article at about

Acting Examiner-in-Chief. Mr. Stone
wrote the opinion of the board.

50,000 psi and sintered in a substantially non-oxidizing atmosphere. Particular significance is attached to the fact that the proportion of copper in the mixture is less than 1% by weight and appellant's application states:

Although it has been proposed that elemental sulfur provides greatly improved strength at relatively low compaction pressures, and that copper is compatible with sulfur in this respect, it is believed that no one has recognized heretofore that in combinations involving less than 1% each, respectively, copper and sulfur, with powdered iron sintered articles there is thus provided an unexpected, greatly improved effect unpredictable from the activity of either sulfur or copper alone. Although copper has been used for various reasons in powdered iron mixes, it has always been used in quantities in excess of one percent.

Claims 5, 10, 15 and 20 are product claims while the remaining claims are method claims. A more significant grouping of the claims from the viewpoint of our subsequent discussion, is that claims 1-10 and 16-20 recite a proportion of copper in the mixture in the range 0.1% to about 0.9% (or in some of these claims up to 1%) while claims 11-15 recite a proportion of copper in the mixture in the range 0.1% to 0.7% by weight.

Only one reference, Russo U. S. patent No. 3,120,699, issued Feb. 11, 1964, has been cited. Russo discloses the production of sintered articles from powdered iron admixed with sulfur in the range 0.1%-2% by weight. Russo also refers to the addition of copper to such a mixture, stating:

When copper powder is used as a strength-inducing additive, the effects of the sulfur and the copper are not additive. At concentrations substantially in excess of 1% copper, the sulfur addition produces no significant improvement in the strength of the

sintered iron part, sulfur performing essentially independently of copper. Although while copper is not helpful to the achievement of strength through my invention, it of course could be tolerated to enhance some property of the system, other than strength.

The examiner rejected all the claims 1-20 under 35 U.S.C. § 103 as obvious in view of Russo, stating:

The reference further discusses copper as a strength-inducing additive, but indicates that, if the copper is in excess of 1%, then the sulfur addition produces no significant improvement. This is a clear teaching that less than 1% of copper would be used with the sulfur to achieve the optimum strengthening characteristics * * *. Since the patent teaches the addition of copper and sulfur to iron powder prior to sintering, to use such a combination to achieve the results achieved by applicants is obvious from the reference.

The board agreed with the examiner that the previously quoted portion of the Russo reference constituted a teaching of the use of less than 1% of copper, saying:

Appellant construes this language as to mean the reference has not used less than 1% of copper. We do not so consider it and we are in accord with the Examiner's view that this teaching would suggest to one skilled in the art that a proportion of less than 1% of copper may be used in conjunction with sulfur. * * *

Then the board proceeded to affirm the examiner's rejection of the claims.

On appeal, appellant contests the board's finding that Russo inferentially teaches a proportion of copper less than 1% and emphasizes the unexpected nature of the results obtained by addition of copper and sulphur in the proportion claimed. To provide a visual indication of these advantages, appellant, in his