

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MALCOLM PIPES,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2019-1189

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

Decided: November 15, 2019

CHERI L. CANNON, Tully Rinckey PLLC, Washington,
DC, argued for plaintiff-appellant.

ERIN MURDOCK-PARK, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, argued for defendant-appellee. Also repre-
sented by JOSEPH H. HUNT, DEBORAH ANN BYNUM, ROBERT
EDWARD KIRSCHMAN, JR.

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

CLEVINGER, *Circuit Judge*.

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

BACKGROUND

I. Facts

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

specified by the SFIP, which included pushups, crunches, and a 1.5 mile run.

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

On January 6, 2006, due to his continuously elevated blood pressure readings, Pipes reported high blood pressure as a concern on his annual USAF physical screening. On February 5, 2006, Pipes was evaluated by Dr. Granger, a USAF medical doctor. Pipes produced medical records to Dr. Granger from his civilian physician showing elevated blood pressure as well as a USAF form completed by his civilian physician stating her concerns regarding Pipes' continued participation in the SFIP. Dr. Granger's evaluation demonstrated that Pipes had elevated blood pressure, which ranged between 151/94 when sitting to 146/99 when standing. Further, Dr. Granger rendered a diagnosis of hypertension and obesity.¹ Unlike Pipes' civilian physician, Dr. Granger did not relay this health information to Pipes and instead communicated to him the need for

¹ Both Pipes' Squadron Commander, John Rowlands, and Logistics Support Squadron Commander, John Snowman, assert in their affidavits that "Capt. Pipes was not obese, and his correct BMI was 28.9 as recorded in his physical fitness assessment records for 4 Feb 2006." J.A. at 74; *see also* J.A. at 58.

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

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

On September 3, 2006, Pipes became ill while running in accordance with the SFIP and experienced "a headache, difficulty breathing, dizziness, an impression of being overheated, and a general feeling of malaise." J.A. at 14 (internal citation omitted). These symptoms continued into the night, requiring Pipes to go to the hospital around 2:00 AM on September 4, 2006. Pipes was diagnosed with a Cerebrovascular Accident, *i.e.*, a stroke.

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

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

On or about October 15, 2010, Pipes obtained a copy of his USAF medical records. Upon review of these records, Pipes learned for the first time that during his February 4, 2006 medical clearance exam, the USAF Medical Examiner observed that his blood pressure was abnormally high, rendered a diagnosis of untreated hypertension, but nonetheless cleared him for continued participation in the SFIP and his fitness assessments.

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



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