

1 SHUNTA LEMAR BEST IN THE
2 Plaintiff CIRCUIT COURT
3 vs FOR
4 PRINCE GEORGE'S
5 PRINCE GEORGE'S COUNTY, MARYLAND, COUNTY
6 et al.

7 Defendants Case No:
8 CAL 05-03798

9 _____/

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11 The deposition of PEDER K. MELBERG, M.A.,
12 C.R.C., was held on Friday, April 28, 2006, commencing
13 at 2:05 p.m., at the Law Offices of Joseph, Greenwald &
14 Laake, P.A., 6404 Ivy Lane, Suite 400, Greenbelt,
15 Maryland 20770, before Robert A. Shocket, a Notary
16 Public.

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21 REPORTED BY: Robert A. Shocket

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1 P-R-O-C-E-E-D-I-N-G-S

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3 Whereupon,

4 PEDER K. MELBERG, M.A.,C.R.C.

5 called for examination, having been first duly sworn to

6 tell the truth, the whole truth and nothing but the

7 truth, was examined and testified as follows:

8 EXAMINATION BY MR. WHITEFORD:

9 Q. Mr. Melberg, we introduced ourselves -- it
10 is Mister, not Doctor, right?

11 A. Mister, yes.

12 Q. We introduced ourselves earlier. My name
13 is Tom Whiteford. I represent one of the co-defendants
14 in the case that's being brought by Mr. Best. And, we
15 are here today to take your deposition as an expert
16 witness who has been retained on behalf of Mr. Best, as
17 I understand it to give testimony pertaining to
18 expertise in vocational rehabilitation. Is that your
19 understanding as to why you're here today?

20 A. Yes, sir.

21 Q. All right. You have pulled out from your

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1 file notes to be copied. You have a file in front of
2 you. I would ask you if you could, could you just leaf
3 through that for me and tell me or explain to me what
4 the different sections of your file are?

5 A Yes, sir. In the first section, my report
6 and notes that I would have taken in my vocational
7 diagnostic interview of Sergeant Best, would be
8 contained.

9 Q. Let me stop you there. That's your report
10 of February 24, 2006?

11 A Yes, sir. Also in that section on the
12 other side I would have record-keeping, which would
13 include correspondence and my time record.

14 Q. And is that correspondence from counsel?

15 A Yes.

16 Q. Would there be any other correspondence
17 included in there?

18 A No, sir.

19 Q. So it's, that section then is
20 correspondence from counsel and your record-keeping
21 notes as to how much time you have put in, in order to

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1 offer your opinions here today?

2 A Correct. And notice of deposition.

3 Q. Understood.

4 A The second section is vocational or

5 work-related information and would contain the

6 worksheets for the vocational analysis process,

7 Commandant's guidelines from the military, which are

8 essentially military performance appraisals.

9 Q. Did you say Commandant's?

10 A Commandant's, and income records. And then

11 finally the last section contains disability-related

12 information, medical treatment records and

13 neuropsychological test results.

14 Q. All right. Let me ask you about that last

15 section for a second. The purpose of you reviewing

16 that information will be what?

17 A My first review is to determine the types

18 of disabilities or medical impairments that I might be

19 dealing with and then the second purpose is to

20 determine whether the records contain a definition of

21 functional losses or functional limitations that will

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1 be vocationally relevant.

2 Q. All right. And, in your review of those

3 medical records did you find any definition of

4 functional losses that would be relevant in regard to

5 Mr. Best's vocational function?

6 A I did find in the neuropsychological test

7 results the suggestion that there were functional

8 losses that needed further clarification in

9 consultation with the neuropsychologist.

10 Q. All right. And, is it those functional
11 losses that you ultimately reflect in your report of
12 February 24th, 2006?

13 A Yes, sir.

14 Q. All right. So, is it a fair statement to
15 say that your report of February 24th, 2006 is a
16 compilation of your opinions gathered after reviewing
17 all of the material contained in your file?

18 A That's fair statement. Yes, sir.

19 Q. What is the underlying job of a vocational
20 rehabilitation specialist, not from a standpoint of
21 conducting expert testimony or providing expert

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1 testimony but, for instance, if I walked into your
2 office and asked you as a vocational rehabilitation
3 expert for assistance in finding a job, is that

4 something that you do?

5 A Yes.

6 Q. And what would your analysis undertake;

7 what would you do in that situation?

8 A I would examine work background,

9 educational background. I would examine whether you

10 had any medical impairments that presented as

11 vocational handicaps or other vocational handicaps that

12 would affect your ability to work. I would undertake

13 an evaluation as necessary to assess work capabilities

14 and then outline vocational options that would be

15 available to you.

16 Q. How much are interests factored into what

17 it is what you do?

18 A Interests are factored in from the

19 perspective, from the evaluation perspective we look at

20 both manifest and expressed interests. Unfortunately,

21 when we deal with individuals with disabilities,

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1 interests are kind of secondary to capabilities.

2 Q. Do you limit yourself as a vocational
3 rehabilitationist to looking into potential vocations
4 that the individual either has training in or an
5 interest in?

6 A No.

7 Q. So, if we talked more specifically in this
8 matter about Mr. Best, Mr. Best has training as a
9 supply clerk, essentially?

10 A Yes.

11 Q. Would you agree with that statement?

12 A Yes.

13 Q. All right. When you looked at his
14 potential for working outside of the military, did you
15 limit yourself to areas in the supply field or do you
16 also look at other jobs that he would be potentially
17 qualified for?

18 A I would look at any, I would like look at
19 the wide range of jobs that he would otherwise be

20 qualified to perform, not just those in supply

21 functions.

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1 Q. So, let me backtrack then for just a
2 second. In performing your analysis, you look at work
3 history?

4 A Yes.

5 Q. Education?

6 A Yes.

7 Q. In this matter, Mr. Best is a high school
8 graduate, correct?

9 A Yes.

10 Q. And he graduated with a 3.21 --

11 A One --

12 Q. GPA which puts him at a solid B, right?

13 A Yes.

14 Q. Do you consider Mr. Best to have the mental
15 competencies of a high school graduate at this time?

16 A I think that's a question best addressed to
17 a neuropsychologist.

18 Q. And that's fine. I'm not trying to get you
19 to offer opinions that you don't feel comfortable
20 offering. Would it be a fair statement to say that
21 whether Mr. Best has the equivalent cognitive skills of

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1 a high school graduate is a question that you would
2 defer to a neuropsychologist?

3 A Yes, sir.

4 Q. When you are asked to do a vocational
5 assessment, are you looking for the highest and best
6 salary or are you looking for the position that will
7 make the individual happiest; how do you go about your

8 assessment as what your job is?

9 A Almost uniformly it would be highest and
10 best salary except when we have emotional behavioral
11 impairments that would suggest that a person would be
12 unsuccessful at that type of work and would be better
13 placed into a job that satisfied their interests and
14 made them happy.

15 Q. All right. So, in this instance then -- or
16 strike that. So, when someone comes in to you and says
17 I need help and you are going to say to them, in most
18 instances, as I think your testimony was, that you are
19 going to do an analysis and come back to them and say
20 your best earning potential is in this field, is that
21 correct?

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1 A Yes.

2 Q. All right. And, absent emotional or
3 behavioral impairments, that's the recommendation that
4 you are going to make? If emotional impairments exist,
5 you may find yourself going, while you may be qualified
6 to do this over here and it may have a slightly higher
7 salary, given your difficulties you may be better in
8 Field B, it pays a little less but we think that's a
9 better fit for you; is that consistent with what you
10 do?

11 A Well, it's relatively consistent with how I
12 would go about doing a vocational evaluation. In the
13 rehabilitation counseling process with my clients, they
14 express interests. They have, it's an interactive
15 process where we select occupational alternatives and
16 therefore if I tell them here's their best optimal
17 alternative for employment but they're not interested
18 in that particular area, I don't need a psychological
19 problem to then say, okay, let's look at next best but
20 you understand that this is not going to offer you the
21 level of income that the other alternative would.

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1 Q. Understood. Let's take a step back and
2 let's talk about exactly what you did in performing a
3 vocational analysis as to Mr. Best. What was the first
4 thing you did?

5 A The first thing I did was to complete a
6 vocational diagnostic interview with Sergeant Best.

7 Q. And explain to me what that would entail.

8 A Yes, sir. That's a structured interview
9 format in which I obtain background information,
10 information about work, progression in career,
11 education, interests, hobbies. I also make
12 observations of my client during that interview and I
13 obtain their perception of their capabilities or their
14 limitations.

15 Q. Provided to me by counsel has been what's
16 called, is titled an interview guideline. Okay?

17 A Yes.

18 Q. Are you familiar with that document?

19 A I am.

20 Q. All right. Is this an interview guideline

21 for that initial interview that you conduct with your

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1 clients?

2 A It is.

3 Q. And would this, would the notes,

4 handwritten notes on it be the actual interview that

5 you conducted with Mr. Best?

6 A No. The notes would be some peripheral

7 notes I made during the interview process. The actual

8 interview notes would be attached on several sheets.

9 Q. All right. So, you go in with this as a

10 guide; you may have written some peripheral note on

11 here during the interview but you actually take other

12 notes as well?

13 A Yes, sir.

14 Q. All right. Understood. So, if I go down

15 this interview guideline, these are all areas of

16 inquiry that you would have gone through with Mr. Best?

17 A Yes, sir.

18 Q. All right. You just talked to me a second

19 ago about inquiring of your client as to what they want

20 to do?

21 A Yes.

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1 Q. All right. Did you have that discussion

2 with Mr. Best?

3 A Yes.

4 Q. All right. And what did Mr. Best tell you

5 that he wanted to do?

6 A And this is covered under goals, would be
7 the third sheet of my interview notes. His career goal
8 prior to this injury was to be a career marine, 20-year
9 service. Afterward, post injury, he in the interview
10 said that he was considering leaving the Marines
11 because of changes within the Marine Corps.

12 Q. And did you inquire any further as to what
13 those changes within the Marine Corps were?

14 A We briefly covered that he was dissatisfied
15 with the level of quality of the Marine Corps, although
16 we did not discuss specifics, and he was dissatisfied
17 with people looking at him differently than prior to
18 the injury.

19 Q. His perception?

20 A Yes, sir.

21 Q. But would you agree, one of his chief

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1 complaints was in regard to the overall quality of the
2 Marine Corps and that the Marine Corps had changed as
3 opposed to him changing?

4 A That's what he stated; yes, sir.

5 Q So, it's your understanding that one of, at
6 least one of the major factors in his deciding to leave
7 the Marine Corps is not the accident but rather how the
8 Marine Corps itself has changed since he's returned?

9 A In his perceptive or perception and his
10 interpretation, yes.

11 Q And that's what he told you?

12 A Yes.

13 Q Other than leaving the Marine Corps, did
14 you have any discussions with him about what he wanted
15 to do after leaving the Marine Corps?

16 A No, sir. And in fact when I met with him
17 he did not definitively say that he intended to leave
18 the Marine Corps, that that was something that he had
19 considered.

20 Q It's still up in the air?

21 A Yes.

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1 Q. Let's talk about that for a second. What's
2 his current salary in the Marine Corps?

3 A He is, he is a pay grade E-5 with nine
4 years experience so his total annual salary would be
5 \$48,772.

6 Q. Plus benefits, right?

7 A Well, that would include BAS and about BAQ
8 which are a form of military benefit but in addition to
9 that, health benefits and other benefits.

10 Q. I have not had the privilege of serving and
11 do not know what BAS or BAQ are. Could you explain
12 that to me, sir?

13 A Yes. BAS is a supplement given to members
14 of the military for, intended to reimbursement them for

15 their sustenance, for food, and BAQ is a partial
16 assistance with quarters.

17 Q. Understood. And, the number that you gave
18 me, the 48,000, I think it was?

19 A 48,772, sir.

20 Q. Does that number include the BAS and BAQ?

21 A Yes, sir.

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1 Q. And, if Mr. Best should remain in the
2 military, would you anticipate that he would continue
3 to receive BAS and BAQ as part of his salary?

4 A Yes, sir.

5 Q. And, if I'm, sort of just -- I'm jumping
6 around a little bit but I want to get this out if I
7 can. It's my understanding from your report at least
8 that you are, that your ultimate conclusion -- I'll

9 refer to you page three of your report -- your ultimate
10 conclusion is that if Mr. Best decided to leave the
11 military, that his highest and best use as we've talked
12 about before, meaning where he has the best potential
13 to attain his best salary would be as a supervisor in
14 warehousing or material handling, is that correct?

15 A Yes. If he had not been injured, the best
16 optimal alternatives for him outside of the, military
17 would have been in supervisory positions in material
18 handling or warehouse work.

19 Q. Because that's what he's been trained in,
20 in the military, correct?

21 A Not only trained in but also has, would

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1 have had extensive experience in, in the military.

2 Q. And those jobs as you've indicated would

3 pay 41 to \$45,000?

4 A Yes, sir.

5 Q. Is that correct?

6 A Correct.

7 Q. And then you go on to say, because of his

8 injuries, based upon at least your assessment, which we

9 will get into in a second, it's your opinion that he no

10 longer has the ability to do the supervisory role and

11 in fact would have to take lesser positions somewhat in

12 the same field?

13 A Yes, sir.

14 Q. All right. Now, at the beginning of the

15 deposition you told me that in virtually all of your

16 circumstances when clients come in to you, your

17 ultimate recommendation is highest and best use, i.e.,

18 highest salary correct?

19 A Yes. That's correct.

20 Q. In this situation we have an individual who

21 is in the military, he's making \$48,772 currently; he

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1 has not made a definitive decision at least when he
2 discussed it with you that he's leaving the military,
3 correct?

4 A Not a definitive decision. He was
5 indicating that in all likelihood he would be leaving
6 at the end of his current term.

7 Q. All right. Why is not his highest and best
8 use, i.e., best vocational result remaining in the
9 military where he would continue to make \$48,772 plus,
10 at this time?

11 A Yes. I have concern that he is being
12 artificially supported in the military because of the
13 supports that are provided to service personnel or in
14 the jobs that he's functioning in, and I have concern
15 that he may not in the long return be permitted to
16 remain in the military.

17 Q. You interviewed his direct supervisor,

18 correct?

19 A Correct.

20 Q. And you interviewed his supervising

21 officer, correct?

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1 A Yes.

2 Q. Did either of those two individuals tell
3 you that there are any plans to move Mr. Best out of
4 the military?

5 A No.

6 Q. So, this artificial inflation or artificial
7 support that factors into your opinion is a belief that
8 you have based upon what?

9 A Based upon what these individuals told me
10 they found necessary to do in order to have Sergeant
11 Best continue in his job function.

12 Q. Did they indicate to you that there was any
13 plan to cease providing these additional supports to
14 Mr. Best?

15 A He's no longer under their command.

16 Q. In fact, he's been transferred over to
17 Okinawa, correct?

18 A Yes, sir.

19 Q. Have you spoken with his supervisor in
20 Okinawa?

21 A I have not.

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1 Q. And, as I understand it, he is a chief --
2 let me get this straight. I read it in your note.
3 Well, I'll ask you while I look for it, I know I have
4 seen it, but, do you know what his current title is in
5 Okinawa? Here it is, sir. Page two of your report.

6 He's a warehouse chief at Third MHG Supply in Okinawa,

7 Japan; do you see that?

8 A Yes, sir.

9 Q. All right. The next sentence in there says

10 he presently functions with four to five warehouse

11 clerks reporting to a supply chief; correct?

12 A Yes, sir.

13 Q. All right. Do you understand that those

14 warehouse clerks may in fact be working under Mr. Best?

15 A Yes.

16 Q. All right. So, in fact he's not the lowest

17 man on the totem pole, he is the warehouse chief,

18 correct?

19 A Yes.

20 Q. All right. So, you have clerks and then

21 you would have a warehouse chief and then everyone is

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1 reporting to a supply chief, is that correct?

2 A That's correct.

3 Q. So, to some extent Mr. Best at least is

4 performing some supervisory roles over these warehouse

5 clerks that work under him?

6 A Presumably by title.

7 Q. We haven't spoken to his supervisors in

8 Okinawa, correct?

9 A Correct.

10 Q. All right. So, once again, you don't know

11 of any definitive statements from anyone within the

12 military indicating that there is any thought at this

13 time about moving Mr. Best out of the military and/or

14 failing to provide him with the supports he needs to

15 perform his duties, correct?

16 A That's correct.

17 Q. All right. Would you agree with me, sir,

18 that if in fact Mr. Best is able to continue working in

19 the military and there is not a supported or evidenced

20 push to remove him from the military, that his highest

21 and best vocational use at this point would be to

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1 continue within the military?

2 A Yes.

3 Q. And if in fact he continues within the

4 military, would you agree with me, sir, that he does

5 not have an economic loss as a result of this accident?

6 A He would not have an economic loss as of

7 today. He would, however, in my view, begin to develop

8 an economic loss when and if he did not receive

9 upgrades or promotions in the future.

10 Q. All right. Let's talk about that for a

11 second. You have interviewed his past direct

12 supervisor and his past direct officer in charge?

13 A Correct.

14 Q. Did either of those two individuals

15 indicate to you that Mr. Best was passed up for

16 promotion as a result of his injuries?

17 A Not as a result of injuries but he has been

18 passed over for promotion.

19 Q. And did they give you a reason as to why he

20 was passed over for a promotion?

21 A They indicated that in '04 he was passed

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1 over but he would have been in an early zone for

2 consideration so they could not say one way or the

3 other what his likelihood of being promoted would have

4 been at that time. The second promotion, he had been

5 on light duty for a long period of time and that was a

6 factor that entered into the reason why he was not

7 promoted. Again, they would not definitively say that

8 he was passed over because of his impairments.

9 Q. So, as you sit here today you can't say

10 that but for the accident Mr. Best would have received
11 a promotion?

12 A Not through today; no, sir.

13 Q. And into the future, have you had
14 discussions with anyone of Mr. Best's current
15 supervisors indicating that he will not be promoted as
16 a result of his injuries?

17 A His supervisor, Major Harrison, indicated
18 that future promotional status was in question.

19 Q. And this is his past supervisor?

20 A Correct.

21 Q. But we haven't talked to his current

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1 supervisor?

2 A No, sir.

3 Q. Do you know whether Major Harris (sic) is

4 in any way involved currently in whether or not Mr.

5 Best will receive a promotion?

6 A I don't know.

7 Q. Do you understand what the criteria are for

8 promotion?

9 A No, not entirely.

10 Q. That would be something that you would

11 defer to someone else on as far as the military

12 promotional procedures?

13 A Yes. I do know that performance of job

14 duties and response to command are very important

15 considerations.

16 Q. Did you have the opportunity to review any

17 type of performance evaluations of Mr. Best in his

18 position in Okinawa?

19 A No, sir.

20 Q. So, as you sit here today, having not

21 spoken with his direct supervisor and having not

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1 reviewed any performance evaluations, you do not have
2 direct firsthand knowledge as to whether or not Mr.
3 Best is performing above required expectations, at
4 expectations or below expectations?

5 A No firsthand knowledge; no, sir.

6 Q. Do you have any knowledge whatsoever as to
7 whether he's above, at or below expectations in regard
8 to what the military is asking of him in Okinawa?

9 A No, sir, not in Okinawa.

10 Q. So, the last information you have on
11 performance really goes back to when, prior to his
12 appointment in Okinawa?

13 A That's correct.

14 Q. Would you agree with me that his
15 performance in Okinawa, his current performance would
16 be a better measure as to what he potentially can and
17 cannot do in the military than his past performance
18 prior to going to Okinawa?

19 A No, I don't think so, necessarily. I think
20 we would have equal importance from his performance in
21 his most recent position before the assignment to

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1 Okinawa.

2 Q. Do you know whether Mr. Best's condition is
3 progressively getting better, progressively getting
4 worse or is stable?

5 A In light of my conversations or interview
6 with the neuropsychologist, I understand it's
7 relatively stable. I know that some experts believe
8 that there can be some progression over a period of
9 time. I wouldn't expect it to be getting any worse.

10 Q. I'm going to refer you to your report for a
11 second, sir. I'm going to walk up through that real
12 quickly, if I can. Paragraph two, which is your

13 diagnostic interview, all right, I would assume that
14 one of the things that you do as a vocational
15 rehabilitation expert is as part of your job you are
16 trying to assess how somebody handles himself because
17 that factors into how they will handle themselves in
18 the workplace, is that correct?

19 A Yes.

20 Q. If someone comes in and isn't able to
21 answer any questions or is dressed inappropriately,

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1 these are factors that could hurt them in the job
2 market, correct?

3 A That's right.

4 Q. All right. Back to your report then. When
5 he came in to see you, you write that he was casually
6 dressed, neatly groomed; that would be appropriate,

7 correct?

8 A Yes, sir.

9 Q. He demonstrated good oral communication

10 skills, appeared to be an adequate historian for

11 personal events with a large memory gap lasting for the

12 years prior to the injury, is that correct?

13 A Yes, sir.

14 Q. So, other than this memory gap, when you

15 were asking him questions about himself and about his

16 history, he was able to adequately communicate answers

17 to you, is that correct?

18 A Adequately, yes.

19 Q. I mean, you write good oral communication

20 skills?

21 A Correct.

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1 Q. Those are your words, right?

2 A Yes. He responded to questions

3 appropriately and relatively intelligently.

4 Q. You then go on to say that Sergeant Best's

5 affect as observed to be variable and appropriate to

6 the situation; what do you mean by that, sir?

7 A I observed the individual's outward

8 appearance of emotion, their presentation to make sure

9 that it is not abnormal or aberrant in some way.

10 Q. And in this instance you found Mr. Best to

11 be normal, is that correct?

12 A Yes.

13 Q. So, at least from what I will call the

14 walking in the door and the first five minutes with

15 you, Mr. Best appears to be an appropriate candidate to

16 be placed in any job at that point?

17 A He did not have visual appearances that

18 would interfere with his marketability.

19 Q. Fair enough.

20 A Of course other than his facial

21 disfiguration.

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1 Q. Understood. We've already discussed the
2 fact that he's a high school graduate with a 3.21 GPA
3 and that you would defer to a neruopsychologist or a
4 neurologist in regard to whether or not he continues to
5 have the capabilities of a high school grad?

6 A Yes.

7 Q. When you look to place Mr. Best from a
8 vocational standpoint, do you look to place him in jobs
9 which require the capacities of someone with a high
10 school education?

11 A Yes, as long as they're within his
12 limitations.

13 Q. So, is that what you did in this instance,
14 for instance, the jobs that you pulled up here, did you
15 say I've got a high school graduate here; therefore, I
16 should be looking at this sector of jobs?

17 A Yeah. Very broadly stated, we look at the
18 skills, the aptitudes, the educational development that
19 the worker has developed before their injury and that
20 develops a pool of occupations that that person would
21 have been qualified to perform absent any type of

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1 disability. We then select from that list of
2 occupations a list of occupations that the person now
3 would be capable of performing. So, on that prior list
4 it would have included supervisory positions in
5 warehouse and material handling and then we go to those
6 occupations that are now within the individual's
7 capabilities.

8 Q. How do you reconcile the fact that Mr. Best
9 is currently working in a supervisory position with
10 your opinion that he does not have the capabilities to

11 work in a supervisory position?

12 A Sir, Sergeant Best was under title in a
13 supervisory position when he was with the Drum and
14 Bugle Corps after this injury but he had so much
15 support and the addition of other clerks in his role
16 that he was not functioning supervisory. He was
17 essentially carrying out whatever job duties he saw
18 necessary at the time. Other individuals picked up to
19 perform his job duties that weren't done. And, his
20 co-workers and supervisors perceived and saw that he
21 was unable to function without that level of direction.

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1 Q. Did you, yourself, perform any type of
2 testing on Mr. Best to determine in your own mind
3 whether or not Mr. Best had the ability to perform in a
4 supervisory function?

5 A I don't know that that form of vocational
6 test exists. I would need an in vivo evaluation and/or
7 some comment from neuropsychological testing.

8 Q. If, in fact, Mr. Best is currently working
9 in a supervisory position, in more than just name only,
10 would that change your opinion that he's not currently
11 able to work in a supervisory position?

12 A That would be completely discrepant with
13 the observations of his work function before he was
14 reassigned to Okinawa and also completely inconsistent
15 with the neuropsychologists's view of his limitations.

16 Q. Do you have an opinion, sir, as to whether
17 Mr. Best has the current ability to return to school
18 and obtain a college education?

19 A Again, a question that's best addressed to
20 the neuropsychologist. The input that I had from Dr.
21 Bleiburg was that he has not lost the intellectual

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1 capacity to study and learn additional materials. He
2 would have lapses in his ability to do that
3 successfully, but, more importantly, may have trouble
4 applying those skills once he's learned them on the
5 other side.

6 Q. Would you agree with me, sir, that if in
7 fact Mr. Best is able to return to school and obtain a
8 college education that his potential earning power
9 would increase?

10 A Certainly achievement of additional
11 education would open the range of occupational
12 alternatives from him. The question is what level of
13 education or what type of education would permit him to
14 work in a job that had the structure that he's going to
15 need once he's completed that and I wasn't able to find
16 any.

17 Q. What particular areas of employment did you
18 look at other than in warehousing?

19 A Well, Sergeant Best had expressed an

20 interest in business, and, so I looked into business.

21 I think unfortunately that's exactly the wrong choice

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1 for him to make in light of the fact that business

2 people make ongoing decisions on a daily basis, they

3 direct their own activities. They initiate their own

4 activities. And, that's where he has his primary

5 problems.

6 Q. Any particular jobs that you looked at

7 other than business as a whole?

8 A I looked at business management. I looked

9 at sales, functions, looked at warehouse management,

10 trucking management. All of those occupations I found

11 to be outside of his capabilities.

12 Q. And what exactly was it about his

13 capabilities that makes those jobs inappropriate?

14 A None of those jobs fit into a category of
15 what I would call simple task structured directed work
16 activities under supervision.

17 Q. To your knowledge, is Mr. Best able to
18 handle his own finances?

19 A I don't know at what level he handles them
20 and I have no -- I can't make that judgment. I don't
21 have enough information.

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1 Q. So, that wasn't part of your interview with
2 Mr. Best, to actually determine whether he can handle
3 money, whether he saves money, whether he handles his
4 own expenses?

5 A Whether he spends money impulsively?

6 Q. Right.

7 A No, sir, it was not a part of my interview.

8 Q. All right. Would the ability to budget,
9 handle finances play into a determination as to whether
10 he was capable of managing himself in a work
11 environment?

12 A If I found an individual who was handling a
13 very complex financial budget with investments and
14 multiple payments and was doing it successfully, that
15 might cause me some question but for a simple budget or
16 a cash budget, not necessarily.

17 Q. All right. But we don't know one way or
18 the other as to what Mr. Best was doing because we
19 didn't ask him, is that correct?

20 A That's correct.

21 MR. FLACHS: Well, we know his salary and

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1 that's been documented. Correct?

2 THE WITNESS: We know that he has a very
3 straightforward and simple pay structure.

4 BY MR. WHITEFORD:

5 Q. Excuse me while I just look over this for a
6 second, sir. All right. Let me refer you, sir, if I
7 could to page two of your report, in the paragraph
8 which starts, during his medical rehabilitation; do you
9 see that paragraph, sir?

10 A Yes, sir.

11 Q. Two -- six lines down there's a sentence
12 that starts with whereas; do you see that?

13 A Yes, sir.

14 Q. Let me read that. It says, whereas prior
15 to the injury Sergeant Best was the sole supply clerk
16 at the Drum and Bugle Corps, following the injury three
17 additional service personnel were assigned to supply
18 clerk functions. You do not mean to imply by that
19 paragraph that the military assigned three additional
20 personnel simply to accommodate Mr. Best's losses?

21 A Sir, what I was informed was that when

1 Sergeant Best came back to his function he was unable
2 to handle his functions and the military had brought in
3 three supply clerks to work within his division to
4 handle the job duties that he had been doing
5 previously.

6 Q. So, it's actually your understanding that
7 the military went out and hired three individuals to
8 perform the job that he was performing prior?

9 A That's correct.

10 Q. Who told you that?

11 A Major Harrison and Gunnery Sergeant Cox.

12 Q. And these individuals were specifically
13 hired to do the job that he had performed earlier and
14 weren't simply additional supply clerks?

15 A They took over his responsibilities, yes,
16 one in purchasing and two in the warehouse.

17 Q. All right. But, do you have information

18 that those individuals would not have been added had

19 Mr. Best not been injured?

20 A I don't know how many people would have

21 been added had he not been injured but three people

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1 took his position.

2 Q. I guess what I'm trying to get at here -- I

3 may inartfully be saying it. Was this simply a

4 situation where the military hired more supply clerks

5 and there were more people doing this work or was this

6 a situation where but for Mr. Best's injuries the

7 military would not have hired these supply clerks?

8 A I don't think I can say one way or the

9 other.

10 Q. All right. In his interview with you, am I

11 correct that Sergeant Best reported that the loss of

12 his right eye vision has not resulted in functional
13 loss?

14 A By his self-report, he did have to retrain
15 to use a weapon on the other side.

16 Q. But at least in his mind the loss of his
17 vision has not affected his ability to perform his job
18 functions, correct?

19 A By his self-report, that's correct.

20 Q. Do you have an understanding of how long
21 Mr. Best's current workday is?

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1 A No, sir.

2 Q. Do you have a current understanding of how
3 many hours Mr. Best works in a week?

4 A No, sir.

5 Q. And the last paragraph on page two -- one,

6 two, three, four -- on the fourth line down, there's a
7 sentence that starts with based; do you see that, sir?

8 A Yes, sir.

9 Q. I'll read the sentence. Based on the input
10 from Dr. Joseph Bleiburg, Sergeant Best has cognitive
11 functional impairments which will affect his work
12 capacity and possibly limit his ability to maintain a
13 full day of work; did I read that correctly?

14 A Yes, sir.

15 Q. All right. As you sit here today you do
16 not know whether or not his functional impairments have
17 limited his ability to maintain a full day of work as
18 we don't know what his work hours are or how many hours
19 he works in a week, right?

20 A Well, the number of hours that he spends in
21 the workplace wouldn't necessarily tell me whether he

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1 was effective in doing the work throughout a normal
2 workday but along those lines, no, I don't know.

3 Q. Do you know whether Mr. Best does any of
4 the scheduling for the supply clerks that work under
5 him?

6 A I don't know.

7 Q. Do you know whether Mr. Best does any of
8 the division of work for those supply clerks?

9 A No, sir.

10 Q. When you completed your vocational
11 assessment of Mr. Best, did you have a discussion with
12 Mr. Best at all regarding your opinion that in the
13 civilian workforce he would be looking at jobs in the
14 23,000 to 26,000 dollar annual salary range as opposed
15 to his military salary of \$48,772?

16 A No, sir. I have not had that discussion
17 with him.

18 Q. Is that something that you would generally
19 do with a client?

20 A If they inquire, yes, I would.

21 Q. Am I correct, sir, that the direction,

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1 supervision structured environment of the military is,
2 in fact, the optimal work environment for someone with
3 the difficulties that Mr. Best is currently
4 experiencing?

5 A Up to a certain level, yes, sir.

6 Q. At his current level?

7 A In my assessment he is a step above his
8 capabilities in terms of his current work assignments
9 or duty assignment. He would be in my view best
10 performing a basic supply clerk function instead of a
11 chief function.

12 Q. But given what you know about Mr. Best,
13 giving the vocational assessment that you have
14 performed, am I correct that your recommendation to Mr.

15 Best would be that your optimal work environment, your
16 highest and best use at this point and your opportunity
17 to obtain the best financial outcome would be to remain
18 in the military?

19 A My recommendation to him would be that he
20 attempt to stay in the military as long as they could,
21 in light of his disabilities, facing the possibility of

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1 ultimately being boarded out.

2 Q. Understood but at least, as we've discussed
3 earlier today, as we sit here today, we don't have any
4 evidence at all that the military is looking to usher
5 him out of the military, correct?

6 A Well, I can't say we don't have any
7 evidence that they're looking to board him out.
8 There's much that goes into consideration with that and

9 the inability to perform assigned job duties at an
10 expected level would be a consideration. In terms of
11 whether there is anybody who is on the trail in an
12 attempt to do that, no, I'm not aware of that.

13 Q. And as we sit here today we don't know how
14 he's performing in his current job duties?

15 A I don't know directly how he's performing.
16 I would you surmise based upon past performance and on
17 neuropsych results that he is not performing the full
18 duties of a chief warehouse supply clerk.

19 Q. Would you agree that actually interviewing
20 the individuals that are currently working with him and
21 under him might be a better way of actually finding out

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1 how he is doing than surmising based upon testimony or
2 information from prior supervisors?

3 A The ideal circumstance would be to do an
4 on-site evaluation where I could observe work
5 performance against certain measures. Whether the
6 supervisor has had sufficient time, whether the
7 supervisor is aware of things that happen within the
8 environment for what, how he gets his work done or not,
9 I would need to observe firsthand.

10 Q. Can you pull these notes up for me, sir?
11 We have a couple handwriting issues. Yours is much
12 better than mine but I still need a little help.

13 A Uh-huh.

14 Q. I believe it's on the third page. You see
15 where I am?

16 A Yes.

17 Q. All right. Could you read what I have
18 highlighted in pink here?

19 A Yes. That's either reenlist or get out.

20 Q. And, that's where you are interviewing Mr.
21 Best, at that point; these are notes from that

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1 interview?

2 A Correct.

3 Q. All right. And this is what we've talked
4 about before, which is, those are essentially his two
5 options and he's still weighing them, at this point?

6 A That's, that's correct, leaning toward
7 getting out.

8 Q. Can I ask you to go to that page, sir?
9 And, do you see that?

10 A I'm sorry. I --

11 Q. Is that a different section?

12 A Yes, sir.

13 Q. Sorry.

14 A No problem. Yes, sir.

15 Q. All right. Can you, if I refer you to the
16 bottom of the page where it says I think E-5?

17 A Yes, sir.

18 Q. Can you read from there down for me,

19 please?

20 A E-5 as of April '01. November 23, '02,

21 injury. Passed over for E-6, September '04, September

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1 '05, Marine Corps target, seven and a half years.

2 Q. Let me stop you there. What does Marine

3 Corps target, seven and a half years mean to you?

4 A The Marine Corps has certain, I believe

5 they're called TISs, time in service, which gives an

6 expected range of, for when the individual will move

7 from one promotion to another. He should have achieved

8 a certain rank in a certain period of time.

9 Q. So, is it as simple as the military would

10 like to you move from E-5 to E-6 within that seven-year

11 period?

12 A With seven and a half years of total

13 service, correct.

14 Q. So it's not the time between, is it the

15 time between, so --

16 A No. It's time in service.

17 Q. I'm sorry. I'm just not understanding. I

18 should probably let somebody else ask these questions.

19 But, let's say he's an E-5, just today, he's an E-5.

20 A Yes, sir.

21 Q. Are we talking about there being a

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1 projected seven-year target date between his going from

2 E-5 to E-6?

3 A No. He, his time in service, which --

4 Q. So, from the time he enlisted?

5 A In 1997, he should be moving to an E-6 by

6 approximately seven and a half years of service, which

7 would bring him to 2004, 2005.

8 Q. All right. The next line, could you read

9 that for me, sir?

10 A Yes. Not unusual five to six years in

11 service to move to E-6. And then below that, supply

12 may be slower.

13 Q. What did that mean to you?

14 A That the Major informed me that it would

15 not be unusual for a Marine with high performance

16 standards to have moved to an E-6 after five to six

17 years of service; in other words, Sergeant Best could

18 have been considered for a promotion to E-6 as early as

19 a year after his injury, if not for his injury, but,

20 that sometimes in supply assignments the increases are

21 a little bit slower.

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1 Q. So, in other words, the Major is saying
2 simply from being in supply he may not have achieved
3 E-6 as quickly as in some other division?

4 A Not at 5 to 6, that's correct.

5 Q. All right. And then could you read the
6 last two lines on that page, sir?

7 A Yes. But current performance may have an
8 impact.

9 Q. And then what's the last line?

10 A If he does not achieve E-6 by 12 to 13
11 years, that will be a problem.

12 Q. All right. Given that statement, does it
13 sound to you as if Major Harrison believes that there
14 is a current movement to move Mr. Best out of the
15 military? I mean, doesn't that statement imply that
16 he's at least going to be there 12 to 13 years?

17 A Twelve to 13 years total service.

18 Q. Yes.

19 A The statement from Major Harrison, as I
20 understood it, was that Sergeant Best would not be
21 receiving or would have difficulty receiving another

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1 promotion and that his continuing in the service, in
2 the military was in question, particularly if he got to
3 12 to 13 years without having achieved that promotion.

4 Q. Do you know what the average annual income
5 for a high school graduate, a 1996 high school graduate
6 is currently?

7 A I think the most recent statistics that I
8 saw put it in the 26 to 28,000 dollar range.

9 Q. Currently?

10 A Yes. That's established worker earnings.

11 Q. And, is that a, that's a little higher, I
12 think, than you have Mr. Best, is that correct?

13 A Yes.

14 Q. All right. Are the positions which you
15 found to be appropriate or potentially appropriate for

16 Mr. Best positions which generally hire high school
17 graduates or are they positions which generally hire
18 individuals with less than a high school graduate
19 level?

20 A I don't believe that a high school
21 graduation would be necessary to be considered for

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1 these jobs.

2 Q. All right. Would, for instance, a job with
3 the U.S. Post Office be an appropriate position for Mr.
4 Best, as a letter carrier, to be more specific?

5 A He certainly can be considered for that,
6 yes.

7 Q. Is there a reason why that it wouldn't be a
8 job that would be on your list as, of a potential job
9 for Mr. Best of what we're looking at here?

10 A No. And, in fact, I would suggest that
11 some distribution-type jobs in the Post Office would be
12 options for him to consider also.

13 MR. WHITEFORD: Let me refer you to this
14 page of your notes, if I can, sir. Do you have that,
15 Jeremy?

16 MR. FLACHS: Yes.

17 THE WITNESS: Yes, sir.

18 MR. WHITEFORD: Do you have that in front
19 of you, sir?

20 THE WITNESS: I do.

21 BY MR. WHITEFORD:

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1 Q. At the top of the page, it reads Sergeant
2 L. Best. Does that mean that these are notes taken
3 from his interview with you or are these notes on

4 Sergeant Best based on an interview of somebody else?

5 A These are notes about Sergeant Best based
6 on an interview by Dr. Bleiburg.

7 Q. Fair enough, okay. I'm just going to point
8 to it because I don't need you to read the entire
9 thing. I believe that this says learning ability, is
10 that correct?

11 A Yes, sir.

12 Q. And then over here, the line you have drawn
13 to, can you read this paragraph for me?

14 A Yes, sir. May be able to get additional
15 training slash education but would have lapses, lower
16 level performance or poor judgment.

17 Q. Does this say multitasking and mental
18 flexibility okay?

19 A Yes.

20 Q. What do you mean by that or what did Dr.
21 Bleiburg mean by that?

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1 A Dr. Bleiburg, these categories that I place
2 here are issues that I brought up questions to Dr.
3 Bleiburg about and asked for him to then define whether
4 the test results, neuropsych test results indicated
5 that there was an indication of a problem in any of
6 those areas.

7 Q. All right. So, for instance, on down where
8 it says impulsivity and irritability, okay, those are
9 two subjects you brought up with Dr. Bleiburg?

10 A Correct.

11 Q. And he indicated that at least from his
12 examination they appeared to be okay as far as Mr. Best
13 is concerned?

14 A Yes. The "okay" represents that the
15 neuropsych test results themselves did not specifically
16 define there was a problem here. Now, you will note
17 flex to impulsivity and irritability that there is a
18 personality change noted.

19 Q. Oh, that's what this says over here to the

20 right?

21 A Yes, sir.

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1 Q. Thank you. Show you this page. Can you
2 read that bottom part for me?

3 A Can't sustain normal levels of performance
4 consistently over three-hour period. Can function
5 adequately for short periods.

6 Q. That's Dr. Bleiburg's statement to you?

7 A Yes.

8 Q. All right. Do you know whether Dr.
9 Bleiburg, well, did you and Dr. Bleiburg discuss the
10 amount of time that Mr. Best is currently working?

11 A No, sir.

12 Q. Other than business generally, did Mr. Best
13 tell you what type of business he might be interested

14 in going into in the civil labor force?

15 A No, sir.

16 Q. Did you have any discussions at all with

17 him about what particular interests he has, be it

18 sports, music, computers, anything like that?

19 A His hobbies before this injury were

20 basketball, tennis and pool.

21 Q. Any discussion at all about subjects that

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1 he did well in, in high school or that he preferred

2 over another?

3 A No, sir.

4 Q. Any discussion about whether he had any

5 connections in the civilian world which would enable

6 him to get into a particular job area?

7 A No, sir.

8 Q. Did he indicate in any way whether he was
9 looking to get back into the civilian labor market in
10 the United States as opposed to in Japan?

11 A. Did not inquire.

12 Q. Are you, do you have the expertise to know
13 what his potential income would be in Japan given his
14 post injury abilities?

15 A. No, sir.

16 Q. If you have, and not in particular to Mr.
17 Best but if you have a client who comes in to you and
18 says I've been doing Job A for ten years, I have
19 decided I don't have any training at all but I want to
20 go do Job B, that's where my interest lies, as a
21 vocational specialist, what do you do, how do you

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1 assess that situation to determine whether Job B would

2 be an appropriate fit for that individual?

3 A Well, again we look at work background to
4 see that the individual has the capabilities and
5 qualifications that would match that. My first
6 question, though, would be what has happened to Job A
7 or the individual to have changed their perspective
8 that this was a satisfactory situation for some time
9 and became unsatisfactory. There could be changes in
10 the job or there could be changes in the person and I
11 would inquire in that regard initially.

12 Q. Was there ever any detailed inquiry of Mr.
13 Best as to what particular changes in the military, in
14 the Marines had occurred that really troubled him?

15 A Yes. I did inquire and he was not able to
16 give very definitive answers. He gave very general
17 answers to that.

18 Q. So, it wasn't just my question in the
19 deposition or your question, okay. We have the same
20 problem.

21 A It did cause me to ask Dr. Bleiburg why

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1 someone like Sergeant Best might have a changed
2 perspective and whether a brain injury could contribute
3 to that.

4 Q. And what did he say?

5 A He thought that certainly that a brain
6 injury could contribute to that and there could be a
7 defense mechanism involved here where Sergeant Best, we
8 know has poor insight, and perhaps he is giving himself
9 an easy way out of the military before someone else
10 makes that decision for him.

11 Q. But Mr. Best actually fought to stay in the
12 military, didn't he?

13 A Yes, particularly through his
14 rehabilitation.

15 Q. Right. And, he, in fact, objected to any
16 attempt they had to remove him from the military as a

17 result of his disability, didn't he?

18 A He made every attempt to stay in.

19 Q. And he's been successful?

20 A Yes.

21 Q. If Mr. Best completes 20 years in service,

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1 it's my understanding that he would be eligible for

2 retirement at that point?

3 A Yes.

4 Q. And what benefits would incur to him upon

5 retirement?

6 A Well, he is eligible for a pension and for

7 a continuation of health care. Beyond that, I'm not

8 familiar enough with the benefits to tell you.

9 Q. So, as you sit here today, you wouldn't be

10 able to tell me what that pension would be?

11 A No, sir.

12 Q. Does it affect his ability to obtain health

13 care, do you know? I'm just asking.

14 A I'm sorry. I didn't understand the

15 question.

16 Q. Let me rephrase the question. If he

17 retires after 20 years in service, is Mr. Best in any

18 way entitled to free military health care for the rest

19 of his life?

20 A I think there's a health care provision

21 with full retirement but I'm not familiar with it

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1 enough to answer that question.

2 Q. And, would you agree, sir, that a health

3 care benefit would be part of the vocational assessment

4 as to where he's going to be able to make the most

5 money?

6 A I generally do not involve benefits in the
7 consideration. We look strictly at salary and salary
8 provisions. Now, the military is a bit unusual with
9 the BAH and the BAQ or the BAS and BAQ in that they are
10 supplemental salaries and not what I would consider
11 benefits.

12 Q. Do you know whether or not at the end of 20
13 years if Mr. Best wanted to re-up at that time he would
14 have the opportunity to or is it mandatory retirement
15 after 20 years?

16 A And this is based on experience and not
17 specific military knowledge in that regard. My
18 experience is that not all military personnel are out
19 at 20 years but rather can continue, depending on their
20 rank at that point in time and their progression over
21 time. And, I see individuals serving 26 years under

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1 some circumstances, in great part because the higher
2 the level of rank and pay grade they achieve before
3 retirement, the higher the level of their pension.

4 Q. To your knowledge, is Mr. Best able to
5 drive?

6 A Yes.

7 Q. Any indication that he's not able to use a
8 map or get himself around in a vehicle?

9 A Mr. Flachs has related to me that there are
10 other witnesses who I have not interviewed who indicate
11 that he gets lost very easily and very frequently. I
12 have not spoken to these people directly.

13 Q. Fair enough. To your knowledge, does Mr.
14 Best have a criminal record?

15 A Not that I'm aware of.

16 Q. He's been described as having a strong work
17 ethic, correct?

18 A Yes.

19 Q. Have you done any type of projection of
20 what Mr. Best's potential pay increases or expected pay

21 increases would be should he stay in the military

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1 through his 20 year potential term?

2 A I have not done the actual calculations. I
3 have access to military pay charts, where under certain
4 assumptions that type of calculation could be made.

5 Q. And am I correct, sir, that under those, if
6 those assumptions were made, that you would, that you
7 anticipate that his pay grades would continue to
8 outpace what he could make should he return to the
9 civilian labor force preinjury?

10 A If we assume that he would have actually
11 get promotions -- and I cannot come to that, I would
12 not come to that conclusion, in my evaluation.

13 Q. Understood.

14 A Then yes.

15 Q. All right. In your final calculation on
16 page three, being very simplistic, if I understood what
17 you just told me, preinjury would be paragraph one of
18 this page, what he would be, you would anticipate he
19 would be able to make in the civilian labor force?

20 A Yes, sir.

21 Q. And post injury would be paragraph two,

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1 what he would be anticipated to make, is that correct?

2 A Yes.

3 Q. And, his loss of earning capacity would
4 simply be averaging out those two numbers and that's
5 where you came up with 18,500?

6 A Yes, sir.

7 Q. Nowhere in here is there any discussion of
8 fringe benefits correct?

9 A That's correct.

10 MR. WHITEFORD: Let me take a break and
11 talk to Mr. Kinsley for just a second.

12 (A discussion was held off record.)

13 MR. WHITEFORD: We can go back on the
14 record.

15 THE WITNESS: Mr. Whiteford?

16 MR. WHITEFORD: Oh, sure.

17 THE WITNESS: You were inquiring on,
18 regarding my notes earlier and I had noted that I had
19 two sides here and I wanted to make sure that you had
20 received copies of both sides.

21 MR. WHITEFORD: What I'm going to do at the

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1 end of the deposition is just ask that we mark the
2 entire file and that we get a copy of the entire file.

3 THE WITNESS: Okay.

4 MR. WHITEFORD: The front and back and
5 everything in between so I know what you've got. Okay?

6 THE WITNESS: Very good.

7 MR. WHITEFORD: But thank you.

8 BY MR. WHITEFORD:

9 Q. Back to your report for a second. And, you
10 might want to reference your notes as well because I
11 saw in the notes here that you had particular jobs with
12 particular salaries, which I think ultimately assisted
13 in your conclusion. Let me see if I can find that page
14 for you.

15 A Yes, sir.

16 Q. You have that in front of you?

17 A I do.

18 Q. If we're referring to your report, page
19 three, paragraph one, where you write, Sergeant Best
20 would have an earning capacity in the range of 41 to
21 45,000 annually in these occupation, these are

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1 preinjury occupations?

2 A Correct.

3 Q. Is that 41 to \$45,000 a starting salary or
4 is that a salary based upon the experience that Mr.
5 Best would take into these positions?

6 A It is both. It is a starting salary that
7 he would begin at given his military experience.

8 Q. All right.

9 A In other words, he goes into these
10 supervisory positions from supervisory position.

11 Q. And, given the fact that, well, we know
12 that the military, you're going to get pay increases as
13 your rank goes up, correct?

14 A Yes.

15 Q. All right. In the private sector, would
16 you expect these salaries to move up more quickly than
17 military salary, in other words, I may start at 45,000

18 but I'm going to get to \$60,000 faster; do you have an

19 opinion?

20 A I don't. That would be best addressed to

21 an economist.

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1 Q. All right. Let's take it down to the
2 second paragraph, then. Post-injury salaries, 23 to
3 26. Once again are those starting salaries of someone
4 with no experience, for instance, forklift operator, or
5 are those salaries taking into account the experience
6 that Mr. Best has obtained in the military?

7 A They take into consideration his
8 experience.

9 Q. Same question, then. If you look at the
10 list of jobs here, forklift operator, material handler,
11 delivery driver, warehouse worker, loader, unloader,

12 order selector and supply clerk, do you know how
13 quickly the salary range that you have projected here
14 is anticipated to grow in the future?

15 A No, sir.

16 Q. What is your arrangement with either Mr.
17 Kahn or Mr. Flachs regarding your retention as an
18 expert?

19 A I have been notified that I would be
20 possibly called as an expert witness in this case. I
21 was retained to do an assessment and I notified them of

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1 my fees and rates.

2 Q. And what are your current fees, sir?

3 A I charge three-fifty, first hour, for
4 consultations where I don't set the timeframe, which
5 would be courtroom appearance or deposition testimony

6 and one seventy-five per hour thereafter or for other

7 services with designated timeframes.

8 Q. Is that portal-to-portal?

9 A Yes, sir.

10 Q. How about reviewing documents?

11 A One seventy-five.

12 Q. And how about performing your vocational

13 assessment?

14 A One seventy-five.

15 Q. Are all of your bills and timekeeping

16 records for this matter contained within your file?

17 A My time record is contained, not my

18 invoices.

19 Q. All right. Do you know how much you have

20 invoiced Mr. Kahn or Mr. Flachs in this matter?

21 A No, sir. I can approximate.

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1 Q. If you could approximate for me, I would
2 appreciate it.

3 A Appears approximately 23 hours.

4 Q. And I would multiply that times 175 then
5 plus today?

6 A Yes. Plus some expenses.

7 MR. WHITEFORD: Plus some expenses.

8 MR. FLACHS: And for clarification, I
9 assume today is being billed to defense counsel --

10 MR. WHITEFORD: I'm just talking about
11 money in his pocket, counsel, yes.

12 MR. FLACHS: Okay.

13 MR. WHITEFORD: Can I get these marked as a
14 group? Deposition Exhibit Number 1, I guess it would
15 be.

16 (Melberg Deposition Exhibit Number 1 was
17 marked for purposes of identification.)

18 BY MR. WHITEFORD:

19 Q. Sir, I have marked collectively three
20 different letters, February 8th, 2006, November 3rd,
21 2005 and January 17th, 2006 from Jeremy Flachs to

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1 yourself. Do you recognize those documents?

2 A Yes.

3 Q. And did you, in fact, receive those, that

4 correspondence from Mr. Flachs?

5 A Yes.

6 Q. All right. Thank you. In the February

7 8th, 2006 letter, enclosed is the article from Trial

8 Magazine. Do you see that, sir?

9 A Yes.

10 Q. Is that article part of your file?

11 A No.

12 Q. Do you still have that article?

13 A I might, yes.

14 Q. Do you know what the article pertained to?

15 A It, to the best of my recall, it dealt with

16 a court decision in Northern Virginia dealing with
17 economic projections of future wage loss in a death
18 case.

19 MR. WHITEFORD: If you still have that --

20 MR. FLACHS: Can I proffer that that's

21 actually not what it pertained to.

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1 MR. WHITEFORD: Well, if somebody wants to
2 provide me with a copy of it, I'll be happy.

3 MR. FLACHS: One of us can provide you with
4 a copy.

5 MR. WHITEFORD: That's fine.

6 MR. FLACHS: I think Mr. Melberg is
7 referring to something else, which I don't recall at
8 all. I can proffer to you it just had to do with
9 different methods of evaluating claimants by vocational

10 rehab people and it is in Trial Magazine. Even if we

11 couldn't find it, I know you could.

12 MR. WHITEFORD: I just know don't know --

13 THE WITNESS: Refreshes my memory.

14 MR. WHITEFORD: I don't know the paragraph.

15 I don't know the year. I was just hoping if the

16 expert, if it was provided to the expert, I would

17 appreciate someone could provide our office with a copy

18 of it.

19 MR. FLACHS: You can see how much he relied

20 on it and how well he retained what was in the

21 particular document.

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1 THE WITNESS: Or how relevant I thought it

2 was.

3 MR. WHITEFORD: Can I get that marked as

4 Exhibit 2, please.

5 (Melberg Deposition Exhibit Number 2 was
6 marked for purposes of identification.)

7 BY MR WHITEFORD:

8 Q. Mr. Melberg, counsel has provided to us
9 Exhibit Number 2, which is entitled deposition
10 testimony. Is that a list that you created, sir?

11 A It is. It's actually two documents. One
12 is trial testimony and the other, deposition testimony.

13 Q. All right. And, does Exhibit 2 fairly and
14 accurately represent your experience in providing
15 deposition and trial testimony current to today?

16 A Yes. Over the last four years, correct.

17 Q. And it's current up to today, to the best
18 of your knowledge?

19 A It is up through December of 2005.

20 Q. Approximately how many times have you
21 worked with either Mr. Flachs or Mr. Kahn or anyone

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1 from their offices?

2 A With Mr. Flachs, perhaps three to four
3 prior cases; with Mr. Kahn, zero.

4 Q. And, I assume in this instance it was Mr.
5 Flachs who contacted you and asked for your assistance?

6 A Initially, yes, sir.

7 Q. All right. Can I see your file for a
8 second?

9 A Yes, sir.

10 MR. WHITEFORD: Dave, do you have any
11 questions while I'm looking?

12 MR. KINSLEY: Yes. This is actually
13 follow-up in one area.

14 EXAMINATION BY MR. KINSLEY:

15 Q. Mr. Whiteford asked you after we came back
16 in about the various jobs that, and salary ranges,
17 pre-accident and post-accident that are on your list
18 and he read off the post-accident ones before, forklift

- 19 operator, cook, material handler, delivery driver,
- 20 warehouse worker, loader, unloader, order selector,
- 21 supply clerk, and then their salaries to the right of

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1 that. And he asked you about projected future
2 increases in salary and in general your answer was that
3 you would probably need an economist for that. Am I
4 paraphrasing it somewhat correctly here?

5 A Yes, sir.

6 Q. I think the question can be taken two ways
7 so let me try to break it down. My, my question
8 actually would be more along the lines of, are any of
9 these jobs the type that would normally have not just
10 your cost of living increases that you might project
11 forward through an economist, which I agree you do
12 there, but, it would be like, say, for example, career

13 ladder jobs, like in the federal government, some jobs
14 you get in federal government, you're a GS-5, 7, 9, 11
15 and within four years and some odd number of weeks
16 you're at a GS-11 so you're not just getting your cost
17 of living increases but you're actually getting bumped
18 up on a periodic basis. Is what I'm saying making any
19 sense at all as kind of a predicate to future
20 questions; there are some jobs like that?

21 A Yes, there are.

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1 Q. Are any of the jobs that are either on this
2 list for Mr. Best or are not on this list that you
3 consider Mr. Best to be eligible for jobs that might
4 fall into that category, for lack of a better term,
5 let's call them career ladder jobs, where there are
6 some initial bump-ups in salary or status and as long

7 as you do the job, do the job level, and you get bumped
8 up to the next level in the first few years so that
9 between, say, years one and three or four, or five,
10 whatever, your early years, you'd actually have a
11 higher increase in salary than you would just through
12 cost of living?

13 A Yes. None of the occupations that I have
14 identified I think would fall into that category. But
15 I might also note that many of those jobs that you are
16 referring to in general, with the bumping up comes
17 increased responsibilities or lead worker
18 responsibilities and I don't believe that Sergeant Best
19 is, would be capable of doing that type of work; in
20 other words, he may be stuck at the entry level type
21 function for the remainder of his career.

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1 MR. KINSLEY: Okay. All right.

2 MR. WHITEFORD: I'm going to have your file
3 marked as Exhibit Number 3 and then I'm going to give
4 it back to you and I'm going to ask you that you give
5 it to Mr. Kahn and have him copy it, or Mr. Flachs and
6 have him copy it or you copy and it send me the bill.

7 Okay?

8 THE WITNESS: I can do that.

9 MR. WHITEFORD: I just literally what I
10 like to do is get a copy of the back cover, copy of the
11 front cover and everything in between. That way I know
12 I not everything? Okay?

13 THE WITNESS: Very good.

14 (Melberg Deposition Exhibit Number 3 was
15 marked for purposes of identification.)

16 MR. WHITEFORD: I don't have any further
17 questions. Thank for are your time.

18 THE WITNESS: Okay.

19 MR. FLACHS: Counsel, I had two or three
20 questions.

21 EXAMINATION BY MR. FLACHS:

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1 Q. Mr. Melberg, when you received information
2 about the clerks that were working with Mr. Best in
3 Okinawa, what was the source of your information about
4 the clerk?

5 A Sergeant Best.

6 Q. And, when that information was provided to
7 you, was it provided in any kind of context as in
8 additional help for him versus simply the military
9 hiring additional people because the work was so much
10 more voluminous than it had previously been for Mr.
11 Best?

12 A Well, with regard to his function at the
13 Drum and Bugle Corps, it was in the context of what had
14 changed within the work place after he came back to
15 work and what was done to facilitate his getting the
16 job done. In that case, I relied on input from his

17 commanding officers.

18 Q. Let me stop you there. So, the information
19 that you received from both Mr. Best and his commanding
20 officer pertained not only to Okinawa but also to his
21 position in the Washington, D.C. facility before he

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1 left for Okinawa, is that correct?

2 MR. KINSLEY: I'm going to object to that
3 and ask you to break it down because I think you're
4 merging them.

5 MR. WHITEFORD: Yes. I would object as
6 well.

7 BY MR. FLACHS:

8 Q. Well, then let me ask it this way. When
9 Mr. Best returned to duty after rehabilitation or at
10 least partial rehabilitation, is it your understanding

11 that instead of working alone he was now working with
12 additional clerks underneath him?

13 A He was working --

14 MR. KINSLEY: Objection.

15 MR. WHITEFORD: Objection.

16 MR. KINSLEY: Objection. I'm sorry.

17 Objection to the form of the question.

18 A He was working with additional clerks
19 underneath him.

20 BY MR. FLACHS:

21 Q. And that this situation has continued

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1 through the present in Okinawa?

2 MR. WHITEFORD: Objection.

3 MR. KINSLEY: Objection.

4 MR. FLACHS: You want a standing objection

5 to all my questions?

6 MR. KINSLEY: No.

7 MR. FLACHS: What's wrong with that

8 question?

9 MR. WHITEFORD: Just the leading ones.

10 MR. FLACHS: I'm going to lead him on
11 everything so why don't you just object to all of them.

12 MR. WHITEFORD: Well, why are you going to
13 do that.

14 MR. FLACHS: To save time. It's a
15 deposition. I can lead if I want. I may not be able
16 to read it into evidence but I can lead it to get a
17 question and answer.

18 MR. WHITEFORD: Why don't you just ask him
19 a question and he'll give you an answer. He's your
20 witness.

21 MR. FLACHS: I did. Do you have an answer?

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1 A Yes, he has clerks working for him in

2 Okinawa also.

3 BY MR. FLACHS:

4 Q. I believe that in response to counsel's

5 questions you have testified that Mr. Best cannot

6 remain at a Sergeant E-5 indefinitely?

7 A That's correct.

8 Q. In fact, I believe you tested that the

9 outside range, based on information that was provided

10 to you by one of his supervisors, was a total of, was

11 it 12 to 12 and a half years?

12 A Twelve to 13 years.

13 Q. Twelve to 13 years. Based on not only that

14 information but everything you know as a professional

15 vocational rehab, rehabilitationist, would you agree

16 that between now and 2009 if he doesn't have a

17 promotion, he will be asked to leave the military?

18 MR. WHITEFORD: Objection.

19 MR. KINSLEY: I'll join in that on that.

20 A Based on the information I had available to
21 me that if he does not receive a promotion to E-6 by

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1 2009 or 2010, that his continued service would be in
2 question.

3 Q. Now, how, if you know, does the military
4 terminate one's service under these circumstances?

5 A It has been my experience that the
6 individual receives notice that they did not meet grade
7 requirements and they are notified that at the end of
8 their service term that they will be out of the
9 military; they are not eligible for reenlistment.

10 Q. And do we know the period of service term
11 for Mr. Best and is it variable or is it a particular
12 uniform period?

13 A I think there's a uniform period but I

14 can't tell you if it's two or three years, at this

15 point in his career.

16 Q. Do you take it upon yourself in your

17 capacity as a vocational rehabilitationist to discuss

18 with brain-injured individuals such as Mr. Best their

19 options with respect to staying in the military or not

20 staying in the military under circumstances where they

21 are being assisted and have been assessed and treated

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1 by psychologists and neuropsychologists?

2 MR. WHITEFORD: Objection.

3 A I think career discussions with individuals

4 like Sergeant Best have to be done very cautiously, to

5 take into consideration the level of functioning of the

6 individual, making sure not to be confrontational with

7 the individual with regard to what they're able to

8 emotionally handle, and sometimes are best handled by
9 therapeutic counselors or psychologists who can deal
10 with the emotional consequences.

11 Q. You were asked a question about Sergeant
12 Best being employed, was it a mail delivery person;
13 what was the proffer by counsel, was that correct?

14 A Carrier --

15 Q. Mail carrier?

16 A -- or Post Office jobs, yes.

17 Q. And that job requires driving and
18 one-on-one interaction with the public, correct?

19 A A carrier job, a rural carrier job would
20 involve and some distribution jobs would involve
21 driving.

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1 Q. If you were to assume that Mr. Best was

2 constantly losing his way when he attempted to find
3 locations that he had many, many times found
4 previously -- and prior to his injury, is what I'm
5 getting at -- as well as acted inappropriately such as
6 approaching strangers with, what I'll just characterize
7 as inappropriate comments as well as acting
8 inappropriately and saying odd things around family
9 members, all of which was different from the way he had
10 been prior to his injury, would you have any opinion as
11 to whether or not he would be a good candidate or
12 eligible for a mail carrier position?

13 MR. KINSLEY: Objection.

14 MR. WHITEFORD: Objection.

15 A Yeah. Inappropriate work behaviors are a
16 significant issue that affects a worker's
17 employability. I would need further assessment of how
18 severe those problems were before I could comment.

19 Q. Well, getting lost is a problem, isn't it?

20 A Yes, sir.

21 MR. FLACHS: I don't have anything else.

1 Thank you.

2 MR. KINSLEY: I do.

3 RE-EXAMINATION BY MR. KINSLEY:

4 Q. I do. Do you have any indication in Mr.

5 Best's current position that there has been any

6 incidents or episodes of inappropriate work behavior?

7 A In Okinawa?

8 Q. Well, yeah, let's start there, in Okinawa.

9 A No. No, sir. In the Drum and Bugle Corps

10 his direct supervisors described him as more impulsive

11 and irritable.

12 Q. Did they categorize that as inappropriate

13 work behavior?

14 A No. But I didn't inquire to that extent.

15 Q. All right. And, the time -- I think of it

16 as time in grade -- the 12 to 13 years, is that the

17 time period when you hit, what, I'm sorry, what is it,

18 E-5.

19 A No, sir. The E-5 would be earlier than

20 that, five to six years generally. The E-6, the E-6,

21 he would have to have be promoted to E-6 after 12 to 13

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1 years service from E-5.

2 Q. That's -- all right. When was he made an

3 E-5? I'm sorry. I forgot.

4 A I would have to refer to my file. April

5 '01, so, after four years of service, he was E-5.

6 Q. All right. And, if he's not promoted to

7 E-6, at what point in time would he be at risk of being

8 drummed out?

9 A Twelve to 13 years total service, so, that

10 would be in 2009, 2010.

11 Q. If he was promoted to an E-6 anytime

12 between now and 2009 and 2010, when would he reach the
13 next level of needing a promotion in order to avoid
14 being drummed out?

15 A I don't have the answer to that.

16 Q. Do you have any indication that it would be
17 before he reached the 20-year point, 2016?

18 A I couldn't answer.

19 MR. KINSLEY: That's all I have.

20 (A discussion was held off record.)

21 MR. FLACHS: He'll read and sign.

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1 (Deposition concluded at 3:46 p.m.)

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1 CERTIFICATE OF DEPONENT

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5 I hereby certify that I have read and
6 examined the foregoing transcript, and the same is a
7 true and accurate record of the testimony given by me.

8

9 Any additions or corrections that I feel
10 are necessary, I will attach on a separate sheet of
11 paper to the original transcript.

12

13 _____

14 Peder K. Melberg, M.A., C.R.C.

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1 State of Maryland.

2 Baltimore County, to wit:

3 I, ROBERT A. SHOCKET, a Notary Public of
4 the State of Maryland, County of Baltimore, do hereby
5 certify that the within-named witness personally
6 appeared before me at the time and place herein set
7 out, and after having been duly sworn by me, according
8 to law, was examined by counsel.

9 I further certify that the examination was
10 recorded stenographically by me and this transcript is
11 a true record of the proceedings.

12 I further certify that I am not of counsel
13 to any of the parties, nor in any way interested in the
14 outcome of this action.

15 As witness my hand and notarial seal this

16 3rd day of May, 2006.

17 _____

18 Robert A. Shocket,

19 Notary Public

20 My Commission Expires:

21 November 1, 2006

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3 April 28, 2006

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