

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

AUG 31 1998

IN THE MATTER OF:

DOCKET NUMBER: 96-01447

COUNSEL: [REDACTED]

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

1. Her military record be corrected to show that she was retired from active duty by reason of physical disability in either June 1993 or October 1995; or in **the alternative,**

Her records reflect that she was neither released from active duty in September 1995 nor transferred to the Standby Reserve in October 1995.

2. Her pay and allowance be corrected accordingly, with the usual provision for offsets and counter-offsets.

APPLICANT CONTENDS THAT:

Under Title 10, USC Section 1201-02, military reserve personnel who incur or aggravate a disease while performing more than 30 days of extended active duty (EAD) are entitled to a full and fair hearing to determine whether they should be retired by reason of disability. Under this legislation, she is entitled to active duty retirement because of her breast cancer.

In May 1992, she was serving on EAD. While on EAD, and as a result of self examination during July, she noticed a lump in her breast and reported to sick call. She left active duty on 14 August and returned on 19 August 1992. She was given a mammogram and in September 1992, after a biopsy, was diagnosed with breast cancer. She underwent a modified left mastectomy and given chemotherapy treatment for six months. At the completion of the course of treatment she was found fit for full duty and released from active duty back to the Air Force Reserve.

In May 1995, she returned to EAD. She was examined pursuant to the Air Force Reserve's normal five-year cycle, and her condition found to be in remission. Nonetheless, on 29 August 1995, she was found medically disqualified for continuing military duty. She was released from active duty on 30 September 1995 and given orders on 6 October 1995 relieving her from her assignment and transferring her to Standby Reserve status. The orders recited that she was "being processed for medical reason."

Counsel contends that neither in 1992 nor in 1995 was the applicant afforded a Medical Evaluation Board (MEB) as provided in AFI 36-3212. She was entitled to an MEB because she was, in each instance, on active duty for more than 30 days. **An** agency is bound by its own regulations. She is entitled to disability retirement because she was on EAD both in 1993 and 1995. The only question is the date on which she should be deemed to have been retired from active duty. If the Air Force's position is that her condition is disqualifying, that determination must be applied as of the time she was treated in 1993, since she was on EAD when her cancer was diagnosed.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

According to a 7 April 1992 message from HQ USAF/REP, Reservists injured in the line of duty (LOD) when on orders for more than 30 days, will not be involuntarily released from those orders until final disposition of their case; i.e., return to duty or final results of medical board action. Therefore, these Reservists are entitled to full pay, allowances, and benefits provided by law or regulation to the same extent as a Regular component member.

Applicant was on active duty (over 30 days) during the periods 26 May 92 through 14 August 1992, and 19 August 1992 through 11 June 1993.

She was initially treated on 31 July 1992 for a lump in her left breast which had rapidly grown from her initial discovery about two months ago. In September 1992, a biopsy confirmed cancer of the infiltrating ductal type. She underwent a lumpectomy on 28 October 1992, and a modified left radical mastectomy on 17 November 1992. Chemotherapy continued from 8 December through 22 May 1993. Subsequent to completion of chemotherapy, she was found fit for full duty.

An LOD determination dated 5 October 1992 found applicant's mammary carcinoma was in the LOD. The AF Form 348 also indicates that the applicant had been present for duty from 0800 19 August 1992 through 1700 20 September 1992.

The [REDACTED] Naval Hospital Surgeon requested on 28 September 1992 that the applicant be placed on medical hold status. On 25 May 1993, he certified applicant fit for duty and requested she be released from medical hold status.

On 20 September 1995, as a result of a routine physical, HQ ARPC/SGS medically disqualified applicant for continued military service based on a diagnosis of Metastatic Intraductal Breast Carcinoma. HQ ARPC/SGS indicated that she was not eligible for disability processing under provisions of AFI 36-3212, Physical

Evaluation for Retention, Retirement and Separation. No Medical Evaluation Board (MEB) was initiated at this time to determine her fitness for duty and AFRES started administrative discharge action under the provisions of AFI 36-3209.

Reserve Order JR-0806, dated 26 September 1995, indicates that, effective 6 October 1995, the applicant was reassigned to HQ ARPC, Non-Affiliated Reserve Section (NARS). This placed her in the Standby Reserve pending administrative discharge action, and denied her the opportunity to perform further military service.

A Notice of Proposed Discharge, dated 17 October 1995, from HQ ARPC/DPAD advised the applicant of her rights and options.

In a letter dated 2 November 1995 to HQ ARPC/SG, applicant's area defense counsel (ADC) contended that ARPC's decision to administratively discharge her was based on a Veterans Affairs (VA) rating which incorrectly stated she did not begin active duty until 19 August 1992. The ADC asserted that the applicant was on active duty for training from 26 May until 14 August 1992, and the cancer was removed in September 1992. The ADC argued that since the applicant was on active duty in excess of 30 days during the timeframe the growth was discovered, she should have been processed through the procedures outlined in AFI 36-3212.

HQ ARPC/SGS advised applicant's ADC on 7 November 1995 that the documentation submitted tended to support his position that the applicant was entitled to a Medical Evaluation Board (MEB). Further, the active duty Medical Treatment Facility (MTF) is required to ensure the military member "meet an MEB within 90 calendar days of initial diagnosis or as soon as the medical condition has stabilized." As far as ARPC/SGS could determine, an LOD determination was not made and, if one had not been made prior to treatment, the applicant should file an appeal with the AFBCMR since an error appears to have occurred.

On 17 January 1996, the DVA rated the applicant's breast surgery as service-connected with a disability rating of 40%. The DVA had assigned a 100% rating from 15-18 August 1992, and from 12 June 1993, the date after release from active duty for training, until 1 May 1994, 12 months after cessation of chemotherapy.

Applicant's retirement/retention year 28 February 1995 through 27 February 1996 was a satisfactory year of service.

On 10 September 1996, ARPC/DPAD terminated discharge action and cleared her to return to active participating status in the Reserve as in Individual Mobilization Augmentee (IMA) with an assignment limitation code (ALC) of "C." This ALC is used to protect members from being assigned to an environment without adequate medical care for a possible life-threatening condition and to prevent the assignment of non-worldwide qualified personnel to overseas locations.

The applicant was initially identified as tentatively eligible for consideration by the Reserve Brigadier General Qualification Board (RBGQB), which was scheduled to convene on 3 December 1996. However, on 18 October 1996, she was notified by HQ ARPC/DP that she was ineligible for consideration because she was not, among other things, in a Ready Reserve position.

As of 24 February 1997, the applicant was still rated at 40% by the DVA for modified radical mastectomy, left breast, for intraductal carcinoma with lymph node metastases.

By Reserve Order HB-00164 dated 10 March 1997, the applicant was reassigned from HQ ARPC, NARS, to HQ ARPC, Inactive Status List Reserve Section (ISLRS), in Standby Reserve status, effective 28 February 1997. The order indicates that the reason for the assignment action was applicant's inability to earn required points for retention.

AIR STAFF EVALUATION:

The Director, Health Services, Individual Reserve Programs, HQ ARPC/SGS evaluated this application. The author indicates that the applicant maintains she should have had an MEB before termination of orders for active duty training. The action was never initiated. AFI 36-3212 states Reserve members are not entitled to MEB processing. The LOD Determination in October 1992 was not reviewed and approved by the proper appointing authority. Furthermore, the issues of Existed Prior to Service (EPTS) and Aggravated by Service were not addressed. Applicant contacted HQ ARPC in April 1995 for assistance with documentation to overturn the second opinion of the [DVA]. That was the first notice to HQ ARPC/SG that the medical conditions existed. HQ ARPC/SG evaluated the medical documentation available concerning the diagnosis of Metastatic Breast Cancer in September 1995 and determined she was unfit for continuation in the Reserve program. The documentation did show the condition to be in a state of remission; however, AFI 48-123, Atch 2, para A2.18a, identifies the diagnosis as a disqualifying condition. If the applicant had notified this office of the diagnosis of breast cancer when it was first determined in September 1992, processing for discharge would have occurred at that time. Disapproval of this request is recommended. She received fair and appropriate medical consideration. If the Board disagrees with this recommendation, the applicant should be evaluated for medical retirement/discharge against the standards found in AFI 36-3212, and discharged for medical reasons with appropriate compensation.

A complete copy of the Air Staff evaluation is attached at Exhibit C.

APPLICANT'S RESPONSE TO THE AIR STAFF EVALUATION:

Counsel points out that the evaluation misstates the relief applicant requests. He emphasizes that the applicant is entitled to be retired by reason of disability in June 1993. In the alternative, she requests retirement in October 1995, or, in the alternative, that she was neither released from active duty in September 1995 nor transferred to the Standby Reserve in October 1995.

Counsel states that applicant, contrary to the advisory opinion, was entitled to have been processed by an MEB because she was on active duty at the time the lump in her breast was discovered. Whatever the legal rule may be for Reserve personnel who are not on active duty, that rule has no bearing on her case since she was on active duty at the pertinent time. It is not the applicant's fault that the favorable LOD determination was not reviewed by the proper appointing authority. Beyond this, nothing in the advisory opinion casts the slightest doubt on the fact that her cancer was incurred in the LOD or suggests that any EPTS or aggravation issue precludes a favorable ruling. It is irrelevant when HQ ARPC/SG became aware of the applicant's medical condition. The question presented in this case is simply whether the applicant was entitled to be retired by reason of disability (cancer). If she had breast cancer (which is undisputed) while she was on active duty (which is also undisputed), she is a clearly entitled to be retired by reason of disability as if she were a Regular officer.

On 24 September 1996, counsel provided an additional input. Attached to his input is a memorandum for the applicant from HQ ARPC/DPAD indicating all action to discharge her had been terminated and that she was cleared to return to active participation in the Reserve in a limited capacity. However, counsel points out that applicant was never afforded the requisite medical board even unto this day. The original requests remain unchanged, the memorandum from DPAD notwithstanding. Counsel also states that if the Board for any reason denies her the physical disability retirement to which she is entitled, then it must calculate the back pay and allowances she would have received had she been permitted to perform drills during the period from the time she was dropped from active participation until such time as she is restored to a paid drilling position.

Counsel also advised that his client has been notified that because she is not in a Ready Reserve position, she is ineligible for consideration for promotion to brigadier general. She has **been** reassigned to inactive Reserve status because she is unable to earn the points required for retention. The reason she is unable to earn the points is because the Air Force Reserve has made no effort to reinstate her to a position in which she could participate. These are further prejudices she is suffering.

Applicant's complete rebuttals are attached at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Chief, Physical Disability Division, HQ AFPC/DPPD, provided an additional evaluation of this appeal. A review of the applicant's records for the periods May 1993 through September 1995, when she performed numerous active duty tours, does not contain any documentation to reflect that she was unable to perform her assigned duties; i.e., she was fit. The decision to conduct an MEB is made by the MTF providing health care to the member. In September 1995, when the applicant's fitness for duty was first called into question, she was entitled to disability processing through the USAF Disability Evaluation System. Based on the medical records available, had an MEB been conducted in September 1995 and had it been referred to the Informal Physical Evaluation Board (PEB), that board would have found the member fit and returned her to duty. The key element in fitness determinations is whether or not the member can adequately perform their military duties. A review of her record clearly indicates outstanding duty performance throughout the periods in question. The fact that the applicant received treatment for her medical problem and the DVA granted her service-connected benefits for residuals of left breast surgery is not unusual. The reason why the applicant could be found fit by the military and subsequently granted a disability by the DVA lies in understanding the differences between Titles 10 and 38, USC, which the author proceeds to explain. Nothing in her records substantiates that her medical condition disqualified her from performing her assigned duties. The author defers discussion regarding applicant's being compensated with retroactive pay and allowances for periods of service in which she was denied the opportunity to serve in the Reserves to the appropriate staff agency. *[The AFBCMR Medical Consultant indicated his concurrence with the AFPC/DPPD advisory on the AFBCMR letter requesting additional Air Force comments.]*

A complete copy of the additional Air Force evaluation is attached at Exhibit F.

The Chief, Retirements and Separations Division, HQ ARPC/DPAD, concurs with the advisory prepared by HQ AFPC/DPPD. Discharge action against the applicant had been terminated on 10 September 1996. She was informed she was cleared to return to active participating status, and given instructions on how to return to IMA status. **An** Air Force Form 1288, Application for Ready Reserve Assignment was attached for her convenience. ARPC is unable to comment on why the applicant did not apply for an active assignment.

A complete copy of the additional Air Force evaluation is at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Counsel reviewed the additional Air Force evaluations and provided two responses. He contends that AFPC/DPPD essentially confirms that it was an error not to conduct an MEB, and the failure to have done so cannot simply be shrugged off as the advisory appears to do. He questions AFPC/DPPD's assumption that the applicant would have been found fit and returned to duty. In his second response, he indicates that "ARPC is unable to comment on why [the applicant] did not apply for an active assignment" last year when she was notified that she was cleared to return to active participating status in the Air Force Reserve. The applicant has been submitted for Mobilization Augmentee assignments or Category B assignments. The applicant had volunteered for a Category B assignment. It is evident the latest opinion was not based on a correct understanding of the events. Counsel contends that the core of this case is not complicated. The applicant has been treated extremely unfairly and is entitled to the relief for which she applied.

Counsel's complete responses are at Exhibit I.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice to warrant granting partial relief. The applicant provided alternative remedies and we shall discuss our conclusions on each request in turn in the following paragraphs.
4. The applicant's primary request was to be medically retired from active duty either in June 1993 or October 1995. In considering this request, we noted she probably should have been placed before an MEB through the USAF Disability Evaluation System in September 1995 when she was on active duty and her fitness was first called into question. However, both during this time and upon completion of her chemotherapy back in 1993, she apparently was able to perform her assigned duties. Indeed, review of her record clearly indicates outstanding performance throughout the periods in question. Also, in September 1996, ARPC/DPAD terminated discharge action and cleared her to return to active participating status with an assignment limitation code

of "C." The evidence of record does not appear to indicate her medical condition disqualified her from performing her assigned duties, and the key element in fitness determinations is whether or not the member can adequately perform their military duties. Consequently, we find no compelling basis upon which to disagree with AFPC/DPPD's assessment that, had her condition been considered by an MEB/PEB in 1995, she would have been found fit and returned to duty. Furthermore, the AFBCMR Medical Consultant concurred with AFPC/DPPD's opinion. Therefore, as we are not persuaded that a medical retirement is in order, this requested remedy is denied.

4. The applicant's alternative remedy was for her records to reflect that she was not released from active duty in September 1995 nor transferred to the Standby Reserve in October 1995. She requested she be awarded the back pay and allowances she would have received had she been permitted to perform drills from the time she was dropped from active participation until such time as she is restored to a paid drilling position. As discussed above, the applicant was found fit for duty and was cleared to return to active participating status as an IMA with a "C" assignment code in September 1996. We believe the fair resolution to this case would be to void her reassignment to HQ ARPC, Non-Affiliated Reserve Section (NARS) in Standby Reserve on 6 October 1995, void her reassignment to the Inactive Status Reserve List on 28 February 1997, and award her an additional 35 inactive duty points for the period 28 February 1996 through 27 February 1997, making that period a satisfactory year of service. However, when she was cleared to return to active participating status in the Reserve as an IMA on 10 September 1996, we believe from that point on it was the applicant's responsibility to take such action as necessary to obtain points and pay. We therefore recommend her records be corrected to the extent indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. The Reserve Order [REDACTED], dated 26 September 1995, assigning applicant to the Non-Affiliated Reserve Section effective 6 October 1995, be declared void and she remained assigned to her Individual Mobilization Augmentee position of 963IF1ZM/MT.

b. She was assigned to the Non-Affiliated Reserve Section effective 10 September 1996.

c. The Reserve Order [REDACTED], dated 10 March 1997, assigning applicant to the Inactive Status List Reserve Section effective 28 February 1997, be declared void and removed from her records.

d. She was credited with 35 unpaid inactive duty training points and 15 membership points during the retirement/retention year 28 February 1996 through 27 February 1997, resulting in 50 total points; and that the period 28 February 1996 through 27 February 1997 is a year of satisfactory Federal Service for retirement.

e. She be evaluated for eligibility for possible consideration by the Reserve Brigadier General Qualification Board, which convened on 3-5 December 1996, to determine her potential for assignment to Reserve General Officer positions.

The following members of the Board considered this application in Executive Session on 20 January 1998, under the provisions of AFI 36-2603:

Mr. Vaughn E. Schlunz, Panel Chair
Mr. Gregory H. Petkoff, Member
Dr. Gerald B. Kauvar, Member

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

- Exhibit A. DD Form 149, dated 22 May 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ ARPC/SGS, dated 15 Jul 96.
- Exhibit D. Letter, AFBCMR, dated 5 Aug 96.
- Exhibit E. Letters, Counsel, dated 5 & 24 Sep 96 w/atrch, 4 Nov 96 w/atrch, and 18 Mar 97 w/atrch.
- Exhibit F. Letter, HQ AFPC/DPPD, dated 19 Jun 97.
- Exhibit G. Letter, HQ ARPC/DPAD, dated 2 Oct 97, w/atchs.
- Exhibit H. Letters, AFBCMR, dated 30 June 97 and 23 Oct 97.
- Exhibit I. Letters, Counsel, dated 25 Jul 97 and 29 Oct 97.


VAUGHN E. SCHLUNZ
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

AUG 3 11998

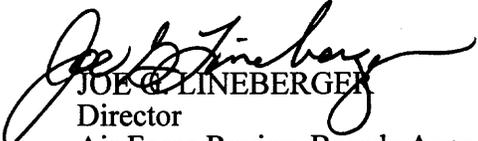
Office of the Assistant Secretary
AFBCMR 96-01447

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that:

- a. The Reserve Order [REDACTED] dated 26 September 1995, assigning applicant to the Non-Affiliated Reserve Section effective 6 October 1995, be, and hereby is, declared void and she remained assigned to her Individual Mobilization Augmentee position of 963IF IZM/MT.
- b. She was assigned to the Non-Affiliated Reserve Section effective 10 September 1996.
- c. The Reserve Order [REDACTED], dated 10 March 1997, assigning applicant to the Inactive Status List Reserve Section effective 28 February 1997, be, and hereby is, declared void and removed from her records.
- d. She was credited with 35 unpaid inactive duty training points and 15 membership points during the retirement/retention year 28 February 1996 through 27 February 1997, resulting in 50 total points; and that the period 28 February 1996 through 27 February 1997 is a year of satisfactory Federal Service for retirement.
- e. She be evaluated for eligibility for possible consideration by the Reserve Brigadier General Qualification Board, which convened on 3-5 December 1996, to determine her potential for assignment to Reserve General Officer positions.


JOE LINEBERGER
Director
Air Force Review Boards Agency