

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

AUG 26 1998

IN THE MATTER OF:

DOCKET NUMBER: 96-02964

COUNSEL: [REDACTED]

HEARING DESIRED: Yes

---

APPLICANT REQUESTS THAT:

She be granted disability retired pay for the period she was on the Temporary Disability Retired List (TDRL), 11 March 1975 through 19 January 1978, and the discharge with severance pay (DWSP) she never received.

---

APPLICANT CONTENDS THAT:

She was medically discharged in 1975 and never received any severance pay. She is still suffering from depression.

In support of her request, the applicant submitted copies of her DD Form 214 and rating decision from the Veterans Administration (VA.) The applicant submitted her application through her congressman and the Legislative Liaison Branch (LLI).

Applicant's complete submission is attached at Exhibit A.

---

STATEMENT OF FACTS:

The applicant enlisted in the Regular Air Force on 1 July 1971.

The available records reflect onset of symptoms of depression in 1974. She was put on medication, Elavil 150 mg daily, then Tofranil PM, 150 mg daily. She met a Medical Evaluation Board (MEB) on 28 January 1975 which recommended she met a Physical Evaluation Board (PEB). On 11 February 1975, the PEB recommended placement on the TDRL with a compensable rating of 50% for depressive reaction, severe impairment of social and industrial adaptability. The applicant agreed with the findings on 19 February 1975.

The findings were approved by the Secretary of the Air Force Personnel Council. As a result, effective 12 March 1975, she was placed on the TDRL, in the grade of sergeant (E-4), under provisions of AFR 35-4. She served a total of 3 years, 8 months, and 11 days of active duty.

Applicant received her first evaluation while on the TDRL on 26 July 1976 and it was recommended that she remain on the TDRL with a 30% compensable rating. This recommendation was approved on 27 August 1976.

She was reexamined on 6 December 1977 and her records met the Informal PEB. On 27 December 1977, Informal PEB recommended that she be removed from the TDRL and she be discharged with a compensable rating of 10% with entitlement to DWSP on the basis that the severity of her condition had decreased. The applicant concurred on 9 January 1978 and on 18 January 1978, officials within the office of the Secretary of the Air Force directed her removal from the TDRL, effective 19 January 1978.

Effective 19 January 1978, applicant was DWSP.

The latest rating from Department of Veterans Affairs (DVA) indicates applicant has a 10% compensable rating for major depression with a history of depressive reaction.

---

AIR FORCE EVALUATION:

The Physical Disability Division, AFPC/DPPD, reviewed the application and stated that it appears the applicant is requesting an increase in her compensable percentage for the disability for which she was discharged and payment for her DWSP separation, which she claims she never received. She receive a 50% rating when she initially entered the TDRL. The medical entries show she steadily improved and the final TDRL reevaluation found her to be only 10% disabled. By law, this made her ineligible for either continuance on the TDRL or permanent retirement. She was appropriately recommended for discharge with severance pay. She concurred with this determination. Based on the above, DPPD recommends denial of the applicant's request. She has submitted nothing that shows she was inappropriately rated by the service at the time of her discharge.

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

The Retired Pay Operations Branch, DFAS-CL, also reviewed the application and addressed the issue of severance pay. They noted the applicant is requesting payment of retired pay and disability severance pay which was due her for the period 11 March 1975 through her DWSP on 19 January 1978. The records available on microfiche for 1976, 1977 and 1978 show that she was paid disability retired pay less her entitlement from the Veterans Administration. However, the record does not indicate if the severance pay was actually issued. In accordance with the provisions of Title 31, US Code, Section 3702, a claim against the government must be submitted within 6 years of the date that the claim initially accrued. As there is no record of a claim

for the severance payment within 6 years of the accrual for such a claim, the payment of the severance pay is barred for payment at this time. As the Barring Statute for payment of the retired pay and disability severance pay has expired, no correction can be made for that purpose. DPAF-CL recommended denial of the applicant's request.

A complete copy of the evaluation is attached at Exhibit D.

---

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the evaluations and responded that she is requesting a personal hearing before the Board. She pointed out that the Air Force evaluation is specific in indicating that there is no proof that severance pay was ever paid. She has requested copies of that documentation and that she concurred with the findings of the board that directed her removal from TDRL. She has also requested copies of the Retirement Order showing she was discharged with severance pay. She does not remember concurring with or receiving any severance pay. The DVA continues to penalize her by reducing her VA compensation as evidence that severance pay was paid. She does not feel that she should be charged with severance pay at this time by the VA. She states that if she was discharged with severance pay, that she be paid that severance pay especially since it cannot be determined that severance was ever paid. The medications and treatment she received were supposed to be monitored very closely. There have been no follow-up appointments, no instructions, and no advice. She came off the medications on her own. Now that she has found where to go and how to get the proper treatment, she is being penalized by a severance pay that she never received.

The applicant's complete response is attached at Exhibit F.

---

ADDITIONAL AIR FORCE EVALUATION:

The Chief, General Law Division, AF/JAG, reviewed the application and pointed out that the Barring Act, 31 U.S.C. 3702, provides that "claims involving uniformed service members' pay...must be received by the official responsible...for settling the claim...within 6 years after the claim accrues...." "A claim first accrues when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action." The statute of limitations must be strictly construed, as claims are increasingly difficult to resolve justly the older they become. The instant case does not involve a "continuing claim," thus the accrual date for applicant's allegation of error would have been no later than 18 January 1978, when she was discharged with an entitlement to severance pay due to a decrease in her disability rating.

Therefore, she should have filed with the Board within six years after that date rather than on 24 September 1996, well beyond the expiration of the limitations period. The file contains no evidence that she attempted to obtain redress prior to 24 September 1996. The fact that there is no record of her having received severance pay illustrates the fundamental reason claims must be filed within the statute of limitations; over time records are lost or are destroyed in the normal course of business. Therefore, it is the opinion of AFJAG that the Board has no authority to correct the record to reflect a timely filing, insofar as there is no factual basis for doing so. As to whether DFAS would honor the claim if the Board were to elect that course of action, JAG can only say that they agree with DFAS's evaluation that this claim is barred under 31 U.S.C. 3702.

A complete copy of the evaluation is attached at Exhibit G.

---

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

The applicant reviewed the additional evaluation and responded that the premise for denial of her request is the Barring Act 6-year statute of limitations. Nowhere through all the background information and discussion does it refer to equitable treatment for a former service member to right a wrong. Nowhere does it address the nature of her disability other than stating it had improved which resulted with her removal from TDRL and granting severance pay. Nowhere does it mention that continued treatment was received for the depression/psychosis that the service member endured during this time. There is definitely no statute of limitation on long term illness such as one that she suffered from that has now totally and permanently disabled her. She asks that the Board refer to her statement, dated 15 July 1997, which explained her reasons for filing for redress and her not understanding the nature of being removed from TDRL, explaining the request for providing proof that severance pay was actually paid which cannot be done or is not being done, and, the actual orders to be mailed to her showing this severance pay being made which has not been done. She feels that she has been deceived by the U. S. Government as they have not been able to provide the proof that severance pay was ever paid. However, the DVA is indicating that it has been paid and they are holding that severance pay against her compensation payments. It also appears the Government is using a 6-year statute of limitations as their only basis to deny her claim. She believes it a reasonable request that the Air Force provide the justification and paperwork showing that severance pay was paid. She also asked that the Board not to use as their only weapon the barring of the 6-year statute denying her claim.

A complete copy of her response is attached at Exhibit I.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was not timely filed; however, it is in the interest of justice to excuse the failure to timely file.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After thoroughly reviewing the evidence of record, we are persuaded that applicant was paid retirement pay while she was on the TDRL. In this respect, we note that DFAS indicates that according to their microfiche records, applicant was properly paid her disability retired pay less an entitlement from the DVA while she was on the TDRL. With respect to the disability severance pay issue, although DFAS indicates that there is no record that the severance pay was paid, the Chief, General Law Division indicates that the applicant did not attempt to pursue this issue until 1996. And as DFAS-CL points out, in accordance with law, a claim against the government must be submitted within six years of the date that the claim actually accrued. In this case, that would have been 19 January 1978, the date applicant was discharged. Therefore, even if we were to consider recommending some form of relief, it appears that it would not be paid by DFAS. In addition, we note that the DVA has indicated that applicant's severance pay balance was removed and a check was issued to her for the amount that had been recouped. Therefore, it now appears that she has received all the pay to which she was entitled despite her assertions to the contrary. In view of the foregoing, we find no compelling basis to recommend granting the relief sought in this application.
4. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

---

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

---

The following members of the Board considered this application in Executive Session on 18 September 1997 and 23 July 1998, under the provisions of AFI 36-2603:

Ms. Charlene M. Bradley, Panel Chair  
Mr. Robert Zook, Member  
Mr. Jackson A. Hauslein, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 24 Sep 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPPD, dated 25 Feb 97.
- Exhibit D. Letter, DFAS-CL/FRAB, dated 28 May 97.
- Exhibit E. Letter, AFBCMR, dated 23 Jun 97.
- Exhibit F. Applicant's response, dated 15 Jul 97.
- Exhibit G. Letter, AF/JAG, dated 17 Oct 97.
- Exhibit H. Letter, AFBCMR, dated 30 Oct 97.
- Exhibit I. Applicant's response, dated 12 Nov 97.
- Exhibit J. Letter, AFBCMR, dated 23 Feb 98.
- Exhibit K. Letter, DVA, dated 6 May 98.

  
CHARLENE M. BRADLEY  
CHARLENE M. BRADLEY  
Panel Chair