

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 12 1999

IN THE MATTER OF:

DOCKET NUMBER: 97-01142

COUNSEL: [REDACTED]

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

Her records be corrected to reflect that she retired by reason of physical disability with a compensable disability rating of 100 percent, with no deduction for any willful noncompliance.

APPLICANT CONTENDS THAT:

The findings of the Formal Physical Evaluation Board (FPEB) that the applicant was willfully noncompliant with her medications was clearly erroneous. The supporting letters provided with this package from her treating physicians show that this is not the case.

The 50 percent disability rating appeared to be arbitrarily given by the FPEB, as Dr. M--- testified that the applicant was 100 percent disabled.

In support of her appeal, the applicant provided statements from her counsel and a medical doctor, extracts from her military personnel and medical records, and other documents associated with the matter under review.

STATEMENT OF FACTS:

Applicant was appointed a second lieutenant (Medical Service Corps (MSC)), Reserve of the Air Force on 27 Nov 91. She was appointed a captain (Medical Corps), Reserve of the Air Force on 1 Jun 95. She was voluntarily ordered to extended active duty on 11 Jun 95.

Available documentation reflects that the applicant was referred to a MEB at Wilford Hall Medical Center, Lackland AFB, Texas on 18 Apr 96. Based on the medical data provided to the Informal Physical Evaluation Board (IPEB), the applicant was found to be unfit for continued military service on 7 May 96 based on a

diagnosis of Bipolar I Disorder. The IPEB recommended that the applicant be given a disability discharge under other than Chapter 61, 10 U.S.C. for what they perceived as a medical condition that existed prior to service without service aggravation. The applicant nonconcurred with the IPEB's recommendation and requested a formal hearing which was scheduled for 18 Jun 96. On 28 Jun 96, due to her medical condition which was confirmed by her doctor, she submitted a waiver of her appearance to the Formal Physical Evaluation Board (FPEB). She also requested that in her absence she be represented by her counsel. The applicant's waiver was approved by the FPEB President.

The FPEB convened on 28 Jun 96 and found the applicant unfit for continued military service and recommended she be discharged with severance pay and a zero percent disability rating (i.e., a 50 percent disability rating less a 50 percent deduction for non-compliance). The FPEB commented that there were two instances of member's failure to comply with sound medical advice, either one of which is independently sufficient for a full deduction for willful non-compliance. The applicant's legal counsel was briefed on these findings, non-concurred with the FPEB's recommendation, and forwarded a written rebuttal on behalf of his client to the Secretary of the Air Force Personnel Council (SAFPC).

Upon reviewing of the case file, the SAFPC noted that the member was hospitalized for her disorder at the time of her formal board. Based on this information, the council requested an updated medical addendum reflecting her current status, prognosis, and social and industrial impairment. A psychiatric evaluation was conducted at Wilford Hall Medical Center on 12 Aug 96. The evaluation concluded that her condition at the time of the evaluation had greatly improved with respect to her bipolar symptoms. On 23 Aug 96, after a thorough review of the entire case file, the applicant's extensive rebuttal and the updated medical information, officials within the office of the Secretary of the Air Force concurred with the findings and recommendations of the FPEB and directed that the applicant be discharged with severance pay with a disability rating of zero (0) percent.

Applicant was honorably discharged on 29 Oct 96 under the provisions of AFI 36-3212 (Disability - Entitled to Severance Pay). She was credited with 1 year, 4 months, and 19 days of active duty service.

AIR FORCE EVALUATION:

The BCMR Medical Consultant reviewed this application and indicated that the applicant developed a bipolar disorder during the course of her active duty service, a condition which had not

been diagnosed prior to her service (as suggested by the IPEB) nor which was aggravated by "willful noncompliance" as the FPEB found. A decision by the couple to conceive a child could be argued as being inappropriate at this particular point in time, but the decisions reached by them in order to achieve this goal should not be used to totally eliminate any award of disability entitlement her psychiatric disorder engendered. In the Medical Consultant's view, it is clear from the review of the records that an injustice has occurred in this case.

The Medical Consultant is of the opinion that the applicant should receive relief from the disability evaluation system and have the disability award reinstated at 30 percent based on her treating psychiatrist's finding of "definite" social and industrial impairment. The previous 50 percent level of award which the IPEB and FPEB had agreed on based on their assessment of "considerable" social and industrial impairment prior to applicant's August hospital discharge was no longer valid at the time of the Personnel Council review.

A complete copy of the Medical Consultant's evaluation is at Exhibit C.

The Physical Disability Division, AFPC/DPPD, reviewed this application and recommended denial. According to DPPD, the purpose of the military disability system is to maintain fit and vital force by separating members who are unable to perform the duties of their grade, office, rank or rating. Those members who are separated or retired by reason of physical disability may be eligible, if otherwise qualified, for certain disability compensations. Eligibility for disability processing is established by a Medical Evaluation Board (MEB) when that board finds that the member may not be qualified for continued military service. The decision to conduct an MEB is made by the medical treatment facility providing health care to the member.

DPPD indicated that they do not concur with the advisory and recommendations of the Medical Consultant. While the Medical Consultant may have a different opinion as to the appropriateness of assessing a noncompliance factor in determining the compensable disability of the applicant (a determination under the purview of the PEB not MEB process), his subjective opinion does not outweigh that of the other eight senior officials on the FPEB and the Air Force Personnel Board. There was no error or injustice in the processing of the applicant's disability case.

In DPPD's view, the applicant has not submitted any material or documentation to show she was inappropriately rated or processed under the military disability evaluation system. She was granted all rights to which she was entitled under disability law and departmental policy in effect at the time of her disability discharge.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel indicated that, while they believe that the BCMR Medical Consultant was on track, they also believe the minimum disability rating should be at least 50 percent.

Counsel's complete response and additional documentary evidence are at Exhibit F.

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 injustice. After a careful review of the available evidence, we are of the opinion that corrective action is warranted in this case. In this respect, we note that the applicant was diagnosed with a bipolar disorder and was found by her treating psychiatrist to have a "definite" social and industrial impairment. Furthermore, we are persuaded that the applicant was not willfully noncompliant when she discontinued treatment for her condition prior to conceiving a child and when she declined treatment after becoming pregnant. In the first instance, it appears that the applicant's drug treatment was discontinued because the applicant was feeling better and not symptomatic. In the second, we note that the applicant was in her second trimester of pregnancy. In our view, for the applicant to decline treatment while pregnant was reasonable. While one could question the appropriateness of the applicant's decision to conceive a child at the time, in our view, the elimination of an award of a disability entitlement for her psychiatric disorder was a punitive act based on the applicant's personal decision. Therefore, we believe that the applicant should be afforded some relief. We are not persuaded that the evidence pertaining to the applicant's condition supports the award of a compensable rating of 50 percent. However, to remove the possibility of an injustice, we believe that the recommendation by the BCMR Medical Consultant that the applicant be awarded a compensable rating of 30 percent is appropriate. Accordingly, we recommend that the applicant's records be corrected as indicated below.
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THE BOARD RECOMMENDS THAT:

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

a. On 28 Oct 96, she was found unfit to perform the duties of her office, rank, grade or rating by reason of physical disability incurred while entitled to receive basic pay; that the diagnosis in her case was Bipolar I Disorder, VA Diagnostic Code 9206, rated at 30 percent; that the compensable percentage was 30 percent; and that the degree of impairment might be permanent.

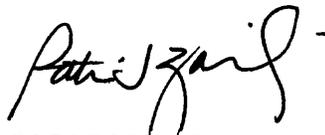
b. She was not honorably discharged under the provisions of AFI 36-3212 on 29 Oct 96, but, on that date, her name was placed on the Temporary Disability Retired List (TDRL) under the provisions of AFI 36-3212 and 10 U.S.C. 1202.

The following members of the Board considered this application in Executive Session on 19 May 98, under the provisions of AFI 36-2603:

Ms. Patricia J. Zarodkiewicz, Panel Chair
Mr. Jackson A. Hauslein, Member
Mr. Robert W. Zook, Member

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

Exhibit A. DD Form 149, dated 6 Jan 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, BCMR Medical Consultant, dated 30 Jun 97.
Exhibit D. Letter, AFPC/DPPD, dated 12 Sep 97.
Exhibit E. Letter, SAF/MIBR, dated 6 Oct 97.
Exhibit F. Letter, counsel, dated 20 Nov 97, w/atc.



PATRICIA J. ZARODKIEWICZ
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

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Office of the Assistant Secretary

AFBCMR 97-01142

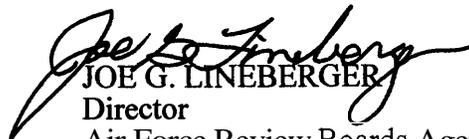
MEMORANDUM FOR THE CHIEF OF STAFF

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. On 28 Oct 96, she was found unfit to perform the duties of her office, rank, grade or rating by reason of physical disability incurred while entitled to receive basic pay; that the diagnosis in her case was Bipolar I Disorder, VA Diagnostic Code 9206, rated at 30 percent; that the compensable percentage was 30 percent; and that the degree of impairment might be permanent.

b. She was not honorably discharged under the provisions of AFI 36-3212 on 29 Oct 96, but, on that date, her name was placed on the Temporary Disability Retired List (TDRL) under the provisions of AFI 36-3212 and 10 U.S.C. 1202.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency