SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXX

DOCKET NUMBER: BC-2007-03623-4

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for a medical retirement; or in the alternative, be returned to duty to be evaluated for a medical separation.

RESUME OF THE CASE

At the time of application, the applicant was a former Air National Guard technical sergeant (E-6) awaiting retirement pay at age 60, on 4 February 2022.

On 10 Apr 12, the Board reconsidered and denied his request to have his Reserve retirement rescinded and his name placed on the Temporary Disability Retired List (TDRL) with a compensable disability rating of 40 percent. The Board concurred with the findings of the offices of primary responsibility and did not find any evidence that would overcome their assessment of the case. Furthermore, the Board found he received a thorough review of his medical conditions prior to his separation to determine if he should have been placed on the TDRL. Additionally, the Board found his record was properly corrected in a previous case affording him Reserve retired pay at age 60. Consequently, the Board found no basis to correct the applicant's record beyond the corrections already made.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letters and Records of Proceedings at Exhibits C and L.

On 20 Dec 21, the applicant requested reconsideration of his request for a medical retirement. He again contends his separation was erroneous and that it should be vacated with the outcome of returning to a medical status for diagnosis, evaluation, and correct legal processing. He was erroneously separated and not given the opportunities to retire from the injuries he incurred in the line of duty (LOD). The new evidence he presents shows willful harm in preventing him from being processed for a retirement over 16 years ago. Actions were taken by his Air National Guard unit to deliberately prevent his attaining an entitled retirement physical and an attending physician was not involved in the process which would have set his disability rating over 30 percent. Documents have been removed and/or tampered with from his medical records.

In support of his reconsideration request, the applicant submitted the following new evidence: (1) additional medical records; (2) an email to his unit dated 27 Apr 03; and (3) a witness statement pertaining to his injury.

The applicant's complete submission is at Exhibit M.

AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends denying the application finding insufficient evidence to support his appeal that his separation was erroneous and that it should be vacated with the outcome of returning to a medical status for diagnosis, evaluation, and correct legal processing. The medical decisions and overall separation process were found completely fair and appropriate without any indisputable evidence that an applied error or rendered injustice has occurred.

The applicant's personal addendum to his application was lengthy and precisely identified and explained over 30 submitted documents. Although lengthy, the addendum also contained inconsistencies when compared to documents and medical records submitted with the case file. The Medical Advisor will first reveal the most glaring inconsistencies as gleamed from the chronological timeline of events. The email sent from the applicant to his Detachment Commander, dated 27 Apr 03, actually contradicts what the applicant stated in another email sent the very next day on 28 Apr 03, whereby he received authorization prior to the end of the calendar year to see a doctor. That authorized appointment took place on 14 Jan 03, with treatment consisting of medication, heat, physical therapy (PT), and limited duty. However, the applicant's own words in the same email stated "Prescribed care has not been authorized" which was incorrect when both emails are compared. The email dated 28 Apr 03, also contains a false statement whereby the applicant writes that he "…has not received required medical attention" for his pain conditions. His authorization to be seen by medical was already accomplished and fulfilled over three months prior to his sent email. The email sent from the applicant dated 10 Nov 05, was again false and misleading. That email contained the statements of "At present, I have not received entitled medical care and my left knee has not been diagnosed nor given any treatment." According to reviewed records, such statements were unfounded. Not only did he receive authorization to be seen by medical, which occurred in Jan 03, he was appropriately worked-up with preliminary x-rays prior to being seen by Orthopedics which occurred on 7 Apr 03. At that time, he was treated with steroid injections, medications, extended aqua therapy, and limited duty. His orthopedic follow-up for his back condition occurred on 5 May 03 and 27 Jun 03. To claim in late 2005 of not having received entitled medical care is at least nonsensical at best. In regards to his left knee condition not being diagnosed or given any treatment as of 10 Nov 05, is again blatantly false. The records clearly show that a second consult to Orthopedics was requested and the applicant was seen by the specialist on 28 May 04, where x-rays were taken, a diagnosis was rendered and treatment was administered.

Next, the Medical Advisor will address specific issues as contented in the applicant's personal addendum to his application. The applicant made a comment that one of the most egregious events that occurred stating "…should have stopped the process" was that there was not an attending physician involved in the process. The applicant based this apparent egregious error on a locally produced document authored by the base Physical Evaluation Board Liaison Officer (PEBLO) as a frequently asked question (FAQ) information sheet as to assist folks in understanding the Medical Evaluation Board (MEB) process. Although some answers to various

questions were indeed accurate, the document was purely informational without authoritative backing or post-peer reviewing for complete accuracy or currency. Within the same document, the applicant points out that one is "…not entered into the MEB channels until he or she has received optimum medical treatment" which is correct; however, what he failed to further indicate is that such a statement does not necessarily mean that further medical treatment is not indicated, but rather when a competent medical authority has determined that ones' medical condition may disqualify them from further military service…entry into the system is appropriate. This case fits such a scenario given the specialty care that he received coupled with their professional recommendations. Lastly, the term attending physician is used frequently to denote the initial provider seen for a specific medical condition; however, often the consulting specialist is the only provider that continues with care and is considered their provider or attending physician. The applicant questions as to the reason the MEB only addressed a single spinal disc level of L4-L5 when the discogram noted injury to multi-level discs. What he failed to understand was that only the L4-L5 disc revealed the same pain that he subjectively experienced on a daily basis when that specific disc was pressurized with x-ray contrast material. The other discs were not objectively identified as the primary source of his disabling back pain. On page 7 of the applicant's addendum he states, "My begging for medical care, and to be treated as I should, for over 3 years, only to end up where I am today" is proven false by the care he received well prior to three years from the Aug 02 initial incident. On page 8 of the applicant's addendum he infers of not being informed in great detail from the neurosurgeon's options of getting back surgery or not, but then he notes that he was told that the surgery would not be a fix, and he would have a 50/50 chance of it reducing the amount of pain and that there was a risk of becoming paralyzed, if complications arose. Such information amounts to providing the appropriate detailed pre-surgical counsel.

The applicant further denotes that when all of his physical conditions are appropriately considered that he would easily be found disabled at a rate exceeding 30 percent and thus rendering him a medical retirement. However, it is imperative to fully understand why the Service evaluation of some conditions may appear different from that of the Department of Veterans Affairs (DVA). For complete awareness, the military's Disability Evaluation System (DES), established to maintain a fit and vital fighting force, can by law, under Title 10, U.S.C., only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to serve, or the length of time since date of discharge.

Lastly, on page 9 of the applicant's addendum he stated, "I was entitled to many things. I was entitled to medical care, compassion, understanding, service credit, and not being abandoned." After reviewing all the documents associated with this case file, the Medical Advisor cannot see that this individual was abandoned from any entitled medical care. One may conclude that initial care could have been received sooner than it was, but recall that the applicant himself choose not to report to a medical facility for treatment at the time of injury. The Medical Advisor opines

that the applicant did received appropriate medical care to include specialty care, was shown compassion with various and appropriate treatment protocols and was understood by his medical providers by virtue of capturing and documenting his stated words and claims.

The complete advisory opinion is at Exhibit N.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 7 Feb 22 for comment (Exhibit O), and the applicant replied on 20 Jun 22. In his response, the applicant contends the documents he submitted with his original application provided an exact account of the events, are in support of each other, and are indisputable, as there are errors and injustices that took place. The largest majority of these documents were never addressed in the advisory and many facts were not mentioned or were glossed over and facts were taken out of context. The advisor simply scanned over the documents and made opinions and suppositions. Many egregious errors and injustices were committed by many individuals. He was not properly processed as a retiring member who had sustained multiple injuries in the line of duty. This process would have included a retirement physical every qualified member is to have prior to separation which would have recorded and identified all disabilities and assigned an appropriate level of disability which would have resulted in the final character of separation. His records were purged of all information as to who was directly responsible for the wrongdoings during the MEB process.

The applicant lays out all of the statements within the advisory that are misleading or misrepresented which is detailed in his seven page rebuttal.

The applicant's complete response is at Exhibit P.

ADDITIONAL AIR FORCE EVALUATION

The AFPC/DPFXM Medical Advisor found the previous advisory substantively accurate and sufficient from an adjudicator's perspective. The advisory supported that none of the supplied "new evidence … documents believed to be lost were recently located" were sufficient to prove an error or injustice that would impact the final SAFPC/AFBCMR adjudication for either, timeliness of MEB/PEB processing, unfitness for duty determinations, final unfitting conditions, or the final combined 20 percent disability ratings of those conditions.

The advisory appropriately indicated retaliation and illegal acts were not within the advisory scope of review stating "Such claims in regards to any illegal acts having been committed should be investigated or followed by other appropriate offices of primary responsibility. This advisory will strictly address the medical aspects of this case." As with the previous advisory, focus was on the medical, fitness, and disability issues. The applicant's contention of "willful intent/actions to do member harm and prevent award/offer of retirement" is outside the scope of review and all records were considered at face value for indications of MEB/PEB processing, fitness determinations, and ratings.

Under the discussion section addressing the applicant's addendum and emails, the phrasing could have been less inflammatory in nature. Phrases such as the most glaring inconsistencies; contains a false statement, was again false and misleading; so, to claim in late 2005 of not having received entitled medical care is at least nonsensical at best. In regards to his left knee condition not being diagnosed or given any treatment as of 10 Nov 05 is again blatantly false; is proven false by…

The Advisory may go too much into depth concerning timing/authorizations of medical treatments/delays as they are not tied to any outcome the Board could potentially adjudicate. There were favorable findings of ILOD for the back and knee, and no substantive evidence of any examination(s) that would provide higher ratings. The previous advisory clearly discussed the timing and sufficiency to initiate the MEB, the determinations on unfitting conditions, and that DoD only provides compensation for unfitting conditions while the DVA has different guidance.

The applicant's concern about ratings noting that the MEB only addressed a single spinal disc level, would likely have been better answered noting that the lumbosacral spine is evaluated/rated as a segment with all levels considered in the rating. A review of the entire AFBCMR file as well as the entire HAIMS records and JLV entries (electronic medical record systems) from Jan 02 through Dec 08 was conducted. An entirely new case review and advisory, was not the intent, but rather substantiation of the previous advisory content, discussion, and conclusion. Entries did not reveal any evidence that would contradict or cast doubt on the timing or initial determinations of unfitness from the MEB/PEB/FPEB, the additionally unfitting condition, rating(s) from the SAFPC, or the final prior AFBCMR adjudications.

The complete advisory opinion is at Exhibit Q.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 3 Jan 23 for comment (Exhibit R), and the applicant replied on 23 Jan 23. In his response, the applicant contends that the required medical treatment was not afforded as required by standing regulation nor from a medical standpoint. Both medical advisory opinions were unable to find proclamation of either the injury to his left knee or the injuries to his back as being stable. None of his treating physicians made any declaration that his conditions were stable. Without stabilization, proceeding to a MEB/PEB cannot occur as this is required documentation.

The applicant's complete response is at Exhibit S.

FINDINGS AND CONCLUSION

1. The application was timely filed.

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits and evidence submitted by the applicant, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with

the rationale and recommendation of the AFBCMR and AFPC Medical Advisors and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board finds no error or injustice occurred during the disability process. The Board took note of the applicant's additional evidence but did not find it compelling to warrant relief. The military's DES established to maintain a fit and vital fighting force, can by law, under Title 10, U.S.C., only offer compensation for those service incurred diseases or injuries, which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on post-service progression of disease or injury. A higher rating by the DVA, based on new and/or current examinations conducted after discharge from service, does not warrant a change in the total compensable rating awarded at the time of the member's separation. Additionally, the Board did not find the applicant's medical conditions warranted placement on the TDRL. Placement or continuation of TDRL status is justified only when the disability of one or more conditions reaches the minimum 30 percent rating and the conditions are considered unstable. The preponderance of evidence does not support that the applicant's medical conditions, individually or combined, met the minimum 30 percent rating requirement; therefore, removing the stability of either or both conditions from the decision. Furthermore, the applicant provide insufficient evidence to convince the Board that his medical records were tampered with or that documentation was removed. Lastly, the Board finds the preponderance of evidence does not support the applicant's contention that he was denied medical care by qualified medical personnel nor was he denied a separation physical. Physical examinations may be accepted between 90 days and up to 12 months prior to the scheduled date of separation from active duty. Therefore, the Board recommends against correcting the applicant's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2007-03623-4 in Executive Session on 22 Mar 23:

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit L: Addendum Record of Proceedings, w/ Exhibits C-K, dated 10 Apr 12.
Exhibit M: Application, DD Form 149, w/atchs, dated 20 Dec 21.
Exhibit N: Advisory Opinion, AFBCMR Medical Advisor, dated 4 Feb 22.
Exhibit O: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Feb 22.

Exhibit P: Applicant's Response, dated 20 Jun 22.
Exhibit Q: Advisory Opinion, AFBCMR Medical Advisor, dated 16 Dec 22.
Exhibit R: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Jan 23.
Exhibit S: Applicant's Response, dated 23 Jan 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR