RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2008-01395

INDEX CODE: 108.06, 110.03

XXXXXXXXXXXXXXX COUNSEL: NONE

HEARING DESIRED: NO

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APPLICANT REQUESTS THAT:

His Fitness for Duty Determination be reviewed by a Formal Physical Evaluation Board (FPEB), his military retirement be rescinded, and he be reinstated into the Active Reserve.

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APPLICANT CONTENDS THAT:

He elected not to have his Fitness for Duty Determination reviewed by an FPEB due to erroneous information he received concerning his eligibility for Federal Employees Retirement System (FERS) retirement. This erroneous information influenced his decision not to pursue an FPEB, and he elected military retirement in lieu of an administrative discharge due to physical disqualification. A favorable FPBE determination would have allowed him to remain in his Air Reserve Technician (ART) position.

In support of his appeal, he has provided copies of a timeline of events that led to his decision not to pursue an FPEB; an AF Form 422, *Physical Profile Serial Report,* which addresses his medical disqualification; a *Medical Evaluation (ME) for Military Duty Fact Sheet*; a *Physical Evaluation Board (PEB) Election Form* in which he stated he desired to have his case referred to the Informal Physical Evaluation Board (IPEB); notification documents, to include an *Informal IPEB Findings* notification letter; a memorandum in which he declined to have his case referred to the FPEB; documents pertaining to his subsequent separation/retirement due to physical disqualification; and numerous documents pertaining to his civilian retirement.

Applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

The applicant was serving in the grade of senior master sergeant (SMSgt – E-8) in the Air Force Reserve (AFR) as an ART when he was placed on a “4T” medical profile in November 2006, and denied Reserve participation for pay and points due to being found medically disqualified as a result of a non-duty related knee replacement. In April 2007, he elected to have his medical disqualification referred to an IPEB for a fitness determination and, on 19 July 2007, the IPEB found him unfit to perform the duties of his office, grade, rank or rating due to a diagnosis of status-post total right knee arthroplasty. On 20 July 2007, AFRC/A1BF notified him of the IPEB findings, and advised him of his right to have his case reviewed by the FPEB.

On 10 August 2007, the applicant elected not to have his case referred to the FPEB, and acknowledged that he understood discharge processing would be initiated and that he would be afforded the opportunity to apply for reserve retirement with pay at age 60 in lieu of discharge. He was subsequently assigned to the Retired Reserve List awaiting pay at age 60, effective 2007. His date-of-birth is (age 51).

On 26 October 2007, the applicant received a letter from AFPC/DPSOC informing him that the Benefits and Entitlements Service Team (BEST) had determined that he met the age and service requirements for Discontinued Service Retirement, effective 15 November 2007. On 9 January 2008, the applicant received a letter from the Office of Personnel Management (OPM) informing him that his Discontinued Service Retirement application had been disallowed due to the fact that, although he was 50 years of age, he had completed a total of only 17 years, 6 months, and 12 days of creditable service on his date of separation from his former agency, and the FERS requires a minimum of 20 years of service for retirement eligibility at age 50.

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AIR FORCE EVALUATION:

AFPC/DPSD recommends denial of the applicant’s request to have his fitness case evaluated by the FPEB. He had 24 years of satisfactory service and was eligible to apply for reserve retired pay at age 60. They have no responsibility regarding his application for retirement from his civilian job.

The AFPC/DPSD evaluation is at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The fitness determination conducted by the AFR was an informal records review and at no time was he personally evaluated by medical personnel. His decision to retire without evaluation by the FPEB was based solely on the fact that he was told by AFPC/DPSOC and his local Military Personnel Flight (MPF) that he could, and would, be retired from civilian service effective 30 days after his 50th birthday. His military retirement was effective in September 2007, but both his military and civilian service would have been extended if he would have elected referral to the FPEB.

The evaluation does not take into consideration that he is an ART and would not be eligible for retirement until he fulfilled his Civil Service commitment at age 56. As for the mistakes made by AFPC/DPSOC concerning his civilian retirement dates, he was told that their Human Resources specialists have been briefed concerning credible and non-credible service time, and that this mistake would not happen in the future. However, the incorrect information he received from them has jeopardized his employment situation.

It was not until January 2008, that OPM informed him that the previous information used to determine his retirement eligibility was incorrect, and that he was not eligible to retire until May 2010. If he would have had the correct information, he would have elected to meet the FPEB and have them review his case. What he is seeking is to turn back the calendar in order that he may make the decision based on the correct set of facts. He is not looking to place blame, just the chance to make an informed decision.

The applicant’s complete response to the AFPC/DPSD evaluation is at Exhibit E.

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ADDITIONAL AIR FORCE EVALUATION:

The BCMR Medical Consultant recommends denial of the applicant’s request to have his military retirement rescinded and to be reinstated to the Active Reserve, as there is no medical basis to justify such action.

Reserve Component members who are found disqualified for further military service by virtue of a non-service related medical condition are given an opportunity to appeal their fitness determination via a review by the Military Disability Evaluation System; first with a review by the IPEB, followed by a review by the FPEB, and a final review by the Secretary of the Air Force Personnel Council, if necessary. The applicant accepted the decision of the IPEB and declined to further appeal that decision. Further, individuals who have achieved at least 15, but less than 20 satisfactory years of service, are eligible for receiving the benefits of a length-of-service retirement at age 60.

The record reflects that the applicant received erroneous information from AFPC on 26 October 2007, regarding his eligibility for meeting the requirements of a Discontinued Service Retirement. However, the applicant’s election to decline an FPEB was signed on 10 August 2007, and appears to be a decision unrelated to the letters he subsequently received regarding his eligibility, or lack thereof, for a Discontinued Service retirement under the FERS. Had the applicant’s case been referred to the FPEB, he would, more likely than not, have again been found unfit for further military service due to the rigors confronting all components of today’s Air and Space Expeditionary Force and the continued physical restrictions likely to have been imposed upon him; restrictions that would have impeded his ability to fully support the mission of his organization if retained. Thus, although erroneous information was provided to the applicant in October 2007, there is no corresponding or mitigating nexus established between this misinformation and the applicant’s decision to decline an appeal to the FPEB, or a higher appellate review.

The BCMR Medical Consultant evaluation is at Exhibit F.

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APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

On 10 May 2007, his local MPF advised him to contact the BEST hotline, and they confirmed that he was eligible to retire with an unreduced annuity due to his loss of dual status as an ART and the fact that he had completed 22 years and 10 months of service. On the following day, they also confirmed that he was eligible for the Retiree Annuity Supplement. Given this, he had been misinformed long before he signed documents to decline the FPEB, and this trend of misinformation continued until OPM denied his retirement on 9 January 2008.

The dates on the documents provided will show that his only restriction at the time he was eligible for FPEB consideration was no running. Since his local medical squadron had informed him that the earliest he would be considered by an FPEB would be in September-October 2007, he would not have been considered by the FPEB until after 10 August 2007, when he signed the letter. When he was examined for his one-year follow-up in December 2007, the running restriction was lifted, and since his surgeon and family doctor have no reason to impose restrictions on him, there is nothing to impede his ability to support the mission as he now supports it every day without restrictions. He returned to his civilian job in January 2008, and is occupying the same position he held prior to electing retirement. A presumption of fitness should be in order since his retirement date is not until April 2010, he has met or even exceeded the physical requirements for this position, and he participates three times a week in physical fitness training and has scored “GOOD” in the fitness level for his age.

The applicant’s complete response, with attachments, is at Exhibit H.

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THE BOARD CONCLUDES THAT:

1.  The applicant has exhausted all remedies provided by existing law or regulations.

2.  The application was timely filed.

3.  Insufficient relevant evidence has been presented to demonstrate the existence of error or injustice. We took notice of the applicant's complete submission in judging the merits of the case and his contentions are duly noted; however, documents contained in this application indicate that the applicant’s election to decline the FPEB was signed in August 2007, well before his receipt in October 2007, of a letter from AFPC/DPSOC informing him that he met the age and service requirements for Discontinued Service Retirement. The fact that OPM later determined this information was erroneous is unfortunate; however, the applicant was returned to his previous civilian job in January 2008, and the erroneous information he received does not mitigate the fact that there is no documented corresponding or mitigating nexus established between this misinformation and the applicant’s decision to decline an appeal to the FPEB or a higher appellate review. Given the evidence presented in this application, there is no basis, medical or otherwise, to justify rescinding his retirement and reinstating him into the Active Reserve. Therefore, in the absence of evidence to the contrary, we find no compelling basis to recommend granting the relief sought in this application.

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THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of 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.

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The following members of the Board considered Docket Number BC-2008-01395 in Executive Session on 7 October 2008, under the provisions of AFI 36-2603:

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 4 Apr 08, w/atchs.

Exhibit B. Applicant's Available Master Personnel Records.

Exhibit C. Letter, AFPC/DPSD, dated 23 May 08.

Exhibit D. Letter, SAF/MRBR, dated 20 Jun 08.

Exhibit E. Letter, Applicant, dated 26 Jun 08.

Exhibit F. Letter, AFBCMR Medical Consultant, dated

28 Jul 08.

Exhibit G. Letter, AFBCMR, dated 7 Aug 08, w/atch.

Exhibit H. Letter, Applicant, dated 20 Aug 08, w/atchs.