Work-Product

UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2011-03835-2

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He be credited with 20 years of satisfactory service for a Reserve retirement.

In the alternative, the Board reconsider his request his disability rating be increased from 10 percent to 50 percent for a medical retirement.

RESUME OF THE CASE

The applicant is a former Air National Guard (ANG) master sergeant (E-7).

On 19 Jan 99, the applicant was referred to the informal physical evaluation board (IPEB) for his condition of post-traumatic stress disorder (PTSD) and major depressive disorder (MDD).

On 8 Mar 99, the IPEB determined his PTSD rendered him unfit for military service and recommended he be placed on the temporary disability retired list (TDRL) with a rating of 30 percent.

Per his NGB Form 22, *Report of Separation and Record of Service*, he was discharged on 9 Jun 99 for physical disability. Block 10d, Total Service for Pay, and Block 10(e) *Total Service for Retired Pay,* reflect 19 years, 3 months and 14 days.

On 10 Jun 99, the applicant was placed on the TDRL in the grade of E-7 with a compensable percentage of 30 percent for physical disability.

After undergoing two TDRL reevaluations, the IPEB on 12 Feb 02 determined the applicant's PTSD continued to be unfitting; however, his condition had improved, allowing him to further stabilize his life. The IPEB recommended he be removed from the TDRL and discharged with severance pay (DWSP) with a 10 percent rating.

On 2 Mar 02, the applicant disagreed and requested to appeal at a formal hearing.

On 18 Apr 02, the formal PEB (FPEB) recommended the applicant be DWSP with a 10 percent disability rating for his unfitting condition of PTSD, associated with MDD, mild social and industrial impairment. The FPEB found the testimony and medical evidence supporting the findings of the IPEB. The applicant had been running his own business installing computer cables. He employs eight people and dedicates approximately 30 hours per week to the job. The applicant was found functional in the activities of daily living and made it to the gym about once a week but

still had an aversion to crowds. The FPEB noted disagreements in medical documents concerning his current medical condition and had to weigh heavily on testimony concerning his level of functionality. Overall, the applicant made improvements while on the TDRL and the FPEB opined he no longer met the retirement threshold. The FPEB found the applicant unfit and recommended DWSP with a rating of 10 percent.

On 18 Apr 02, the applicant disagreed with the findings and recommended disposition.

On 3 Jun 02, the Secretary of the Air Force Personnel Counsel (SAFPC) directed the applicant be removed from the TDRL and DWSP.

On 26 Jun 02, the applicant was removed from the TDRL and DWSP in the grade of E-7 with a compensable percentage of 10 percent for physical disability.

In a rating decision dated 6 Aug 02, the DVA increased the applicant's service connected compensable disability rating for his PTSD from 30 percent to 50 percent based on his examination dated 11 Apr 02, effective 5 Dec 01.

On 13 Feb 03, the DVA informed the applicant they proposed to stop his DVA payments effective 1 Mar 03 due to his receipt of severance pay. He was informed he would have to refund the severance pay to continue receiving DVA compensation.

On 26 Jul 12, the Board denied the applicant's request his DWSP be changed to a medical retirement with a compensable rating of 50 percent. The Board agreed with the AFBCMR Medical Consultant the TDRL examination failed to document a degree of functional impairment consistent for a disability rating of 50 percent. Moreover, there was no documentation in the TDRL examination of the DVA's 50 percent rating such as panic attacks, memory loss or impaired judgment/thinking. The applicant was noted to run a small business, performed duties as an emergency medical technician (EMT) and owned a home with a roommate. The entries implied a higher level of functioning was present at the TDRL evaluation compared to the DVA 50 percent rating description. It was also noted, the Department of Defense (DoD) operating under 10 U.S.C., was only able to offer compensation for any service incurred or aggravated condition; while the DVA, under 38 U.S.C. could offer compensation for any service incurred or aggravated medical condition without regard to its impact on a service member's retainability, fitness for duty or reason for career termination.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit E.

On 1 Apr 21, the applicant, through counsel, requested reconsideration of his case. While deployed in Sep 91, he was involved in a terrifying incident. Subsequently, he was placed on the TDRL. On 18 Apr 02, the FPEB found he suffered from PTSD and gave him a 10 percent rating. Almost at the same time, the DVA gave him a 50 percent rating for his PTSD. The Board's decision in his prior case was rendered before the DoD liberal consideration policy was issued for cases related to PTSD and mental health conditions. He turned 60 in Jan 21 and would be eligible to apply a Reserve retirement if not DWSP before he reached 20 years of service. In the interest of justice, he should be retired. He was placed on the TDRL just nine months shy of reaching 20 years for retirement purposes. He asks he be allowed a Reserve retirement for his service and the hardships he endured.

He did not fully understand the implications of his medical separation at the time it occurred. He would have gladly continued to serve the brief amount of time needed to qualify for his Reserve retirement. After it was evident he would not be allowed to return to service, he followed the

avenues presented to him for a medical retirement status. Ultimately, he received a severance pay in the amount of $76,809.00. The next gut punch was when he learned he had to repay the severance pay, which was a tremendous financial strain for his family. He essentially has received nothing in the way of compensation for his nearly 20 years of military service, other than payments from the DVA. He has remained active in the military and veteran community. He has served as a volunteer firefighter, has his EMT license and is active in his community. In spite of his disability, he has been able to create and manage a successful business.

The applicant's complete submission is at Exhibit F.

APPLICABLE AUTHORITY/GUIDANCE

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
b. Did that condition exist/experience occur during military service?
c. Does that condition or experience actually excuse or mitigate the discharge?
d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie Memo, to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to paragraphs 6 and 7 of the Wilkie Memo.

On 4 Apr 24, the Under Secretary of Defense for Personnel and Readiness issued a memorandum, known as the Vazirani Memo, to military corrections boards considering cases involving both liberal consideration discharge relief requests and fitness determinations. This memorandum provides clarifying guidance regarding the application of liberal consideration in petitions requesting the correction of a military or naval record to establish eligibility for medical retirement or separation benefits pursuant to 10 U.S.C. § 1552. It is DoD policy the application of liberal consideration does not apply to fitness determinations; this is an entirely separate Military Department determination regarding whether, prior to "severance from military service," the applicant was medically fit for military service (i.e., fitness determination). While the military corrections boards are expected to apply liberal consideration to discharge relief requests seeking a change to the narrative reason for discharge where the applicant alleges combat- or military sexual trauma (MST)-related PTSD or TBI potentially contributed to the circumstances resulting in severance from military service, they should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised.

Accordingly, in the case of an applicant described in 10 U.S.C. § 1552(h)(l) who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the military corrections boards will bifurcate its review.

First, the military corrections boards will apply liberal consideration to the eligible Applicant's assertion that combat or MST related PTSD or TBI potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief, such as an upgrade or change to the narrative reason for discharge, is appropriate.

After making that determination, the military corrections boards will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

On 3 Nov 21, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit H). On 14 Oct 24, the Board staff provided the applicant a copy of the updated liberal consideration guidance (Vazirani Memo) (Exhibit O).

AIR FORCE EVALUATION

AFRBA Psychological Advisor finds insufficient evidence for a medical retirement for his mental health condition and concurs with the prior decision of the Medical Consultant and the FPEB in his previous case. There was no evidence his overall functioning and impairment would meet the criteria for a 30 percent or higher rating for a medical retirement. He was initially placed on the TDRL on 10 Jun 99 with a 30 percent rating due to his social and industrial adaptability. Since his PTSD could not be projected as stable for the next three years, placement on the TDRL was appropriate.

In Jan 02, about two and a half years later, he was reassessed under a TDRL reevaluation. At the time, his PTSD continued to be unfitting for continued military service but his social and occupational functioning was reportedly significantly improved due to his employment and his financial and housing situations. The FPEB concluded his condition stabilized and removed him from the TDRL with a 10 percent rating, resulting in DWSP. Although he continued to experience PTSD symptoms, he was able to manage them well enough to run his own business and employ and manage several employees. He was financially responsible and was able to maintain his own

home. His overall functioning was considered to be mildly impaired by his mental health condition. The Psychological Advisor agrees a 10 percent rating was appropriate.

Simultaneously, while the applicant's military rating was reduced to 10 percent, the DVA increased their rating to 50 percent. The disparity between the two ratings caused confusion to the applicant. This is due to the different policies for each department. Again, the military's DES, under 10 U.S.C., can 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 time of separation and not based on future progression of injury or illness. The DVA, operating under a different set of laws, 38 U.S.C., with a different purpose, is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact on a service member's retainability, fitness to serve or the length of time since the date of discharge. The DVA is also empowered to conduct periodic reevaluations for the purpose of adjusting the disability rating awards over the lifetime of the veteran.

The Board may apply liberal consideration to the applicant's petition due to the contention of a mental health condition. The following are the responses to the four questions from the Kurta Memorandum:

1. Did the applicant have a condition or experience that may excuse or mitigate the discharge? The applicant and his legal counsel request an increase of his disability rating to 50 percent for PTSD to be eligible for a medical retirement.

2. Did the condition exist or experience occur during military service? The applicant was diagnosed with PTSD based on his traumatic experiences during military service. He was discharged from service with a 10 percent rating (severance pay) for PTSD.

3. Does the condition or experience excuse or mitigate the discharge? The applicant's condition of PTSD was assessed to be stable and his overall functioning and impairment were found to have significantly improved by the FPEB and thus, resulted in his disability rating being reduced from 30 to 10 percent. There is no evidence, the applicant's mental health condition and level of impairment would warrant a higher rating than 10 percent and so his condition does not excuse or mitigate the discharge.

4. Does the condition or experience outweigh the discharge? Since his condition does not excuse or mitigate the discharge, it also does not outweigh his original discharge and would not provide him a higher rating. The 10 percent rating was consistent with his clinical presentation in his medical records during the TDRL period.

The complete advisory opinion is at Exhibit I.

ARPC/DPTT recommends denying the applicant's request for a Reserve retirement. At the time the applicant was placed on the TDRL, he completed 17 years, 9 months and 6 days of satisfactory service. On 26 Jun 02, he was removed from the TDRL and DWSP. The applicant was not eligible to retire under 10 U.S.C. § 12731 because he did not complete 20 years of satisfactory service. He was also not eligible to retire under 10 U.S.C. § 12731B, with 15 but less than 20 years of service, because there is no documentation to show he was found physically unfit for duty.

The complete advisory opinion is at Exhibit J.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 8 Feb 22 for comment (Exhibit K) but has received no response.

AIR FORCE EVALUATION

ARPC/DPTT provided a revised additional advisory recommending denial. The applicant was not eligible to retire under 10 U.S.C. § 12731 because he did not complete 20 years of satisfactory service. The applicant was also not eligible to retire under 10 U.S.C. § 12731b with 15 but less than 20 years of satisfactory service. The applicant affirmed in the narrative he accepted severance pay, which would make him ineligible for retirement pay. According to the DoD Financial Management Regulation, Volume 7A, paragraph 5.7, since the applicant elected and received disability severance pay under the provision of 10 U.S.C. § 1212, he is not entitled to any payment from the military service for, or arising out of service performed by the applicant before separation. ARPC cannot speak to what the applicant may or may not have been told regarding medical retirement eligibility. Had the applicant elected to be transferred to the Retired Reserve vice discharged, he would have been eligible to apply for Reserve retired pay, effective on his 60th birthday in 2021.

The complete advisory opinion is at Exhibit L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 25 Oct 22 for comment (Exhibit M). In an email on 27 Oct 22, counsel informed the Board staff he received an email which appeared to relate to a "Revised ARPC Advisory;" however, the advisory was omitted in the email of attachments. On 1 Nov 22, the Board staff provided counsel with a copy of the ARPC/DPTT revised advisory. Counsel requested 1 Nov 22 be considered as the first day of the 30 day response period. As of this date, an additional response has not been received.

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, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the rationale and recommendations of ARPC/DPTT and the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no evidence in the applicant's records his overall functioning and impairment would meet criteria for a 30 percent, or higher rating, for a medical retirement. Further the applicant was not eligible to retire under 10 U.S.C. § 12731 because he did not complete 20 years of satisfactory service. In this respect, the Board does not find it in the interest of justice to credit the applicant with a period of service he did not perform duties solely to entitle him to a retirement he did not earn through service. He was also not eligible to retire under 10 U.S.C. § 12731B, with 15 but less than 20 years of service, because there is no documentation to show he was found physically unfit for duty. The Board also notes the applicant is requesting an increase to his disability rating, which in essence is a fitness for duty determination and is not eligible for liberal consideration under the DoD policy (Vazirani Memo). Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

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 Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2011-03835-2 in Executive Session on 23 Feb 22 and 20 Nov 24:

Work-Product Panel Chair
Work-Product Panel Member
Work-Product Panel Member

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

Exhibit E: Record of Proceedings, w/ Exhibits A-E, dated 31 Jul 12.
Exhibit F: Application, DD Form 149, w/atchs, dated 1 Apr 21.
Exhibit G: Documentary evidence, including relevant excerpts from official records.
Exhibit H. Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 3 Nov 21.
Exhibit I: Advisory Opinion, AFRBA Psychological Advisory, dated 4 Nov 21.
Exhibit J: Advisory Opinion, ARPC/DPTT, w/atchs, dated 22 Nov 21.
Exhibit K: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Feb 22.
Exhibit L: Revised Advisory Opinion, ARPC/DPTT, dated 6 Oct 22.
Exhibit M: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Oct 22.
Exhibit N Applicant's Response, dated 2 Nov 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

12/5/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF