



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-2012-00028-3

COUNSEL: Work-Product

HEARING REQUESTED: N/A

APPLICANT'S REQUEST

The Board reconsider his request to correct his disability retirement rating from 50 percent to 100 percent by including his condition of Post-Traumatic Stress Disorder (PTSD) retroactive to 1978.

RESUME OF THE CASE

The applicant is a medically retired Air Force captain (O-3) who was discharged on 8 Sep 78 because he was found unfit at a 50 percent disability rating due to burns and scars he sustained because of a plane crash in 1976.

On 11 Sep 19, the Board considered and denied his request for an increase in his disability retirement rating due to PTSD. The Board concurred with the rationale of the AFBCMR Medical and Psychological Advisors and found a preponderance of the evidence did not substantiate counsel's contentions. Counsel provided statements from two psychologists who opine the applicant suffered from PTSD during military service and claimed it would have been unfitting for continued military service had PTSD been a diagnosis at this time. The Board found these clinical opinions were not proof of the applicant's mental status at the time of his release from the Temporary Disability Retired List (TDRL) finding it difficult to usurp or invalidate clinical evidence during the applicant's period of service with clinical opinions based upon symptoms reported, and rating decisions made over four decades later. Moreover, the fact that the Department of Veterans Affairs (DVA) assigned the applicant a 70 percent disability rating for PTSD is not proof the ratings underlying these actions are reflective of the applicant's actual functionality at the time of his release from the TDRL in 1978. Furthermore, while counsel questioned whether the Psychiatric and Psychological advisors' opinions comport with Title 10 U.S.C. Section 1552(g), counsel was previously informed all AFRBA mental health advisors met requirements set by law. Finally, counsel asserted there was no indication the advisor writers adhered to the liberal consideration standard. However, the Secretary of Defense issued memoranda providing liberal consideration guidance to military correction boards and the Board was satisfied the application of liberal consideration did not warrant relief.

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 N.

AFBCMR Docket Number BC-2012-00028-3

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On 20 Apr 23, the United States District Court for the Eastern District of *Work-Product* vacated the AFBCMR's September 2019 decision and remanded the applicant's case to the AFBCMR for further consideration in accordance with the Court's memorandum opinion.

The Court found the previous Board's decision arbitrary, capricious, and unsupported by substantial evidence and instructed the AFBCMR to review the evidence presented to determine whether his record should be corrected to include a diagnosis of PTSD with a rating increase retroactive to 1978. He presented a significant amount of evidence, including diagnoses from Doctor J-----, Doctor C-----, and the DVA showing he suffers from chronic PTSD resulting from the plane crash such that he was unfit for service. Furthermore, the Court found the Board should apply liberal consideration, appropriately considering the applicant's contemporaneous service records in light of the Hagel and Kurta Memorandums and the Air Force's failure to have the applicant receive a psychiatric or psychological evaluation in 1978 and evaluate and consider the abundance of evidence showing he suffered from PTSD which contributed to his unfitness at the time of service. The Court found the PEB's failure to consider the applicant's mental health and to evaluate him for the psychological impact of the 1976 plane crash to be a material error and injustice. Furthermore, the Court found it unreasonable for the AFBCMR to rely so heavily on the absence of evidence of mental health symptoms in his record because no evaluation was performed which is the very error he seeks to have corrected.

On 22 Jun 23, the applicant requested reconsideration of his request for an increase in his overall disability rating to 100 percent. He contends, through counsel, the AFBCMR acted arbitrarily and capriciously when it failed to apply liberal consideration and summarily dismissed the opinions of his doctors supporting, he had PTSD in 1978 which rendered him unfit. The applicant presented a significant amount of evidence to support his claim he suffered from PTSD due to the plane crash in 1976 and/or from his service in Vietnam. The Board incorrectly relied on the absence of evidence during service to deny his claim. The Board's mere acknowledgement of the liberal consideration and conclusory statements in its previous decision did not show reasoned decision making or a reasonable application of that standard.

The driving force behind the Hagel, Carson, and Kurta Memoranda was the recognition that PTSD was not a recognized diagnosis in 1978 and mental health conditions were not well understood and were underreported. Liberal consideration was applied because records at the time of discharge often lack substantive information about mental health conditions. Furthermore, the lack of any psychiatric or psychological evaluation performed in 1978 was a material error and injustice. It was noted Doctor J----- and Doctor C----- both recognized in 1978 a psychological or psychiatric assessment was a precondition to the applicant being returned to flying duties and the psychological impact due to the plane crash should had been a contributing factor in his disability rating by the Air Force.

The court documents and the applicant's complete submission are at Exhibits O and P.

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 14 May 24, the Acting Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance, dated 4 Apr 24, to Boards for Correction of Military/Naval Records considering cases involving both liberal consideration discharge relief requests and fitness determinations. As stated in the clarifying guidance, "It is DoD policy that the application of liberal consideration does not apply to fitness determinations, 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)."

AIR FORCE EVALUATION

AFPC/DPFDI recommends denying the applicant's request finding no evidence of an error or injustice during DES processing. There is no indication the applicant's mental health condition rose to the level of unfitting for service prior to DES processing. Furthermore, award of a DVA disability rating for a medical condition or change in diagnosis or rating by the DVA after separation does not warrant change to the original DES determination or ratings after the fact.

Although the FPEB hearing primarily focused on the residual effects of burns/scars, the applicant was asked what would prevent him from performing a desk job in the Air Force, and his answer was limited to the physical effects and discomfort related to his burns and scars. In addition, the applicant had specifically noted that difficulty interacting with customers at his father's business related to their reaction to his scars and did not indicate any other specific interpersonal difficulties. At the end of the hearing, the applicant was asked by his counsel if he had anything else he would like to tell the board, but he declined. There was absolutely no evidence at that time of any mental health symptoms that resulted in significant impairment or prevented him from performing duties as a pilot or an officer. The only evidence presented that PTSD was both present and unfitting at the time of his medical retirement are statements from two psychologists, Doctor C----- and Doctor J-----, whose opinions were obtained to support the applicant's claims in the context of his appeals for increased retirement disability rating, and these were provided nearly four decades after his retirement. Doctor J----- provided a written assessment on 15 Apr 16 after evaluating the applicant; however, does not indicate clinical records were reviewed as part of the evaluation. Doctor J----- stated a psychiatric examination at the time of the PEB and TDRL examinations would have been expected to result in a recommendation for 100 percent disability due to a psychiatric condition, most likely an anxiety disorder. This opinion he had a mental health condition or symptoms warranting a 100 percent disability rating must be considered in light of the definition of this rating, which is "total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. Doctor C----- wrote in her memorandum dated 21 Aug 18, the applicant had been suffering from unfitting PTSD not because of any specific diagnostic label but instead due to the extensive, chronic and persistent psychiatric symptoms that interfered with his ability to carry out his duties (in any capacity). These are clearly inaccurate statements as no reasonable reading of any documentation prior to that allows for the conclusion he was completely debilitated or met criteria for 100 percent disability rating at the time of or following separation from service, and furthermore the applicant demonstrated no evidence of an inability to perform duties related to psychiatric symptoms. Doctor C----- also described specific symptoms including intense distress at the thought of flying in an airplane which would be a symptom congruent with PTSD resulting from his traumatic stressors. However, the applicant's pursuit of a civilian flying career for seven years following medical retirement from the Air Force indicates this description of symptoms cannot be considered accurate, and Doctor C----- 2018 assessment is also contradicted by her earlier clinical documentation. For example, on 8 Sep 09, Doctor C----- noted the applicant reported not being hired by the airlines because of liability concerns related to his medical problems and on 9 Jul 10 documented "initially his anger and sadness stemmed from not feeling useful because no one in the civilian world would give him a job as a pilot after he received a medical discharge from the Air Force." Doctor C----- own documentation generated due to care provided and not submitted as a memo to the AFBCMR indicates the applicant was not unfit to fly due to mental health symptoms but rather he did develop symptomatic worsening due to being unable to fly as a civilian.

Although there is a significant gap in documentation following medical retirement in 1978, available clinical documentation starting in 2002 is not congruent with the more recent psychology

opinions. Chronic symptoms were documented on 30 May 03 during the first mental health care encounter for which documentation is available, but this encounter did not establish or indicate chronic symptoms had been present since 1976 to 1978 and had been unfitting at that time. Subsequent documentation over the intervening years also does not establish that but instead contradicts that assertion. Following medical retirement, he sought employment as a pilot for approximately seven years but was unable to be hired, which he has reported was due to having been found unfit and discharged by the Air Force and due to airlines' concerns around liability due to his medical problems. He did work for a bank from 1986-1993 after retraining to become a real estate appraiser, and he built up his department from one person to a staff of over 25 until ethically questionable behavior by a new bank vice president prompted him to transfer to a different area in the bank, involving assessing the viability of commercial building loans. The applicant has noted he made this department highly profitable and had up to 200 people reporting to him. However, he then left this position after bank officers again engaged in unethical behavior and the bank president did not heed his warnings, and he has described this as a very significant loss. The applicant then continued appraisal work on a self-employed, part time basis for several years.

The applicant has reported seeking care from his primary care internal medicine physician, Doctor L-----, in the 1990s for anxiety while he was working for the bank, and the reported circumstances suggest this was in the context of significant employment-related stress, which led to him leaving that position and which he has described as the third time he lost everything. The records from Doctor L----- were requested for this review but were not available, although they were previously submitted to the DVA on more than one occasion as evidence for his claims. The mental health care records starting in 2003 do reflect the applicant reported depressive and trauma-related symptoms, with the genesis noted as his prior military traumatic experiences related to the plane crash and flying combat missions in Vietnam, and on 30 May 03 the applicant presented to the DVA and reported concerns of worsening depression, and he noted he had been receiving private individual therapy for four years, but those records are also not available. He wished to pursue possible antidepressant medication, noting a trial of desipramine was discontinued three years earlier due to side effects. Celexa was prescribed and at the time of his DVA Compensation and Pension (C&P) evaluation on 30 Jan 04, the examiner noted he was a "basically mentally healthy gentleman" who had benefited significantly from treatment, including from his current medication; the examiner specifically noted as well the "veteran's service-connected injuries apparently caused the cessation of his military career due to difficulties with regulation of body temperature resulting from extensive scarring" but did not document any report from the applicant or any other conclusion PTSD or mental health symptoms had caused or contributed to retirement. If this examination had occurred during the DES, its conclusions would have supported PTSD being found as not unfitting at that time. A subsequent C&P evaluation on 25 Feb 05 documented his significant anger at the low disability rating derived from the prior evaluation and how the applicant reported "increasing obsession and preoccupation with his military traumas, particularly the plane crash" and increased distress related to a Nov 04 plane crash in which another person, who lived near him and whom he knew, survived the plane crash but two crew members and one of this person's sons was killed. The applicant also reported "increased obsessional focus on his military history" and "decreased interest in other activities and decreased enjoyment." Subsequent clinical documentation records other factors contributing to his mental health symptoms, including the death of a good friend in an Apr 11 plane crash as well as other pilots who were his contemporaries and were retiring from lucrative careers, and the applicant's reported symptom

severity and his DVA disability rating increased over time. While the development and/or symptomatic progression of a condition can be evaluated and re-evaluated over time by the DVA under Title 38 law, that subsequent development and/or progression of a disease process would not be compensable under the DES. In addition, factors or incidents that occur when not in military status and which cause or contribute to the development or worsening of a condition would not be compensable under the DES.

The statements from an orthopedic hand surgeon and a plastic surgeon that psychiatric or psychological assessments should be performed prior to return to flight duties cannot in any way be construed as evidence that such an evaluation was warranted in a standard clinical sense or that the applicant would not be expected to be found fit to fly at that time. Rather, these statements must be understood in the context of the Air Force's aeromedical approach to clearance for return to flying duties for an aircrew member who has sustained an illness, injury, disease or exposure sufficient to result in removal from flying duties. In such cases, a relevant evaluation/examination is accomplished prior to clearing the aircrew member to fly, whether following something as simple as a common cold or a more significant illness or injury, including a stressful event such as involvement in an airplane crash with or without any obvious injury. A service member who was already determined as unable to return to flying duties for other reasons would not undergo any such evaluation as it would be an unnecessary use of resources when there is no clinical indication to do so, and the absence of such an examination does not constitute any failure on the part of the Air Force. Furthermore, any such aeromedical examination is not part of the disability evaluation process.

The PEB acknowledges the Department of Defense guidance regarding liberal consideration for cases involving the diagnosis of PTSD. However, the PEB notes this guidance is primarily directed at cases where service members received punitive, legal or administrative action resulting in a less than favorable characterization of discharge and where PTSD or TBI could have contributed to the behavior or conduct that resulted in such discharge without honorable characterization. While the guidance that liberal consideration includes considering a subsequently diagnosed condition as having existed at the time of discharge, the guidance does not require a condition to be found to have been unfitting at the time of separation from military service when there is not sufficient evidence to support such a conclusion or when there is evidence to the contrary. The applicant was retired, and his service was characterized as honorable. There was no problematic behavior or misconduct by the applicant that contributed to his medical retirement, and there is no indication, at the time of retirement, any mental health symptoms or conditions caused or contributed to his unfitness. Rather, the evidence indicates PTSD did not prevent the reasonable performance of duties but progressed over time with exacerbation many years later due to other contributing factors. This principle related to PTSD is no different from that applied to any other physical or mental health condition that may be present at the time of separation from service, whether the member is being reviewed by the PEB or not. For example, a service member may have impaired glucose tolerance or even Type 2 Diabetes mellitus (DM) which is diet controlled, has no complications, and results in no impairment. DM would therefore not be unfitting at the time but would typically be service connected by the DVA. DM frequently progresses over time, requiring medication treatment which gradually becomes more aggressive, progressing from a single oral medication to multiple medications, including insulin and other injectable medication. Multiple complications can develop such as retinopathy, neuropathy and

nephropathy, and DM and its complications can require frequent multispecialty care, and a reevaluation by the DVA would be expected to provide a higher disability rating due to DM and its complications. In addition, that subsequent nature of DM would be incompatible with military service. However, none of that changes the fact that DM was not unfitting at the time of separation from service. The PEB sincerely appreciates the applicant's service and the sacrifices involved and acknowledges his significant traumatic experiences during service. While the PEB acknowledges the foundation for PTSD existed at the time of the applicant's medical retirement, and liberal consideration can allow it to be considered as having been present, there is no evidence symptoms of PTSD were unfitting at that time.

The complete advisory opinion is at Exhibit Q.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Dec 23 for comment (Exhibit R), and the applicant replied on 2 Feb 24. In his response, the applicant contends, through counsel, the advisory opinion from Doctor S----- suffers from the same flaws to which the court rejected the previous advisory opinions. Doctor S----- is a radiologist with no apparent expertise in diagnosing or treating mental health conditions and overlooks the court's instructions as he only focuses on his medical records at the time of his service concluding there was no indication his mental health condition rose to the level of being unfit. The court already found that requiring mental health symptoms to be observed or disclosed at the time of service runs contrary to the DoD's guidance that contemporaneous evidence is not required involving PTSD. Additionally, the advisory opinion fails the court's specific instructions to apply liberal consideration to his records stating the "guidance is primarily directed at cases where service members received punitive, legal or administrative action resulting in a less than favorable characterization of discharge where PTSD . . . could have contributed to the behavior or conduct." The court and the DoD guidance recognizes PTSD as "invisible wounds" that are often not recorded in medical records. Furthermore, the advisory opinion fails to acknowledge the Air Force failed to evaluate him in 1978 for an unfit mental health condition. The court already made a factual finding no mental health evaluation was conducted prior to his discharge. He provided a significant amount of evidence including diagnoses from Doctor J-----, Doctor C-----, and the DVA physicians showing he suffered from PTSD as a result of a plane crash in 1976 and his service in Vietnam. The advisory opinion fails to consider this evidence and dismisses it as being provided after his discharge concluding this evidence cannot be used to determine he suffered from PTSD while in the service.

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, the report provided by the Court order, the applicant’s new evidence, the AFPC/DPFDI Advisory and advisories from the previous case, and the applicant’s response, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board applied the liberal consideration standards to the applicant’s petition and contemplated the many principles outlined in the Kurta and Hagel memos; however, the preponderance of evidence indicates his PTSD was not unfitting at or near the time of separation nor did it impair his ability to reasonably perform his military duties in accordance to his office, grade, rank, or rating even though the foundation for PTSD existed at the time of the applicant’s medical retirement. The Board also considered the additional post-service medical records the applicant submitted specifically noting the statements from two psychologists, Doctor C----- and Doctor J-----, provided four decades later; however, finds these statements not compelling enough to persuade the Board to grant the applicant’s request. The Board acknowledges the applicant was not evaluated for a potential mental health condition due to the plane crash in 1976; however, he was already determined as unable to return to flying duties due to his physical medical conditions and the preponderance of evidence does not indicate the applicant suffered from PTSD to the extent that it impacted his ability to reasonably perform his military duties at the time of his separation. The applicant had an opportunity during the medical board proceedings to present evidence to show he had mental health issues resulting from the plane crash; however, he did not make any contentions at the time of a mental health impact to his fitness for duty and did not start receiving mental health treatment until decades after his separation from the service. The mere existence of a medical diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. A Service member shall be considered unfit when the evidence establishes the member, due to physical or mental health disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. The Board also considered the applicant’s records from the DVA; however, a higher rating by the DVA, based on new and/or current exams conducted after discharge from service, does not warrant a change in the total compensable rating awarded at the time of the member’s separation. 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 time of separation and not based on post-service progression of disease or injury. 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 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-2012-00028-3 in Executive Session on 21 Feb 24:

Work-Product Panel Chair
Work-Product, Panel Member

AFBCMR Docket Number BC-2012-00028-3

Work-Product

Panel Member

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

- Exhibit N: Record of Proceedings, w/ Exhibits A-M, dated 11 Sep 19.
- Exhibit O: Court Documents, dated 20 Apr 23.
- Exhibit P: Application, DD Form 149, w/atchs, dated 22 Jun 23.
- Exhibit Q: Advisory Opinion, AFPC/DPFDI, dated 15 Dec 23.
- Exhibit R: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Dec 23.
- Exhibit S: Applicant's Response, dated 2 Feb 24.

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.

<p>Work-Product</p>	<p>5/30/2024</p>
<p>Board Operations Manager, AFBCMR Signed by: USAF</p>	