

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2017-04753-2

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: No

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. He be medically retired effective 28 Mar 16, with a disability rating of 60 percent.
2. His medical conditions be found as combat-related, as a direct result of armed conflict as defined in 26 U.S.C. 104 combat-related determination.
3. In the alternative, his case be returned for processing through the Integrated Disability Evaluation System (IDES).

RESUME OF THE CASE

The applicant is a former Air Force Reserve major (O-4) who was separated on 28 Mar 16, assigned to the Inactive Status List Reserve Section (ISLRS) and is awaiting retired pay at age 60.

On 27 Mar 19, the Board considered and denied his request to be medically retired with a 60 percent disability rating or be returned to duty for processing through the IDES. The Board concurred with the rationale and recommendation of the AFBCMR Medical Advisor and found a preponderance of the evidence did not substantiate the applicant's contentions to justify relief. Specifically, the AFBCMR Medical Advisor opined there was no impropriety in the consideration of the applicant's case during the IDES process or in his subsequent retirement. Furthermore, it was determined the applicant did not provide any new evidence to support his unfitting condition of sciatica was incurred in the midst of or as a direct result of the combat-related criteria specified in DoDI 1332.18, *Disability Evaluation System*. Additionally, the Air Force discharge disposition and the Department of Veterans Affairs (DVA) determined disability benefits are independent in that conditions service-connected and rated by the DVA are not necessarily the same conditions which prompt a fitness for duty evaluation and subsequent IDES consideration. The mere presence of a medical condition or medical symptoms does not in itself indicate a particular condition is unfitting for duty. Similarly, the history of a condition or symptoms that previously affected the member's duty status does not necessarily indicate the condition is unfitting at the present time. An individual can have a condition that is potentially disqualifying yet not unfitting. The member is subject to the interpretation of the evidence at the

time of their adjudication. 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 24 Sep 21, the applicant filed a complaint in the U.S. Court of Claims alleging the AFBCMR decision was arbitrary, capricious, contrary to law, and not supported by substantial evidence. He contended the decision did not address several arguments he made before the Board; nor did the Board appear to have reviewed relevant evidence he submitted.

On 31 Oct 22, the court remanded the applicant's case to the AFBCMR pursuant to Rule 52.2 of the Rules of the Court of Federal Claims in lieu of an answer to Plaintiff's Complaint, instructing the AFBCMR to evaluate his claims that his radiculopathy and sinusitis either individually or collectively with his other medical conditions rendered him unfit to perform the duties of his office, grade, rank, or rating. In conducting its review, the Board shall, further its proceedings consistent with this opinion:

1. Identify the duties of the applicant's office, grade, rank, or rating that he could reasonably be expected to perform and whether piloting aircraft was among those duties;
2. Review and consider all of the relevant evidence of record regarding the impact of his sinusitis and radiculopathy on his fitness to perform the duties of his office, grade, rank, or rating, including but not limited to the evidence the Court has found the Board decision under review did not address;
3. Determine whether preponderant evidence exists to show his sinusitis and/or radiculopathy, either alone or collectively with other medical conditions, rendered him unfit to perform the duties of his office, grade, rank, or rating;
4. Determine the appropriate rating to be assigned to his unfitting conditions; and
5. Provide a complete explanation of the Board's determinations.

Furthermore, the Court found the following evidence needed to be addressed; the letter from his commander, Lieutenant Colonel N-----, a report from Doctor W----, the Narrative Summary from the Flight Surgeon, and the letter from the Ear, Nose, and Throat (ENT) Doctor Mc-----.

On remand, the plaintiff should be permitted to submit any additional relevant evidence and argument.

On 2 Nov 22, the applicant requested reconsideration of his request for a medical retirement; or in the alternative, be returned to duty for processing through the IDER. The applicant's counsel submitted a cover letter and attached the remand order from the court. No other evidence was submitted. In his original case, the applicant contended the Air Force erred in not finding his sinusitis and radiculopathy of the left leg were not unfitting and/or contributed to his unfitness.

The applicant's complete submission is at Exhibit F.

APPLICABLE AUTHORITY/GUIDANCE

DoDI 1332.18, *Disability Evaluation System (DES)*, Appendix 5 to Enclosure 3, “Combat Related” covers injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A disability is considered combat-related if it makes the member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances; as a direct result of armed conflict; while engaged in hazardous service; under conditions simulating war; or caused by an instrumentality of war. Armed conflict is defined as a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which service members are engaged with a hostile or belligerent nation, faction, force, or terrorist.

AIR FORCE EVALUATION

The Secretary of the Air Force Personnel Council (SAFPC) recommends partially granting the applicant’s request for a medical retirement correcting his record to show he was not transferred to the Inactive Status List Reserve Section (ISLRS) on 28 Mar 16, but was instead permanently retired for physical disability for conditions of Intervertebral Disc Syndrome and Recurrent Sprain, Lumbosacral Spine and Radiculopathy, Left Lower Extremity, with a combined compensable disability rating of 40 percent. However, SAFPC does not recommend his records be corrected to reflect his sinusitis was unfitting, nor do they recommend his records be corrected to reflect any of his conditions were combat-related.

The applicant’s entire case file (e.g., original case before the AFBCMR, records related to his disability processing, appeals, and determinations, original AFBCMR Medical Consultant Advisory, submissions by the applicant and his counsel, and the remand order) was thoroughly reviewed in preparing this opinion. The following is provided in response to the Court’s specific questions in the remand:

1. Identify the duties of the applicant’s office, grade, rank, or rating he could reasonably be expected to perform and whether piloting aircraft was among those duties;

Response: The applicant’s office, grade, rank, or rating at the time of his discharge related to administrative duties. The applicant was not assigned to flying duties during the events in question. The applicant’s primary argument is the Formal Physical Evaluation Board (FPEB) and SAFPC erred when they focused on the applicant’s ability to perform administrative duties in determining whether certain conditions rendered him unfit for military service. However, the FPEB and SAFPC determinations were not erroneous. At the time the applicant was found unfit for continued service, he was assigned to a non-flying position with the Air Force Reserve. Because he occupied a non-flying position, the determination as to whether he was unfit to his office, grade, rank, or rating rightfully did not relate to flying duties, but related to his permanent non-flying duties. AFI 48-123, *Medical Examination and Standards*, paragraph 3.1.5, explicitly states inactive flyers do not need to maintain Flying Class II standards, which are foundational to assessment of a fit/unfit state.

2. Review and consider all the relevant evidence of record regarding the impact of the applicant's sinusitis and radiculopathy on his fitness to perform the duties of his office, grade, rank or rating, including but not limited to the evidence the Court has found the Board decision did not address;

Response:

a. Radiculopathy. The objective evidence presented is sufficient to conclude the applicant's radiculopathy was unfitting by virtue of combined effect. Per DoDI 1332.18, paragraph 6.4.d, combined effect includes the pairing of a singularly unfitting condition with a condition that standing alone would not be unfitting. Germane to this case, medical principles exist to establish a close clinical relationship between the applicant's unfitting spine pathology and the radiculopathy. Specifically, the arthritis or inflammation occurring in the back is the direct cause of the nerve irritation a.k.a. radiculopathy. Over and above this direct causal relationship, combined effect can be applied to this case because the radiculopathy complicates treatment options and plans. Logistically, the applicant will need to see an orthopedic specialist more frequently than if back pain was his sole issue. This accentuates the burden upon the Government to protect the service member. Orthopedics also must consider a more complex set of treatment options due to the complicating presence of radiculopathy as compared to if it were absent. Utilization of combined effect, as justified by the above rationale, is appropriate.

b. Sinusitis. Insufficient evidence exists to conclude the applicant's sinusitis was unfitting. While the applicant presented additional medical documentation related to this condition, the totality of the evidence is not sufficient to conclude his sinusitis is individually unfitting. First, while the applicant argues this condition renders him unfit for flying duties, for the reasons noted above, the duties of the applicant's office, grade, rank, or rating did not require flying. His duties were administrative in nature and while the evidence presented indicates regular visits to a doctor for management of the condition, the condition was not so severe as to preclude him from satisfactory performance of his military duties, which did not include flying. While the medical documentation indicates regular treatment of this condition could result in some missed duty, this condition, by itself, was not so severe it would have caused the premature termination of the applicant's military career.

3. Determine whether preponderant evidence exists to show the applicant's sinusitis and/or radiculopathy, either alone or collectively with other medical conditions, rendered him unfit to perform the duties of his office, grade, rank, or rating;

Response: For the reasons noted above, SAFPC believes the evidence is sufficient to conclude the applicant's radiculopathy is unfitting. However, they do not find a preponderance of the evidence indicates his sinusitis is unfitting.

4. Determine the appropriate rating to be assigned to the applicant's unfitting conditions;

Response: Should the Board agree with our recommendation the applicant should have been found unfit for only conditions of Intervertebral Disc Syndrome and Recurrent

Sprain, Lumbosacral Spine and Radiculopathy, Left Lower Extremity, then the applicant's assigned disability ratings should have been assigned as follows: (1) Intervertebral Disc Syndrome and Recurrent Sprain, Lumbosacral Spine at 20 percent and (2) Radiculopathy, Left Lower Extremity at 20 percent.

COMBAT RELATION: The applicant argues his back pain and radiculopathy are combat-related. However, the evidence is insufficient to conclude either condition is combat-related. For a condition to be combat-related, DoDI 1338.18, paragraph 10.2.8 delineates it must be incurred under one of the following circumstances: (1) as a direct result of armed conflict, (2) while engaged in hazardous service, (3) under conditions simulating war, or (4) caused by an instrumentality of war.

The preponderance of evidence does not support either condition as meeting this criteria. First, no direct causal relationship is established by the evidence. Stated alternatively, the applicant provides no clear nexus to demonstrate how or when hazardous service or instrumentality of war spurred the contended conditions. Established medical principles would assign higher probability to the myriad alternative causes for his back pain and nerve irritation. The evidence that is presented ranges from anecdotal to speculative and is insufficient to compel a conclusion that the back pain or radiculopathy is more likely than not to have resulted from combat-related military service as defined by DoDI 1338.18. SAFPC notes the input of the applicant's commander who is also an experienced F-16 pilot. While not diminishing the commander's observations over decades of flying fighter aircraft, the nature of the evidence put forth is anecdotal and bears little clinical weight when seeking to connect high performance flight and spinal pathophysiology. There is greater significance to be drawn from the input of his orthopedic physician, Doctor W--- who identifies as having robust experience with pilots and high-performance aircraft. His strongest remarks are oriented toward the dynamic effect of flight on the intermittent presentation of the applicant's radiculopathy. The doctor also notes trends of spinal pathophysiology in fighter aircraft pilots but, the information provided is anecdotal and not sufficient to conclude there is a direct causal nexus between combat-related duties and his unfitting conditions.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 17 Jan 23 for comment (Exhibit I), and counsel on behalf of the applicant replied on 20 May 23. In his response, both counsel and applicant agree with the advisory opinion granting him a 40 percent medical retirement, but disagree his sinusitis was not unfitting. Furthermore, the applicant argues his office, grade, rank, or rating does require flying and his unfitting back and radiculopathy are combat-related.

In support of his position, the applicant states as an F-16 pilot, being unable to fly impacts the duties of his office, grade, rank, and rating. He also argues the advisory opinion on this issue contradicts statute, service regulations, and long-standing case law on the issue of fitness. A fighter pilot's duties consist of piloting fighter aircraft and commanding crews to accomplish

combat, training, and other missions. Furthermore, he was expected to maintain an aeronautical rating as a pilot because he was receiving Aviation Career Incentive Pay. Although his sinusitis did not affect his administrative duties, it did affect his flying duties as he was unfit for mobility status making him no longer qualified to fly as a rated pilot. This condition should be found as unfit with a disability rating of 30 percent since he had three or more incapacitating episodes per year of sinusitis and rhinitis causing recurrent duties not involving flying (DNIF) for prolonged periods. Furthermore, his commander recommended him for non-retention concluding the applicant is unfit for further military duty, both as a pilot and as a non-flyer given his sinus conditions and his service-connected back issues which significantly restricted his mobility. Finally, the applicant argues the Board needs to consider the combined effect of the applicant's sinusitis and sleep apnea.

The applicant argues there is no requirement for an acute injury to find that a disability is the direct result of hazardous duty, training for combat, or an instrumentality of war. The applicant admits it is true an acute injury provides an easier analysis showing the nexus between one of the combat-related categories and a disability; however, he argues this does not mean cumulative and repeated stresses caused by flying an F-16 do not qualify. The applicant states he had acute complaints of back pain after flying his F-16. The applicant argues the advisory opinion dismisses the argument his back and radiculopathy disabilities are combat-related by stating they are based on anecdotal and speculative statements but the same argument can be made about the advisory opinion's statement that "Established medical principles would assign higher probability to the myriad alternative causes for his back pain and nerve irritation." He takes issue with the advisory opinion, believing that it states this in a conclusory manner and fails to identify what "established medical principles" show this. The applicant argues unless the Board can cite these principles and explain how they apply to his disabilities, then the Board must reject this argument. The applicant states the advisory opinion's statement of a "myriad of alternative causes" for his disabilities could not be a clearer example of speculation. Again, the applicant takes issue with the advisory opinion, suggesting it does not even bother to provide a single alternative explanation to many years and more than a thousand flight hours in an F-16 being the direct cause of his disabilities. The applicant states he was in excellent health at the start of his career and over the course of about 15 years and more than a thousand hours of flight duties as an F-16 pilot, he incurred back and radicular pain disabilities. The only explanation for these injuries in this case is the evidence showing they were incurred as a direct result of flying the F-16. The applicant argues the Board should correct his records to show these disabilities are combat-related.

The applicant's complete response is at Exhibit J.

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 remand order, the applicant's new evidence, the AFBCMR and AFPC Medical Advisories, and the applicant's response, the Board concludes the applicant is the victim of an error or injustice finding a preponderance of the

evidence substantiates the applicant's contentions, in part. Specially, the Board finds evidence to support granting a medical retirement with an overall disability rating of 40 percent, (radiculopathy, left lower extremity rated at 20 percent and Sciatica, IDS rated at 20 percent). The applicant's unfitting radiculopathy warrants a 20 percent disability rating based on the Veterans Affairs Schedule for Rating Disabilities (VASRD) code of 8520. Under Diagnostic Code 8520, incomplete paralysis is assigned ratings between 10 to 60 percent, depending on the severity of the condition with a 60 percent being assigned for severe paralysis with marked muscular muscle atrophy; a 40 percent rating for moderately severe paralysis; and a 20 percent rating for moderate paralysis. The Board noted the DVA's decisions, dated 19 Feb 15 and 18 Mar 15, rating the applicant's radiculopathy, left lower extremity as 20 percent disabling with an evaluation assigned for moderate incomplete paralysis below the knee noting a higher rating was not warranted unless evidence showed moderately severe paralysis and with the likelihood of improvement, the assigned evaluation was not considered permanent and was subject to a future review examination. Further, the Board notes the report from Doctor W---- and the Narrative Summary from his Flight Surgeon discussing his range of motion of his left radiculopathy which supports the DVA findings and determined this condition warrants relief at the 20 percent disability rating.

However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. Specifically, the Board finds the preponderance of evidence does not support his sinusitis was unfitting, either alone or collectively with his other medical conditions. The Board notes the comments from Lieutenant Colonel N----- regarding the applicant's neck and back issues and how they affected his flying position; however, he was not assigned to flying duties at the time of his disability processing but was assigned to a non-flying position as a traditional reservist since 2012, which included administrative duties such as developing plans and policies, monitoring operations, and coordinating squadron activities. The Board finds it was not unreasonable for the applicant to be assigned to a non-flying position nor was it career ending when he was removed from flying duties, especially since he had been assigned to this position for approximately four years prior to his separation. The determination as to whether he was unfit to reasonably perform the duties of his office, grade, rank, or rating did not relate to flying duties, but related to his permanent non-flying duties. Additionally, the Board notes the comments from Lieutenant Colonel N----- regarding his deployability with regards to his difficulties sitting and standing at a desk and agrees his neck and back issues rendered him unfit for continued military service. The Board further notes the comments from his ENT specialist, Doctor Mc----- regarding the applicant's chronic allergy problems, recurring sinus infections, and sleep apnea and how they affected his flying position with an opinion made of how they could still affect his current non-flying job; however, the Board finds insufficient evidence to suggest these conditions were unfit to the level he was unable to reasonably perform his non-flying duties. While the Board agrees his neck and back issues prevented deployment, there was no indication his sinusitis alone prevented deployment.

Furthermore, the Board did not find any of his medical conditions as combat-related as a direct result of armed conflict; while engaged in hazardous service; under conditions simulating war; or caused by an instrumentality of war. No direct causal relationship was established between combat-related duties and his unfitting conditions that demonstrated how or when hazardous

service or instrumentality of war spurred the contended conditions. The Board finds the evidence is anecdotal and speculative and is insufficient to compel a conclusion to find his back pain or radiculopathy as combat-related as a direct result of armed conflict; while engaged in hazardous service; under conditions simulating war; or caused by an instrumentality of war. Finally, the burden of proof is placed on the applicant to provide compelling evidence to support his claim his injuries were combat-related, and the Board finds there are many possible causes for the injuries that made him unfit for continued military service. Without compelling evidence to consider, the Board will not speculate how, when, and where they may have occurred.

RECOMMENDATION

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

- a. On 12 January 2016, he was found unfit to perform the duties of his office, rank, grade, or rating by reason of physical disability, incurred while he was entitled to receive basic pay; the diagnosis in his case was radiculopathy, left lower extremity, under the Veterans Affairs Schedule for Rating Disabilities (VASRD) code 8520, rated at 20 percent; when combined with his initial disability rating of 20 percent due to Sciatica, Intervertebral Disc Syndrome (IDS); DVA rated as IDS and recurrent sprain, lumbosacral spine, results in a combined [not added] disability rating of 40 percent. It is noted the degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during a period of unauthorized absence; and the disability was not as a direct result of armed conflict or caused by an instrumentality of war and was not combat-related.
- b. On 28 March 2016, he was discharged from the Air Force Reserve and on 29 March 2016, he was permanently retired with a compensable percentage for physical disability of 40 percent.
- c. His election of the Survivor Benefit Plan option will be corrected in accordance with his expressed preferences and/or as otherwise provided for by law or the Code of Federal Regulations.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

CERTIFICATION

The following quorum of the Board, as defined in the 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-2020-01378-2 in Executive Session on 22 Mar 23 and 21 Aug 23:

, Panel Chair
, Panel Member
, Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 27 Mar 19.

Exhibit F: Letter to BCMR from Applicant, w/atchs, dated 2 Nov 22.

Exhibit G: Court of Federal Claims Remand Order, dated 31 Oct 22.

Exhibit H: Advisory Opinion, SAFPC, dated 16 Jan 23.

Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Jan 23.

Exhibit J: Applicant's Response, w/ atchs, 20 May 23.

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.

X

Board Operations Manager, AFBCMR