

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03071

XXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel record be amended to reflect placement on the Permanent Disability Retired List (PDRL), with medical retirement and full back pay, effective 2 Mar 07.

APPLICANT'S CONTENTIONS

Per counsel, the applicant served on active duty in the United States Air Force from 28 Jan 03 to 1 Mar 07. He was processed through the military's Disability Evaluation System (DES) and, in 2007, a Formal Physical Evaluation Board (FPEB) found his left knee condition unfitting and assigned a 20 percent disability rating. The FPEB properly found the applicant's left knee unfitting, but erroneously assigned a 20 percent rating for his left knee because the FPEB rated only one left knee condition – chronic left knee pain status-post anterior cruciate ligament (ACL) repair and revision – rather than rating all four medical conditions associated with his left knee: (1) status post multiple ACL reconstructions with residuals of degenerative joint disease and bursitis – left knee; (2) status post-surgical scars – left knee; (3) knee instability – left knee; and (4) major depressive disorder associated with status post multiple ACL reconstructions with residuals of degenerative joint disease and bursitis. On 1 Mar 07, he was discharged with severance pay.

On 16 Aug 06, an AF IMT 618, *Medical Board Report*, was generated and directed referral to the Informal Physical Evaluation Board (IPEB) for processing. As part of the Medical Evaluation Board (MEB) and PEB processing, a Narrative Summary was drafted. On 29 Sep 06, the IPEB found the applicant unfit, assigned a 10 percent rating for his left knee condition, and recommended discharge with severance pay. On 5 Oct 06, the applicant did not concur with the IPEB findings and demanded a hearing at the FPEB. An addendum was made to the Narrative Summary on 1 Dec 06. On 4 Jan 07, the FPEB found the applicant unfit, assigned a 20 percent disability rating for his left knee condition and recommended discharge with severance pay. In contrast to the IPEB, the FPEB characterized the left knee condition as moderate and assigned a 20 percent disability rating. On that same day, the applicant agreed with the FPEB findings and recommendations. He was separated due to disability on 1 Mar 07.

On 30 Apr 07, the applicant filed an initial Department of Veterans Affairs (DVA) claim, and between 1 Nov 07 and 17 Mar 08, was granted service-connection for multiple conditions. On 26 Oct 18, the DVA increased the rating for his major depressive disorder to 70 percent, effective 13 Aug 18. The applicant's combined disability rating was 80 percent, effective 13 Aug 18, and 90 percent, effective 21 Aug 18. On 4 Sep 19, the DVA granted service-connection for status post-surgical underlying soft tissue scar – left knee, and assigned a 0 percent disability rating, effective 3 Jul 19. The DVA granted Individual Unemployability and eligibility to Dependents' Educational Assistance due to the knee issues and Post-Traumatic Stress Disorder (PTSD), on 16 Oct 19, with an effective date of 3 Jul 19. Finally, on 14 Jun 21, the DVA granted an earlier effective date of 13 Aug 18 for Individual Unemployability and eligibility to Dependents' Educational Assistance due to the knee issues and PTSD. DVA also granted special monthly compensation based on housebound criteria.

In support of his contentions, counsel details excerpts from DES processing guidance found in Department of Defense Instruction (DoDI) 1332.38, *Physical Disability Evaluation* (dated 14 Nov 96, Incorporating Change 1, 10 Jul 06), Air Force Instruction (AFI) 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, dated 2 Feb 06, and AFI 48-123, *Medical Examinations and Standards*.

The applicant was discharged with severance pay after referral into the Air Force DES. Air Force members are entitled to DES referral and processing when a medical condition interferes with performance of military duties. As part of the DES processing, a service member is to be evaluated for all medical conditions that may preclude continued military service. The applicant was properly referred into the DES. Both the IPEB and FPEB determined he was unfit for continued military service because of his left knee; however, both the IPEB and FPEB failed to consider and rate all conditions associated with his left knee. Had all conditions been properly rated, the applicant would have been found unfit, assigned a 30 percent or higher rating, and placed on the PDRL. The applicant was not made aware of the error committed in 2007. That error occurred in part because he was not counseled by an attorney about the FPEB results when he was on active duty. He did not discover this error until he applied for unemployability benefits with the DVA. In 2021, his attorney uncovered the error when the applicant was granted an earlier effective date for individual unemployability with a permanent and total identifier. He now timely requests relief.

The presumption of regularity attaches to administrative actions and presumes administrative actions and documentation have been completed correctly. Here, the overwhelming preponderance of evidence shows the MEB, IPEB, and FPEB failed to follow DoD and Air Force instructions. Had the Air Force followed procedure, the applicant would have warranted a medical retirement and placement on the PDRL.

DoDI 1332.38 required referral to an MEB because of a left knee condition and conditions associated with his left knee. On 2 Aug 06, the Narrative Summary details a three-year left knee history including left knee surgery, left knee pain, left knee instability, and depression associated with the left knee. The MEB referred the applicant to the IPEB for chronic left knee pain. The IPEB convened on 26 Sep 06 and determined there was one unfitting or Category I condition – chronic left knee pain, status-post ACL repair and revision. The IPEB assigned Veterans Affairs Schedule for Rating Disabilities (VASRD) Code 5257 and a 10 percent disability rating; however, did not consider other VASRD Codes related to his left knee. Specifically, the IPEB failed to consider: (1) 5010-5260 (formerly 5003) status post multiple ACL reconstructions with residuals of degenerative joint disease, bursitis, and minor chondromalacia knee; (2) 7804 status post-surgical painful scar, knee associated with status post multiple ACL reconstructions with residuals of degenerative joint disease, bursitis, and minor chondromalacia; and (3) 9434 major depressive disorder associated with status post multiple ACL reconstructions with residuals of degenerative joint disease and bursitis.

On 1 Dec 06, an addendum was included in the Narrative Summary and the FPEB convened on 4 Jan 07. The FPEB again assigned VASRD 5257 but increased the rating to 20 percent for the applicant's left knee, again failing to consider the VASRD Codes noted above. The applicant accepted the FPEB's findings and recommended disposition by signing the AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*; however, this form is dated the same day as the FPEB and does not contain any indication the applicant was counseled by an attorney before making his election. The document is signed by the applicant and the Chief, Disability Law. There is no evidence the Chief, Disability Law is an attorney, and if they were an attorney, it is hard to imagine the applicant was advised properly of his options. It is clear from the record he desired a medical retirement due to his left knee condition, but the assigned 20 percent rating would not result in retirement. Had the applicant been advised of his

rights to appeal the FPEB results and counseled about the FPEB's deficiencies in failing to rate his other left knee conditions, he would not have accepted the FPEB's decision.

Effective 2 Mar 07, the day after his discharge, the DVA rated the applicant 10 percent under VASRD Code 5010-5260 for his left knee, 10 percent under VASRD Code 7804 for his left knee, and 30 percent under VASRD Code 9434 for depression related to his left knee conditions. Therefore, we know what rating a PEB would have assigned for his other left knee conditions at the time per the VASRD had the PEB found them unfitting or Category I conditions. Those ratings, combined, amount to 30 percent or greater; whereby, the applicant's left knee conditions that precluded military service warranted a medical retirement.

The applicant's knee condition was stable at the time of discharge. He had multiple knee surgeries and his knee had recovered to a point despite failed surgery. His knee conditions were of a permanent nature and would not improve. This is evidenced by his medical records since discharge in 2007 and his current DVA ratings for those conditions. His DVA ratings have remained the same or increased for each of his left knee conditions. Those ratings never decreased; whereby we know applying the VASRD Codes, no PEB would have assigned a rating less than 30 percent. Therefore, placement on PDRL was proper in 2007; or in the alternative, placement on the Temporary Disability Retired List (TDRL) in 2007, and then placement on the PDRL in 2012.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an honorably discharged Air Force senior airman (E-4).

On 7 Jun 06, according to AF IMT 348, *Line of Duty Determination*, the applicant's left- and right-knee pain existed prior to service. Due to service aggravation, his condition was found to be in the line of duty (ILOD).

On 7 Aug 06, according to AF IMT 618, the applicant was diagnosed with chronic left knee pain and referred to the IPEB.

On 29 Sep 06, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Informal)*, the applicant was found unfit because of physical disability and diagnosed with the following:

- Category I – Unfitting Conditions Which are Compensable and Ratable:
 - Chronic Left Knee Pain, Status-Post ACL Repair and Revision; Incurred while entitled to receive basic pay; ILOD; VASRD Code: 5257; 10 percent disability rating

On 5 Oct 06, according to AF IMT 1180, the applicant did not agree with the findings and recommended disposition of the IPEB and demanded a formal hearing of the case.

On 4 Jan 07, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Formal)*, the applicant was found unfit because of physical disability and diagnosed with the following:

- Category I – Unfitting Conditions Which are Compensable and Ratable:
 - Chronic Left Knee Pain, Status-Post ACL Repair and Revision, Moderate; Incurred while entitled to receive basic pay; ILOD; VASRD Code: 5257; 20 percent disability rating

On 4 Jan 07, according to AF IMT 1180, the applicant acknowledged having been advised of the legal results of the findings and recommended disposition of the PEB (as indicated on the AF Form 356), and the applicable case processing procedures and appeal rights, and he agreed with the findings and recommended disposition of the FPEB. He also acknowledged understanding that upon review by a Special Assistant to the Secretary of the Air Force Personnel Council (SAFPC), his case may be referred to the SAFPC for further review and final decision.

On 12 Jan 07, according to an HQ AFPC/DPPD memorandum, Subject: *Physical Evaluation*, the Secretary of the Air Force directed the applicant be separated from active service for physical disability under the provisions of Title 10, United States Code § 1203 (10 USC § 1203), with severance pay computed under Section 1212 of this title.

On 1 Mar 07, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was furnished an honorable discharge, with Narrative Reason for Separation: Disability, Severance Pay.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

AIR FORCE EVALUATION

AFPC/DPFDF recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice during DES processing.

The applicant contended the FPEB erred by only rating one left knee condition – chronic left knee pain status-post ACL repair and revision, rather than rating four medical conditions associated with his left knee. The four listed medical conditions are: (1) status post multiple ACL reconstructions with residuals of degenerative joint disease and bursitis – left knee; (2) status post-surgical scars – left knee; (3) knee instability – left knee; and (4) major depressive disorder associated with status post multiple ACL reconstructions with residuals of degenerative joint disease and bursitis.

The Air Force and the DVA disability systems operate under separate laws. Under the Air Force system (10 USC) the PEB must determine whether an airman's medical condition renders them unfit for continued military service relating to their office, grade, rank, or rating. To be unfitting, the condition must be such that it alone or collectively with other conditions precludes the member from fulfilling their military duties. The PEB then applies the disability rating provided by the DVA and best associated with the level of disability at the time of disability processing. That rating determines the final disposition (discharge with severance pay, placement on the TDRL, or permanent retirement) and is not subject to change after the service member has separated. Under the DVA system (38 USC), the member may be evaluated over the years and their rating may be increased or decreased based on changes in the member's medical condition at the current time. 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. Additionally, in accordance with the Air Force Instruction in place at the time (AFI 36-3212, dated 2 Feb 2006, paragraph 1.9.), "the Air Force may only rate those conditions which make a member unfit for continued military service."

The applicant requested the FPEB rate four conditions associated with his left knee. The PEB process determined the first condition (status post multiple ACL reconstructions with residuals of degenerative joint disease and bursitis – left knee) was unfitting and therefore, applied the DVA rating for that condition (rated by the FPEB as "Chronic Left Knee Pain, Status-Post ACL Repair

and Revision, Moderate”). He asked for addition of a DVA rating for “status post-surgical scars.” There is no evidence, provided by the applicant nor in the case file, which indicates the post-surgical scars impact his ability to reasonably perform the duties of his office, grade, rank or rating (the definition of fitness). He also asked for addition of a DVA rating for “knee instability – left knee.” This condition was reviewed as part of the PEB process; however, the medical record excerpt in the case file and the FPEB AF Form 356 both note “mild instability” of the knee. None of the records indicate instability of the knee to a level of severity that would have rendered the applicant unfit for continued military service. Additionally, the applicant asked for addition of a DVA rating for “major depressive disorder associated with status post multiple ACL reconstructions with residuals of degenerative joint disease and bursitis.” While the medical record does list depression in the medical history, there is no evidence the condition was unfitting. Nor was the applicant subjected to an MEB for his mental health, which means it never crossed the threshold of being unfitting while he was on active duty. Further, the applicant, through his counsel, contended, “he was not counseled by an attorney about the FPEB results when he was on active duty.” We rely on the Air Force Board for Correction of Military Record’s history and knowledge of PEB processes to acknowledge the checks and balances to ensure the person who signed the AF Form 1180, Block III as “Chief, Disability Law” is in fact, a qualified attorney. It should be noted, based on advice of counsel, the applicant did not identify any additional unfitting conditions, nor did he appeal the FPEB decision, both as per the AF Form 1180 he signed, accepting the FPEB’s findings.

Finally, although the DVA rated other conditions, those conditions were not considered unfitting at the time the applicant met his IPEB and FPEB, and there is no evidence provided which calls their determination into question. Additionally, the DVA service-connected several other medical conditions throughout the years following the applicant’s separation for which he was not boarded by the PEB, and there is no indication these conditions were severe enough to be considered unfitting by DoD standards for DES processing. Lastly, award of a DVA disability rating for a medical condition or change in diagnosis or rating by the DVA after separation does not in and of itself warrant a change to the original DES ratings after the fact.

The complete advisory opinion is at Exhibit C.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Nov 23 for comment (Exhibit D) but has received no response.

FINDINGS AND CONCLUSION

1. The application was not timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DPFDF and finds a preponderance of the evidence does not substantiate the applicant’s contentions. There is no evidence the additional left knee conditions noted by the applicant were unfitting, preventing him from performing the duties of his office, grade, rank or rating. Further, the applicant was afforded due process, via the Air Force DES, through review by the IPEB and FPEB. While the applicant contends he was not counseled regarding the findings of the FPEB, he acknowledged, by signing the AF Form 1180, that he was advised of the legal results of the findings and recommended disposition of the PEB (as indicated on the AF Form 356), and the applicable case processing procedures and appeal rights, and he agreed with the findings and recommended

disposition of the FPEB. Additionally, award of a DVA disability rating for a medical condition or change in diagnosis or rating by the DVA after separation does not in and of itself warrant a change to the original DES rating after the fact. Therefore, the board recommends against correcting the applicant's records. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by 10 USC § 1552, and Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. While the applicant asserts a date of discovery within the three-year limit, the Board does not find the assertion supported by a preponderance of the evidence. The Board does not find it in the interest of justice to waive the three-year filing requirement and finds the application untimely.

RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-03071 in Executive Session on 18 Jun 24:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 7 Aug 23.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DPFDF, w/atchs, dated 16 Nov 23.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Nov 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.

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Board Operations Manager, AFBCMR