

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2024-01364

XXXXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

His official military personnel records be amended to reflect a medical retirement vice a medical discharge.

### **APPLICANT'S CONTENTIONS**

He is requesting his medical discharge in 2012 be upgraded to a medical retirement based off newly acquired information he found on DFAS.mil. He recently read a service member who separates before 20-years of service with a more than 30 percent disability rating should qualify for a medical retirement. If the applicant had a rating below 30 percent, it should be a separation. The applicant contends he has been rated at 60 percent since his separation in 2012, so he should have been medically retired.

It has never been updated or changed since the beginning of the Physical Evaluation Board (PEB) process, so the medical retirement should have happened at that stage. This option was never communicated, so he was unaware of this. The applicant feels in 2012 he was rushed to get out and was not provided time and resources to be given a chance to be knowledgeable of his benefits as a 15-year veteran because he was a career airman. The applicant also feels the PEB system gave him the decision and he was not provided any other information, or resources for other options. His lack of knowledge in this matter is why it has taken so long for him to work with the Board to correct this.

The applicant contends the manner in which he was forced out of the military, and the seemingly new PEB process left him to accept the decision to be separated with zero knowledge of the information found at DFAS.mil. Resources were difficult to come by in the civilian world, and his Transition Assistance Program course did not focus much in regard to the PEB and what he needed to know. Learning this now is unfortunate. The applicant hopes present and future airmen are afforded better access to the information, and also hopes the Board can consider his request based on the facts provided and the valid reasoning behind his delayed request.

The applicant's complete submission is at Exhibit A.

### **STATEMENT OF FACTS**

The applicant is an honorably discharged Air Force technical sergeant (E-6).

On 15 Sep 11, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with:

- Chronic Knee Pain; Incurred While Entitled to Basic Pay: Yes; Existed Prior to Service: No; Permanently Aggravated by Service: No.
- Obstructive Sleep Apnea; Incurred While Entitled to Basic Pay: Yes; Existed Prior to Service: No; Permanently Aggravated by Service: No.

The applicant was referred to the informal PEB (IPEB).

On 21 Oct 11, 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:

- Category I – Unfitting Conditions Which Are Compensable And Ratable:
  - Chronic Right Knee Pain; Incurred While Entitled to Receive Basic Pay: Yes; Line of Duty: Yes; Combat-Related Determination as Defined in Title 26, United States Code § 104 (26 USC § 104): No.

- Category II – Conditions That Can Be Unfitting But Are Not Currently Compensable or Ratable:
  - Obstructive Sleep Apnea

The IPEB remarked this was an Integrated Disability Evaluation System (IDES) case and would be finalized upon receipt of ratings from the Department of Veterans Affairs (DVA).

On 8 Nov 11, according to a DVA DES Proposed Rating, the following evaluations were provided for DES purposes:

- A 10 percent evaluation is proposed for limited flexion due to right knee degenerative joint disease status post surgery for right patellar fracture (PEB referred as chronic right knee pain).
- A 10 percent evaluation is proposed for limited extension due to right knee degenerative joint disease status post surgery for right patellar fracture to include surgical scar (PEB referred as chronic right knee pain).

The combined evaluation for proposed disabilities for DES rating is 20 percent.

According to this same document, the DVA, for the purposes of entitlement to DVA benefits, proposed establishment of service-connection for Obstructive Sleep Apnea as directly related to military service with a 50 percent evaluation.

On 1 Dec 11, according to AF Form 356, the applicant was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Conditions Which Are Compensable And Ratable:
  - Limited Flexion Due to Right Knee Degenerative Joint Disease Status Post Surgery for Right Patellar Fracture; Incurred While Entitled to Receive Basic Pay: Yes; Line of Duty: Yes; Disability Compensation Rating: 10 percent; Veterans Administration Schedule for Rating Disabilities (VASRD) Code: 5260-5010; Combat-Related Determination as Defined in 26 USC § 104: No.
  - Limited Extension Due to Right Knee Degenerative Joint Disease Status Post Surgery for Right Patellar Fracture to Include Surgical Scar; Incurred While Entitled to Receive Basic Pay: Yes; Line of Duty: Yes; Disability Compensation Rating: 10 percent; VASRD Code: 5010-5261; Combat-Related Determination as Defined in 26 USC § 104: No.

- Category II – Conditions That Can Be Unfitting But Are Not Currently Compensable Or Ratable:
  - Obstructive Sleep Apnea; VASRD Code: 6847.

The IPEB recommended Discharge With Severance Pay (DWSP) with a compensable percentage of 20 percent.

On 12 Dec 11, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the findings and recommended disposition of the IPEB and waived the right to a formal PEB hearing.

According to an AFPC/DPSD memorandum, Subject: Physical Evaluation – [applicant], dated 12 Dec 11, the Secretary of the Air Force directed the applicant be separated from active service for physical disability under the provisions of 10 USC § 1203, with severance pay computed under Section 1212 of this title.

On 28 Jan 12, the applicant was furnished an honorable discharge with narrative reason for separation of Disability, Severance Pay, Non-Combat (Enhanced), and was credited with 15 years, 8 months, and 21 days active service.

On 5 Apr 22, according to a DVA summary of benefits letter, provided by the applicant, he was granted a combined service-connected evaluation of 60 percent, with an effective date of 1 Dec 21.

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

## **AIR FORCE EVALUATION**

AFPC/DPFDD 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 IPEB correctly assigned a 20 percent disability rating for IDES purposes as assigned by the DVA which resulted in a DWSP in accordance with Department of Defense (DoD) rules. The DVA's higher total combined rating of 60 percent has no bearing on this decision since it also takes into account other claimed conditions and can fluctuate throughout the years based on current examination of all service-connected conditions.

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 precludes the member from fulfilling their military duties. The PEB then applies the rating best associated with the level of disability at the time of disability processing. That rating determines the final disposition (DWSP, placement on the temporary disability retired list, 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.

On 1 Dec 11, the IPEB found the applicant unfitting for: (1) Limited Flexion Due to Right Knee Degenerative Joint Disease Status Post Surgery for Right Patellar Fracture; and (2) Limited Extension Due to Right Knee Degenerative Joint Disease Status Post Surgery for Right Patellar Fracture to Include Surgical Scar, and recommended DWSP with a 20 percent compensable disability rating. The IPEB placed his Obstructive Sleep Apnea in Category II – Conditions That Can Be Unfitting But Are Not Currently Compensable Or Ratable, and provided the following note in Block 15 of the AF Form 356 to explain its rationale for this decision, "The SM (Service Member) was diagnosed with Obstructive Sleep Apnea that is treated with CPAP (Continuous

Positive Airway Pressure), and is doing well with current pressures of 9 cm of water.” In order for the PEB to award a disability retirement the member must have received a combined compensable disability rating of 30 percent or more. On 12 Dec 11, he concurred with the IPEB’s findings. The applicant was subsequently DWSP, effective 28 Jan 12.

Although records indicate the DVA rated the applicant’s Obstructive Sleep Apnea at 50 percent during IDES processing as mentioned above, the IPEB determined this condition was not compensable under the DES for DoD disability purposes. The DVA indicated in its 9 Nov 11 Benefits Estimate Letter that they proposed a combined rating of 20 percent for his unfitting disabilities. The DVA assigned an additional 50 percent for his claimed disability of Obstructive Sleep Apnea for a combined rating of 60 percent for DVA purposes. The Defense Finance and Accounting Service (DFAS) article the applicant is referencing applies to the DoD rating for DES purposes only and not the DVA’s total combined service-connected disability rating.

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 15 Oct 24 for comment (Exhibit D) but has received no response.

### **FINDINGS AND CONCLUSION**

1. The application was not timely filed. The Board 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.

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/DPFDD and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The Air Force and the DVA disability systems operate under separate laws. Under 10 USC, the PEB must determine if the service member’s condition renders them unfit for continued military service. To be unfitting, the condition must be such that it alone precludes the member from fulfilling their military duties. The PEB then applies the rating best associated with the level of disability at the time of disability processing and that rating determines the final disposition. The DVA, under 38 USC, may evaluate a service member 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 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.

For the purposes of IDES processing of unfitting conditions, the DVA proposed, and the IPEB adopted, a combined disability rating of 20 percent. While the DVA also granted service-connection and a disability rating of 50 percent for the applicant’s Obstructive Sleep Apnea, this evaluation was solely for the purposes of determining DVA benefits and has no bearing on the IPEB final decision. Therefore, the board recommends against correcting the applicant’s records.

## 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, paragraph 2.1, considered Docket Number BC-2024-01364 in Executive Session on 15 Jan 25:

, 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 10 Apr 24.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 8 Oct 24.  
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Oct 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.

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Board Operations Manager, AFBCMR