

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01476

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His disability retirement order amended to reflect "Disability received in line of duty: YES."

APPLICANT'S CONTENTIONS

He went through a medical board and was retired in 2016. His retirement orders, dated 28 Sep 16, state, "NO" in the first section, "Disability received in line of duty." However, the applicant believes this is incorrect and should state, "YES." His AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, dated six days prior to his retirement orders – 22 Sep 16, state, "YES" in the section, "Disability was incurred in line of duty in time of war or national emergency or after 14 Sep 78." The applicant believes his retirement orders were incorrectly labeled "NO" as the dates of the forms were so close together or it was a small overlook from the person filling out his orders.

This oversight is causing trouble with his civil service as the Air Force only accepts retirement orders that state, "YES" under the disputed section as an acceptable form to update his SCD [service computation date] for leave purposes. Under Chapter 6, Section 6, Par B, Sub sec ii, 1. *Credible Service for Leave Accrual*, to get his SCD backdated to include his military time, he has to submit his military retirement orders stating his disability was "incurred in the line of duty during a period of war." His retirement orders incorrectly state, "NO" but his Physical Evaluation Board (PEB) findings on the AF Form 356 state, "YES." This correction will allow the applicant to backdate his SCD and receive eight hours of leave per pay period instead of the four hours he is receiving now. The applicant's physical disability requires him to take more than his sick time allows, so the extra annual leave will help tremendously. Just this one two-letter word on his retirement orders is stopping this. As it sits now, the applicant is losing out on 13 years, 11 months, and 18 days that should be counted toward his leave dates.

The applicant apologizes if this is the wrong avenue to remedy this, but his Military Personnel Flight on the Air Force base told him to submit a ticket to myFSS. myFSS confirmed the action needed to go to the Air Force Board for Correction of Military Records as the error was over five years old. The applicant did not realize it was an error until he started applying to get his SCD backdated with his civilian Air Force job.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force technical sergeant (E-6).

On 1 Jul 16, 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:

- Meniere's Disease. Department of Veterans Affairs (DVA) rated as Meniere's Disease with Vertigo and Right Ear Hearing Loss; Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 30 percent; Veterans Administration Schedule for Rating Disabilities (VASRD) Code: 6205; Combat-Related Determination as Defined in Title 26, United States Code § 104 (26 USC § 104): NO.

- Plantar Fasciitis. DVA rated as Plantar Fasciitis Bilateral; Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 10 percent; VASRD Code: 5276; Combat-Related Determination as Defined in 26 USC § 104: NO.

- Right Elbow Pain. DVA rated as Common Extensor Tendon Tear, Right, Dominant; Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 0 percent; VASRD Code: 5299-5206; Combat-Related Determination as Defined in 26 USC § 104: NO.

Additional findings include: Disability was incurred in the line of duty in time of war or national emergency or after 14 Sep 78: YES; and Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense (NDAA 2008, Sec 1646): NO.

The informal PEB (IPEB) recommended permanent retirement with a combined compensable percentage of 40 percent.

On 18 Jul 16, 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 his right to a formal PEB hearing. The applicant did request a one-time reconsideration of the disability ratings for the conditions found unfitting by the IPEB.

On 22 Sep 16, according to AF Form 356, the applicant was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Conditions:

- Meniere's Disease. DVA rated as Meniere's Disease with Vertigo and Right Ear Hearing Loss (DVA RECON); Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 100 percent; VASRD Code: 6205; Combat-Related Determination as Defined in Title 26, United States Code § 104 (26 USC § 104): NO.

- Plantar Fasciitis. DVA rated as Plantar Fasciitis Bilateral; Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 10 percent; VASRD Code: 5276; Combat-Related Determination as Defined in 26 USC § 104: NO.

- Right Elbow Pain. DVA rated as Common Extensor Tendon Tear, Right, Dominant; Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 0 percent; VASRD Code: 5299-5206; Combat-Related Determination as Defined in 26 USC § 104: NO.

Additional findings include: Disability was incurred in the line of duty in time of war or national emergency or after 14 Sep 78: YES; and Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense (NDAA 2008, Sec 1646): NO.

The IPEB recommended permanent retirement with a combined compensable percentage of 100 percent.

On 28 Sep 16, according to Special Order Number XXXXX, the applicant was relieved from active duty, organization and station of assignment, effective 28 Dec 16, and effective 29 Dec 16, was permanently disability retired with a compensable percentage for physical disability of 100 percent. Disability received in line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in line of duty during a period of war: NO; On 24 Sep 75 had service affiliation as defined in 26 USC § 104: NO; Disability was the direct result of a combat-related injury as defined in 26 USC § 104: NO.

On 11 Oct 16, according to Special Order Number XXXXX, Special Order Number XXXXX, dated 28 Sep 16, was amended to read: the applicant was “relieved from active duty, organization and station of assignment, effective 27 Nov 16, and effective 28 Nov 16, was permanently disability retired with a compensable percentage for physical disability of 100 percent.”

On 27 Nov 16, the applicant was furnished an honorable discharge with narrative reason for separation of Disability, Permanent (Enhanced), and was credited with 13 years, 11 months, and 18 days active service.

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 indication an error or injustice occurred at the time the PEB processed the applicant’s disability case. There is no supporting documentation to show the applicant’s conditions met the criteria to be deemed combat-related in accordance with 26 USC § 104, and a general statement concerning a member’s line of duty determination is not included in disability retirement orders.

Under 10 USC, Chapter 61, the PEB must determine if a member’s condition(s) renders them unfit for continued military service relating to their office, grade, rank, or rating. Additionally, in accordance with Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System (DES)*, Appendix 5 to Enclosure 3, the PEB renders a final decision on whether an injury or disease that makes the service member unfit or contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during war. A disability is considered combat-related if it makes the service member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances:

(1) *As a Direct Result of Armed Conflict.* Injury or disability was incurred in combat with an enemy of the United States. To qualify under this rule, a service member must be engaged with members of opposing armed forces and forces are in close enough proximity to potentially inflict physical harm on one another. Furthermore, to be “engaged with” indicates each party has the potential to cause physical harm to the other; it is reciprocal.

(2) *While Engaged in Hazardous Service.* Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) *Under Conditions Simulating War.* In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and

leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

(4) *Caused by an Instrumentality of War.* Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

On 22 Sep 16, the IPEB found the applicant unfitting for: (1) Meniere's Disease, DVA rated as Meniere's Disease with Vertigo and Right Ear Hearing Loss; (2) Plantar Fasciitis, DVA rated as Plantar Fasciitis Bilateral; and (3) Right Elbow Pain, DVA rated as Common Extensor Tendon Tear, Right, Dominant. The AF Form 356, Items 9C, indicates these conditions were incurred in the line of duty; however, Items 9F indicates these conditions were not deemed combat-related, as defined in 26 USC 104. Additionally, Item 10D indicates the applicant's disabilities were incurred in the line of duty in a time of war or national emergency after 14 Sep 78; however, Item 10E indicates these disabilities were not incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense under the National Defense Authorization Act of 2008, Section 1646. The IPEB recommended the applicant be permanently disability retired with a 100 percent compensable disability rating for these non-combat-related conditions.

On 28 Sep 16, Special Order Number XXXXX was correctly published announcing his permanent disability retirement effective 29 Dec 16 (amended by Special Order Number XXXXX, dated 11 Oct 16, changing his retirement effective date to 28 Nov 16). The following statement is marked "NO" on the retirement order: "DISABILITY RECEIVED IN LINE OF DUTY AS A DIRECT RESULT OF ARMED CONFLICT OR CAUSED BY AN INSTRUMENTALITY OF WAR AND INCURRED IN LINE OF DUTY DURING A PERIOD OF WAR." This statement was correctly marked "NO" since the AF Form 356 determined the applicant's medical conditions were not considered combat-related in accordance with 26 USC § 104. Although this statement also includes verbiage concerning line of duty it only applies to a combat-related determination by the PEB. Additionally, the following statement is also marked "NO" concerning a combat-related determination: "DISABILITY WAS THE DIRECT RESULT OF A COMBAT RELATED INJURY AS DEFINED IN 26 U.S.C. 104." Finally, in order to qualify for a disability retirement and receive disability benefits under 10 USC, Chapter 61, the medical condition(s) must be determined to be in the line of duty as indicated in Item 9C of the AF Form 356, but there is no specific statement that goes on the retirement order to that effect. Furthermore, the retirement order correctly lists his Service for Pay and Active Service for Retirement as 13 years, 11 months, and 18 days.

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 24 Sep 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 applicant's unfitting conditions were found to be incurred in the line of duty, as annotated on the AF Form 356; however, it also states, "Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense (NDAA 2008, Sec 1646): NO." The statement on his retirement order also differentiates between an injury incurred in the line of duty and a "disability received in line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in line of duty during a period of war." The latter statement requires the applicant's unfitting conditions to meet criteria outlined in DoDI 1332.18 for combat-relation. There is no evidence the applicant's unfitting conditions meet these criteria. 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 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-2024-01476 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 18 Apr 24.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 23 Sep 24.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 24 Sep 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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