

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01615

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Her AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, Column 9F, *Combat-Related Determination as Defined in 26 USC 104*, amended to reflect "Yes."

APPLICANT'S CONTENTIONS

The recent passing of the Promise to Address Comprehensive Toxics (PACT) Act makes her condition (asthma) combat-related. She has tried to get her lung issue updated to combat-related since 2015 but has always been given the run around, and no one would help her. With every attempt, she would hit a brick wall. No one seemed to know how to correct the form. Her lungs are permanently damaged/impaired as a result of war/combat and the burn pits. The Department of Veterans Affairs (DVA), Disabled American Veterans, and TRICARE have all of her medical records to validate the worsening disability. This condition is under the PACT Act.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force staff sergeant (E-5).

On 6 Mar 13, according to a *Commander's Letter for Medical Evaluation Board*, the applicant's injury/illness occurred while the applicant was deployed to **Work-Product**, Iraq from May 09 – Nov 09. Trash and chemical burn pits impacted ability to breathe and produced productive cough. Diagnosed with pulmonary issue. Diagnosed with constrictive bronchiolitis and restrictive airways.

On 7 May 13, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with Mild Persistent Asthma; Incurred while entitled to basic pay: Yes; Existed prior to service: No; Permanently aggravated by service: Yes; Line of Duty: Yes; and was referred to the informal Physical Evaluation Board (IPEB).

On 20 Aug 13, 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:

- Mild Persistent Asthma; Incurred while entitled to receive basic pay: Yes; Line of Duty: Yes; Disability Compensation Rating: 30 percent; Veterans Administration Schedule for Rating Disabilities Code: 6602; Combat-related determination as defined in Title 26, United States Code § 104 (26 USC § 104): No; 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 [National Defense Authorization Act 2008 (NDAA 2008), Section 1646]: No.

The IPEB recommended permanent retirement with a compensable percentage of 30 percent.

On 21 Aug 13, 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 (FPEB) hearing.

On 30 Aug 13, according to Special Order Number XXXX, effective 28 Oct 13, the applicant was relieved from active duty, organization and station of assignment. Effective 29 Oct 13, she was permanently disability retired with a compensable percentage for physical disability of 30 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; Disability was the direct result of a combat-related injury as defined in 26 USC § 104: No.

On 28 Oct 13, the applicant was furnished an honorable discharge with narrative reason for separation of Disability, Permanent, and was credited with 6 years, 4 months, and 29 days active service.

On 28 Mar 24, according to an excerpt from a DVA Benefits letter, provided by the applicant, evaluation of mild persistent asthma, which is currently 30 percent disabling, is continued.

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 applicant's request that her unfitting asthma be designated as combat-related. 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. Although this condition may have originated while deployed, Department of Defense (DoD) policy prevents the PEB from designating a condition as combat-related due to burn pit exposure. Finally, the PACT Act is a DVA program designed to assist veterans with certain presumptive illnesses and has no overall bearing on a combat-related determination for DoD Disability Evaluation System purposes.

Under 10 USC, 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 DoD Instruction (DoDI) 1332.18, *Disability Evaluation System*, Appendix 5 to Enclosure 3, the PEB renders a final decision on whether an injury or disease that makes the service member unfit or that 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 20 Aug 13, the IPEB found the applicant unfitting for Mild Persistent Asthma with a 30 percent compensable disability rating as proposed by the DVA and recommended permanent retirement. Block 9F of the AF Form 356 is marked "No" to show this condition was not designated as a combat-related condition since it did not meet any of the criteria listed above in accordance with DoDI 1332.18. Although criteria (4) *Instrumentality of War*, specifies an unfitting condition caused by fumes, gases, or explosion of military ordnance, vehicles, or material may be designated as combat-related, DoD policy has deemed exposure to burn pits does not meet these criteria. On 21 Aug 13, the applicant agreed with the IPEB's findings and did not appeal to the FPEB to try to find this condition as combat-related. The applicant was subsequently permanently disability retired, effective 29 Oct 13.

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 17 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)*. 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. Under 10 USC, 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. The application of standard criteria for combat-relation, as explained in the advisory opinion, and executed by the IPEB, follows guidance outlined in DoDI 1332.18. Although criteria (4) *Caused by an Instrumentality of War*, specifies an unfitting condition caused by fumes, gases, or explosion of military ordnance,

vehicles, or material may be designated as combat-related, DoD policy has deemed exposure to burn pits does not meet these criteria. Finally, the passage of the PACT Act, a DVA program under 38 USC, designed to assist veterans with certain presumptive illnesses, has no bearing on a combat-related determination for DoD DES purposes. Therefore, the board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

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-2024-01615 in Executive Session on 19 Feb 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 28 Feb 24.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 17 Oct 24.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 17 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.

X

Board Operations Manager, AFBCMR