ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXXXXX

DOCKET NUMBER: BC-2018-01623

COUNSEL: XXXXXXXXXX

HEARING REQUESTED: NOT INDICATED

APPLICANT'S REQUEST

The Board reconsider his request to amend his official military personnel record to reflect he was placed on the Permanent Disability Retired List (PDRL) with a 100 percent combat-related disability.

RESUME OF THE CASE

The applicant is a retired Air Force colonel (O-6).

On 19 Dec 18, the Air Force Board for Correction of Military Records (AFBCMR) considered and partially granted his request to be placed on the PDRL with a 100 percent combat-related disability in the grade of colonel. The applicant contended he met a Medical Evaluation Board (MEB) that determined he developed symptoms consistent with chronic pain syndrome and recommended he be found unfit for duty based on his medical conditions. He was referred to an Informal Physical Evaluation Board (IPEB) that concluded his cervicalgia and bilateral ulnar nerve entrapment were conditions that can be unfitting but were not compensable or ratable, and his condition did not overcome the presumption of fitness, returning him to active duty and his pending retirement. The applicant disagreed with the IPEB; however, his request for a formal PEB was denied. The Board adopted the rationale and recommendations put forth in the advisory opinions and determined on 30 Mar 10, the applicant was found unfit to perform duties of his office, rank, grade, or rating by reason of physical disability incurred while entitled to receive basic pay, with a diagnosis of cervicalgia/disc herniation and spurring of the cervical spine, and right-hand pain/numbness, for a total compensable percentage of 10 percent, with a designation of combat zone only. The Board also recommended he be retired on 1 Apr 10 by reason of physical disability with a 10 percent compensable rating vice retired for length of service, and that he be retired in the grade of colonel in accordance with Title 10, United States Code, Section 1372 (10 USC § 1372). The Board found the evidence did not demonstrate a material error or injustice for the remainder of his request.

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 H.

On 5 Jul 23, the United States District Court for the District of Maryland remanded the case, instructing the AFBCMR as follows:

(1) remand the matter to the Secretary of the Air Force, with instructions to submit the matter to the AFBCMR;
(2) retain jurisdiction over the case upon remand;
(3) stay this action pending the resolution of the remand proceeding;
(4) provide AFPC, via the AFBCMR, the opportunity to submit to Plaintiff, within 30 days of this Court's remand order, the findings and rationale from the "medical reviewer" and

the evidence upon which this "medical reviewer" relied upon, referenced in the AFPC's 20 Jun 18 advisory opinion;

(5) afford the AFBCMR the opportunity to obtain a new medical advisory opinion surrounding Plaintiff's arguments for a combat-related 100% permanent disability retirement that more fully explains its recommendations, basing the review on relevant factors in Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System*, Department of the Air Force Instruction (DAFI) or Air Force Instruction (AFI) 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, and any other relevant regulations and legal authorities;

(6) afford Plaintiff the opportunity to file, within 30 days of receipt of the above referenced "medical reviewer" rationale and evidence or new medical advisory opinion, a new written response with supporting evidence regarding Plaintiff's arguments for a combat-related designation and a 100 percent USAF disability retirement rating;

(7) upon receipt of Plaintiff's "medical reviewer" or new advisory opinion response, afford the AFBCMR the opportunity to obtain any new required advisory opinion(s) surrounding Plaintiff's above-referenced arguments that more fully explain recommendations, basing its review on all relevant facts, policies, and legal authorities;

(8) afford Plaintiff 30 days to respond to any new advisory opinion(s) obtained by the AFBCMR and provided to Plaintiff;

(9) afford the AFBCMR the opportunity to reconsider all the evidence in this case, including any new advisory opinions, Plaintiff's responses to any medical reviewer rationale or advisory opinions, the arguments Plaintiff makes in his Complaint before this Court, any new allegations of error or evidence Plaintiff submits, and any errors alleged in Plaintiff's initial application to the AFBCMR;

(10) afford the AFBCMR the opportunity to make new written findings to the Secretary of the Air Force or his delegee, and to prepare a new Record of Proceeding following its deliberations that adequately explains its decision, providing a rational connection between facts found and choices made, considering relevant factors as outlined in DoDI 1332.18, DAFI or AFI 36-3212, and any other relevant regulations and legal authorities, providing a fully reasoned explanation of its decision, and determining whether there has been a material error or injustice (i.e., explain its analytical path and support its conclusions with facts from the administrative record);

(11) order the Parties to docket a joint report to the Court, within 180 days of this matter's remand, advising on the status of the administrative proceedings.

The United States District Court for the District of Maryland remand order is at Exhibit I.

STATEMENT OF FACTS

On 5 Oct 11, according to an excerpt of the applicant's letter to the Department of Veterans Affairs (DVA), provided by the applicant, he appealed the DVA Rating Decision, dated 15 Mar 11.

On 5 Jul 16, according to a DVA Board of Veterans' Appeals order, provided by the applicant, his request for an initial disability rating in excess of 40 percent on appeal was remanded to the agency of original jurisdiction to reconsider his claim of chronic fatigue syndrome, chronic pain syndrome, and any associated disabilities.

On 27 Nov 17, according to a DVA Letter to the applicant, provided by the applicant, based on the new evidence reviewed as a result of the 5 Jul 16 remand order, his disability percentage for chronic fatigue syndrome, previously evaluated as fibromyalgia (previously rated as chronic pain syndrome) and secondary depression was changed to 100 percent, effective 1 Apr 10.

APPLICABLE AUTHORITY

In accordance with DoD Manual (DoDM) 1332.18, Volume 1, *Disability Evaluation System Manual: Processes:*

2.6. *SECRETARIES OF THE MILITARY DEPARTMENTS.*

The Secretaries of the Military Departments:

z. Correct the records, upon former Service members' successful appeal of disability ratings received in the DES. Service members may also appeal post-discharge to VA and their respective Military Department Board for Correction of Military Records or Naval Records. This includes the records of Service members who are veterans temporarily retired through the IDES who appeal ratings that affect unfitting conditions for which the retiree was placed on TDRL.

AIR FORCE EVALUATION

AFPC/DPFDI recommends partially granting the applicant's request for a 100 percent combat-related disability rating. The advisor recommends the applicant's original unfitting conditions be amended to include chronic pain syndrome, in addition to the existing unfitting conditions of cervicalgia and ulnar nerve lesion. Per the DVA ratings at the time of his IPEB adjudication, this would include depression secondary to chronic pain rated at 30 percent disability and chronic pain syndrome at 0 percents disability, for a combined total rating of 40 percent disability for the DoD unfitting conditions and permanent disability retirement. However, the applicant's unfitting conditions do not qualify as combat-related due to an Instrumentality of War, Under Conditions Simulating War, or due to any other combat-related category as defined by DoDI 1332.18.

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 (a snapshot in time). That rating determines the final disposition (discharge with severance pay, 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 service member may be evaluated over the years and their rating may be increased or decreased based on changes in the service member's medical condition at the current time. However, a higher rating and/or award of a rating for a new condition by the DVA, based on new and/or current exams conducted after discharge from service, does not warrant a change in the determination of unfitting conditions or the total compensable rating awarded at the time of the service member's separation.

The applicant was serving as an Operations Staff Officer since 26 Apr 06 and deployed to Afghanistan in Mar 07. In his Letter of Exception, dated 18 Aug 09, he stated he personally led over 112 ground assault ground combat convoy missions outside the wire while wearing individual body armor (IBA) weighing over 65 pounds and a Kevlar helmet while riding in HUMVEEs over rugged terrain. He also documented that prior to Oct 07, he had not experienced any significant medical issues with his cervical spine, neck, or thoracic back muscles, which he attributed to wear of IBA/helmet and rough travel conditions. He further noted his deployment was curtailed by nearly three months when he was medically evacuated out of theater and returned to the United States (US) in Jan 08 due to the medical issues surrounding his neck and back pain. On 21 Jul 08, medical documentation confirmed the applicant was seen

in theater for persistent neck pain that interfered with his level of activity and did not respond to physical therapy and conservative management. Additionally, x-rays demonstrated some evidence of spurring of the cervical spine. He was sent to Landstuhl Regional Medical Center, Germany, for cervical MRI which indicated mild disc herniation. He received Botox injections and other medication/treatment trials without significant improvement in his neck and upper back pain. He also complained of right upper extremity aching and right hand numbness. He redeployed to the US in Jan 08.

The applicant was referred for Neurology consultation and had an initial visit with a civilian provider on 19 May 08 for right hand numbness, right upper arm pain, and neck pain. The provider noted that multiple cervical MRI studies (Oct 07, Jan 08, and May 08) had consistently shown multi-level chronic degenerative changes with small disc bulges and minimal cervical spondylosis, and that the applicant had been treated with various medication, massage, physical therapy, cervical traction, and epidural steroid/other injections by Pain Management. The applicant, who is right hand dominant, reported constant inner upper right arm pain and numbness in his right palm to the fifth digit, with tingling in his ventral forearm. He denied weakness in his right upper extremity. Electromyography (EMG) and nerve conduction study completed on 20 May 08 revealed bilateral ulnar nerve entrapment across the elbows but demonstrated no evidence of carpal tunnel syndrome or cervical radiculopathy. The applicant was trialed on several more medications and received acupuncture but without significant relief of either his neck pain or right hand numbness with bilateral ulnar nerve entrapment.

At a clinic follow-up on 9 Feb 09, the applicant endorsed worsened neck pain and upper back pain/trapezius with spasms that he noted to be quite unbearable. He also reported lack of energy, limited functionality at work, sleep difficulties, and limitations at the four-hour mark of the workday before the remainder of the day became intolerable. The provider assessed his diagnoses/problems to include cervical intervertebral disc degeneration/herniated disc; myalgia and myositis; cervicalgia; nerve palsy, ulnar; neuralgia occipital; pain disorder associated with psychological and physical factors; and fatigue. An MEB was directed. The applicant had applied for military retirement in Nov 08 based on time in service. A retirement order was published on 16 Dec 08 with a retirement date of 1 Apr 09; however, he elected to undergo full military disability processing with placement on medical hold, signed 27 Feb 09, which revoked his previously approved retirement date.

The MEB narrative summary was completed on 15 Jul 09. The applicant's history and presentation, clinical course, treatment, and interventions were summarized with notation that he had "undergone multiple specialty evaluations…without a definitive diagnosis having been made" as to the etiology of his chronic pain. Radiographic imaging of his neck had shown some very mild disk bulging in the cervical region; however, multiple specialists had not considered these findings to be of clinical significance. The applicant had also been variably diagnosed as having carpal tunnel syndrome, myalgias, and ulnar nerve palsy as potential etiologies of the numbness of his right arm/hand but without definitive and consistent diagnosis. The provider concluded "it is fairly clear that this member has developed symptoms consistent with a *chronic pain syndrome*" [emphasis added] focused primarily in the cervical region with other peripheral nerve symptoms but without an identified radicular component. The MEB narrative summary documented the applicant had been unable to perform his duties because of the degree of physical limitation related to his pain syndrome which appeared to be chronic, refractory to interventions, and without resolution despite a fairly prolonged period of treatment. The applicant had been only able to work three to four hours a day at most, with the remainder of the day spent at home resting or lying in bed. He had been assigned to the Patient Care Squadron and the provider noted, "It is very evident that it has significantly impacted all aspects of his life and that he would not be able to continue to function in his current job assignment or reassignment."

The Commander's Impact Statement noted the applicant had not performed any primary duties in several months based on his medical condition, had remained on convalescent leave, and had missed all work in the preceding 90 days. The commander recommended he be found unfit for duty based on his medical condition. The convening MEB determined his medical conditions of cervicalgia, lesion of ulnar nerve, and disturbance of skin sensation warranted referral to the IPEB for fitness for duty adjudication. The AF Form 618, *Medical Board Report*, listing these three conditions was dated 9 Aug 09, and signed by the applicant on 18 Aug 09. The applicant did not request an Impartial Medical Review of the MEB and did not submit a letter of rebuttal, but he did provide the above-mentioned Letter of Exception.

The IPEB determined the applicant's cervicalgia and bilateral ulnar nerve entrapment resulted in medical restrictions that would normally be incompatible with the rigors of military service; however, also noted he had an approved retirement date of 1 Apr 09 which was revoked for referral into the Disability Evaluation System (DES). In accordance with AFI 36-3212, dated 2 Feb 06, paragraph. 3.17., the IPEB applied the Presumption of Fitness and determined his medical condition(s) did not overcome the presumption (DoDI 1332.38, E3.P3.5.2.1., Attachment 1, in effect at the time of DES processing). The IPEB recommended the applicant be returned to duty to proceed with his scheduled retirement. He did not agree with the findings and recommended disposition of the IPEB and requested a Formal Physical Evaluation Board (FPEB) hearing. This request was disapproved on 15 Sep 09 by the Special Assistant to the Secretary of the Air Force Personnel Council as it was determined the justification provided did not support further consideration by the FPEB. The applicant was returned to duty and subsequently retired on 1 Apr 10 with 23 years, 10 months, and 3 days active service.

The applicant applied to the AFBCMR in Apr 18 requesting permanent retirement at 100 percent disability with combat-relation and at the higher rank of colonel. The AFBCMR granted partial relief awarding a medical permanent retirement as of 1 Apr 10 with a compensable disability rating of 10 percent in accordance with the Veterans Affairs Schedule for Rating Disabilities (VASRD) rating decision of 10 Mar 11 (from the applicant's original DVA claim filed 23 Dec 08). His right median neuropathy at the level of the elbow (claimed as nerve palsy and pain) was VASRD coded as 8799-8715 and rated at 10 percent disability; his degenerative disc disease of the cervical spine VASRD coded as 5242 was rated at 0 percent disability. Of note, the applicant received a total combined disability rating of 40 percent from the DVA for all claimed conditions but warranted only a combined DoD disability rating of 10 percent for his unfitting conditions. The AFBCMR additionally noted the applicant had been unable to perform any of his primary duties for several month[s], overcoming the presumption of fitness. His request for combat-relation was not granted as the Board found no evidence of a direct causal relationship with a specific combat event to qualify the applicant's unfitting condition as combat-related; however, he was retired in the grade of colonel, in accordance with 10 USC § 1372.

The applicant has appealed multiple times to the DVA for change in ratings of his disability conditions. He has subsequently been awarded 100 percent disability by the DVA for chronic fatigue syndrome, previously evaluated as fibromyalgia (previously rated as chronic pain syndrome) and secondary depression in a rating decision dated 27 Nov 17, with an effective date of 1 Apr 10. However, this change in DVA rating under 38 USC does not retroactively extend to the DoD disability rating which is established at the time of separation/retirement under 10 USC using the snapshot in time previously discussed above.

Regarding his request for combat-relation, the applicant initially presented with complaints of neck pain while deployed to Afghanistan in 2007 and was seen for this condition in the theater clinic. This documents his neck pain occurred or was exacerbated while deployed within a combat zone and qualifies as Combat Zone. Extensive wear of IBA/helmet and travel in HUMVEE over rugged terrain during his deployment in 2007 very likely caused and/or contributed to his neck pain/cervicalgia and possibly his bilateral ulnar nerve entrapment.

However, extended wear of body armor and rough transportation does not equate to combat-relation. Combat-relation due to Instrumentality of War presumes a disability was directly caused by a vehicle, vessel, or device designed primarily for military service but with evidence of dysfunction or failure of the said vehicle, equipment, or object. Examples would include military weapon misfire, military vehicle accident, illness due to fumes or gases, or explosion of military ordnance or material. There is no evidence the applicant's IBA/helmet were certified as malfunctional or defective or that he was involved in a specific accident or other event while riding in a HUMVEE directly resulting in his unfitting conditions. It is noted that thousands of prior and current service members have functioned under similar circumstances including extended wear of heavy IBA/helmet/gear and travel in military vehicles over uneven courses without universal complaints of unfitting disorders. Additionally, combat-relation Under Conditions Simulating War would also not be applicable in his case. 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 negation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports. Although the applicant mentions in his 18 Aug 09 Letter of Exception that during his three-month (Jan-Apr 07) combat skills training at Fort Bragg, he was required to wear IBA daily throughout the training, there is no evidence that supports his unfitting medical conditions were incurred during this combat training event. Rather, he further details in this memo that prior to Oct 07 he had not experienced any significant medical issues with his cervical spine, neck, or thoracic back muscles. He contributed these conditions to his subsequent deployment.

On review of the submitted MEB casefile (including the MEB narrative summary, Commander's Impact Statement, and the applicant's Letter of Exception), the preponderance of evidence clearly indicates the applicant was unable to reasonably perform the duties of his office, grade, rank, or rating and that he would have overcome the presumption of fitness. His MEB narrative summary clearly delineates findings of an unspecified chronic pain syndrome affecting his ability to perform his duties. Per information provided in the MEB narrative summary, the Commander's Impact Statement, and the applicant's Letter of Exception, the convening MEB should have considered and/or included the finding of chronic pain syndrome on the AF Form 618. The condition of disturbance of skin sensation was not addressed in the MEB narrative summary and it is unclear why it was included on the AF Form 618; it was also not included on the AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*. However, there is substantial evidence of an unfitting chronic pain syndrome which was also acknowledged as service-connected and analogized by the DVA at the time of the initial 10 Mar 11 DVA rating decision as: depression secondary to chronic pain (also claimed as insomnia) rated at 30 percent disability (VASRD code 9434); and chronic pain syndrome (also claimed as fibromyalgia) rated at 0 percent disability (VASRD code 5099-5025).

The complete advisory opinion is at Exhibit K.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 8 Feb 24 for comment (Exhibit L), and the applicant replied on 5 Mar 24. In his response, applicant's counsel summarized the actions which led to the current court remand. Regarding the advisory opinion, he contended the statement that the Air Force and DVA disability systems operate under separate laws is misleading, and its assertion that rating changes by DVA, implemented years after the service member has separated from military service, do not warrant changes in the total compensable rating of the DoD unfitting conditions awarded at the time of separation or retirement, is incorrect, particularly in the applicant's case. Counsel further contended that while the Air Force's Disability Evaluation System (DES) operates under 10 USC to determine a service

member's fitness for duty at the time of separation, and the DVA, operating under 38 USC, may rate service members based on post-separation changes in disabilities, the advisory opinion ignored the degree to which the DVA and DES systems were integrated and how much the DVA's procedures, evidence, and findings drove the system.

The applicant's case was subject to a joint disability evaluation program being piloted by the DVA and DoD intended to test the use of a single procedure for assigning evaluations to a service member's unfit conditions for use by DoD as well as to determine the member's entitlement to DVA disability compensation. According to the DoD *Policy and Procedural Directive-Type Memorandum (DTM) for the Disability Evaluation System (DES) Pilot Program*, 21 Nov 07, the DES Pilot is a service member-centric initiative designed to eliminate the duplicative, time-consuming, and often confusing elements of the two current disability processes of the Department. Contrary to the DPFDI advisory opinion's suggestion that the Air Force DES and DVA processes are entirely independent of each other, the Pilot DES assigned key responsibilities and findings to the DVA that had earlier been fulfilled by the Air Force. Key features of the DES Pilot include one medical examination and a single-sourced disability rating.

This single disability examination was administered by the DVA under its standard procedures and, in turn, provided a single-source basis for the Air Force fitness determinations and ratings for the unfitting condition. Ratings were assigned under the codes and framework from the VASRD. Once the DVA conducted its examination, its results were forwarded to a qualified military treatment facility provider who completed the narrative summary, which set forth, among other things, a final diagnosis(es), a provider statement including stability of the condition, prognosis, service-specific language indicating restrictions/limitations related to military duty, and follow-up. The narrative summary was then forwarded to the MEB. If the MEB determined the service member did not meet medical retention standards, it would refer the case to the IPEB. The ratings for any condition the IPEB deemed unfitting were determined by the DVA.

The DES Pilot program addressed the need for corrections based on post-separation DVA-appeal adjudications and evidence. The DES Pilot Manual states that the "Secretaries of the Military Departments shall . . . Correct the records of those Veterans who successfully appeal their ratings to the VA, using the appropriate Military Department Board for Correction of Military Records (BCMR). The DES Pilot DTM, paragraph 6.14.12. provides, "If the result of a post-separation DVA adjudication of an unfitting disability rating appeal would have materially altered the DoD disability disposition (e.g., increased the amount of DoD disability compensation or changed the disposition from disability separation to permanent disability retirement), the respective Military Department will, upon receipt of a request from the member through the respective BCMR, correct the Service member's record and implement necessary compensation and benefit changes."

Two DVA adjudication principles are particularly relevant to this case and the AFBCMR's consideration of post-separation DVA adjudication evidence. First, the DVA regulations provide a mechanism to correct an erroneous rating through reexamination per Title 38, Code of Federal Regulation, Section 3.327 (38 CFR § 3.327), and second, when the DVA finds an error in their ratings that results in an increase, "The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date." (38 USC § 5110(b)(3)) As DVA appeals are notoriously protracted, it stands to reason that there may be years between the member's separation and the post-separation DVA adjudication of an unfitting disability rating appeal that would have materially altered the DoD disability disposition.

The snapshot in time concept does not provide a rational basis for summary rejection of post-service evidence in this case. As relevant here, there are instances where post-service evidence

should not be summarily dismissed under a proper application of the snapshot in time concept because the evidence is directly relevant to, and may reveal errors in, the accuracy of the DVA and DoD ratings at the time of separation (i.e. the snapshot in time). Indeed, the DES Pilot regulations addressed this very scenario. Clearly, if the DVA determines that either its diagnoses or ratings during the snapshot in time period were erroneous and corrects them, then such evidence of error and correction should not be rejected because the correct findings would have materially altered the DoD disability disposition. This is precisely the scenario the applicant's case presents.

In Mar 09, he was referred to an MEB for cervicalgia, lesion of ulnar nerve, and disturbance of skin sensation. The DVA completed his disability evaluation report on 9 Feb 09. The report noted the applicant's easy fatigability, headaches, sleep disturbance, depression, paresthesia, and chronic fatigue. Ultimately, the examiner could not come up with a diagnosis for fibromyalgia due to a lack of pathology. On 15 Jul 09, the narrative summary indicated diagnoses of chronic cervicalgia, ulnar nerve palsy, and chronic fatigue. The MEB did not consider the findings of what was then characterized as chronic pain syndrome, which the advisory opinion now states was an error. The MEB referred his case to the IPEB and recommended he be found unfit for duty. The IPEB found the applicant fit for duty, concluding he had not overcome a presumption of fitness. The 2019 AFBCMR decision later found the IPEB's fitness determination to be erroneous.

The applicant was retired for longevity on 1 Apr 10. On 10 Mar 11, the DVA issued a rating decision based on his processing through the DES Pilot and reflected chronic pain syndrome with a zero percent VASRD rating, effective 1 Apr 10. Because chronic pain syndrome was not listed in the VASRD, his condition was initially evaluated under criteria for fibromyalgia. Importantly, the diagnostic code for fibromyalgia carries a maximum rating of 40 percent. In contrast, chronic fatigue syndrome carries a maximum rating of 100 percent. On or about 2 Aug 11, the applicant began a nearly six-year process of challenging the DVA's rating decision. Over time, the DVA incrementally increased his disability rating for this condition. Finally, the applicant appealed his rating to the United States Court of Appeals for Veterans Claims and the court remanded the matter to the Board of Veterans Appeals, which in-turn remanded the matter to the DVA. On 29 Jun 17, the DVA assigned a rating of 100 percent for chronic fatigue syndrome, previously evaluated as fibromyalgia (previously rated as chronic pain syndrome) and secondary depression.

Counsel presented the findings of the applicant's previous AFBCMR case, to include both the advisory opinion provided at that time and the applicant's rebuttal response. The applicant subsequently filed suit in federal court and the case was remanded.

Regarding the advisory opinion provided due to remand, it is partially correct that the IPEB erroneously failed to find his chronic pain syndrome to be unfitting, but the reliance on the Mar 11 DVA rating decision to retroactively rate the condition is misguided and arbitrary. The advisory relied on a strained application of the snapshot in time standard to improperly ignore or reject relevant post-Mar 11 evidence that relates directly to the accuracy of the DVA rating decision. Evidence demonstrates the applicant's chronic fatigue syndrome should have been diagnosed at the time of his separation. The DVA incrementally increased his disability percentage over time and their findings would have materially altered his disability disposition at the time of his separation. The DVA decision to correct his rating to reflect 100 percent for chronic fatigue syndrome was largely based in evidence that predates the applicant's retirement. Assuming the DVA's 2017 findings are not persuasive under the snapshot in time concept, the evidence shows his chronic fatigue syndrome met the 100 percent criteria within the putative snapshot period. At the time the IPEB had convened, the condition had reached a point where his commander stated he had not worked in the past 90 days and was not able to perform any primary duty.

Further, regarding the applicant's request for combat-relation, counsel reiterated the statutory and service guidance relevant to his request. He contended the advisory opinion misstates and misapplies the instrumentality of war criteria, citing no source of rule or regulation, it states that meeting the instrumentality of war criteria standard requires evidence of dysfunction or failure of the said vehicle, equipment, or object. The advisory opinion denial rationale is that there is no evidence the applicant's IBA/helmet were certified to be malfunctional or defective or that he was involved in a specific accident or other event while riding in a HUMVEE directly resulting in his unfitting condition. The regulations are unambiguous; nothing in the criteria even suggests that the standard requires evidence of malfunction, dysfunction, or failure.

Counsel contended there is a direct causal relationship between the applicant's unfitting conditions, including chronic fatigue syndrome, and his wear of body armor and riding in HUMVEEs. "[W]ords [in a regulation], unless otherwise defined, will be interpreted as taking their ordinary, contemporary, common meaning" *Perrin v. United States*, 444 U.S. 37, 42 (1979). Applying the unambiguous, plain words of the instrumentality of war criteria, the facts of this case clearly demonstrate that there was a direct causal relationship between his unfitting conditions and his wearing of body armor and helmet and extensive convoy travel in HUMVEEs, devices and vehicles that fall squarely within the definition of instrumentalities of war. In support, counsel reiterated portions of the applicant's medical history previously presented. Finally, counsel provides that HUMVEE tactical vehicles and body armor are instrumentalities of war. They were specifically designed for military use as most persuasively evidence by the fact that they are designated as defense articles under the U.S. Munitions List (USML) and International Traffic in Arms Regulations (ITAR) due to their design primarily for military service. Clearly, they were used in a manner that subjected the applicant to hazards peculiar to military service and, therefore, fall with the definition of instrumentality of war.

The applicant's complete response is at Exhibit M.

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, to include the applicant's rebuttal, the Board concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale, if not the recommendation, of AFPC/DPFDI regarding the applicant's unfitting condition of chronic pain syndrome and finds a preponderance of the evidence substantiates the applicant's contentions, in part. Specifically, the applicant has provided the 29 Jun 17 DVA Rating Decision which increased his disability rating for chronic fatigue syndrome to 100 percent, effective 1 Apr 10, as the result of his successful petition to the Board of Veterans' Appeals, which combined with the guidance provided by DoDM 1332.18 Volume 1, is sufficient to justify granting the applicant's request to be placed on the PDRL with a disability rating of 100 percent.

However, for the remainder of the applicant's request, the Board concurs with both the rationale and recommendation of AFPC/DPFDI, finding 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. The application of standard criteria for combat-relation due to instrumentality of war, as explained in the advisory opinion, and executed by the IPEB, follows guidance outlined in DoDI 1332.18 and AFI 36-3212, both of which not only detail the criteria but also provide examples of how those criteria are (and are not) applied. The language found in both instructions appears to be very deliberate to ensure their intent; injury and/or illness

resulting from the normal wear and/or operation of military equipment do not meet those criteria. Therefore, the Board recommends correcting the applicant's records as indicated below.

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

a. On 30 Mar 10, he was found unfit to perform the duties of his office, rank, grade or rating by reason of physical disability incurred while entitled to receive basic pay; that the diagnosis in his case is cervicalgia/disc herniation and spurring of the cervical spine, a condition which is rated at a compensable percentage of 0 percent under Veterans Administration Schedule for Rating Disabilities (VASRD) code 5242, right hand pain/numbness, a condition which is rated at a compensable percentage of 10 percent under VASRD code 8799-8715, and chronic fatigue syndrome (previously rated as chronic pain syndrome), a condition which is rated at a compensable percentage of 100 percent under VASRD code 6354, with a designation of combat zone only, that the disabilities were permanent; that the disabilities were not due to intentional misconduct or willful neglect; that the disabilities were not incurred during a period of unauthorized absence; and the disabilities were not as a direct result of armed conflict or caused by an instrumentality of war and were not combat-related.

b. On 31 Mar 10, he was discharged from active duty and on 1 Apr 10, he was permanently disability retired with a compensable percentage for physical disability of 100 percent.

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 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-2018-01623 in Executive Session on 17 Apr 24:

Work-Product	Panel Chair
Work-Product	Panel Member
Work-Product	Panel Member

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

Exhibit H: Record of Proceedings, w/Exhibits A-G, dated 13 Apr 19.
Exhibit I: Court for the District of Maryland Remand Order, 5 Jul 23
Exhibit J: Documentary evidence, including relevant excerpts from official records.
Exhibit K: Advisory Opinion, AFPC/DPFDI, w/atch, dated 2 Feb 24.
Exhibit L: Notification of Advisory, SAF/MRBC to Counsel, dated 7 Feb 24.
Exhibit M: Counsel's Response, w/atchs, dated 5 Mar 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