
RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2019-02162

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His reason and authority for discharge be corrected from AFR 45-43, *Administrative Discharge of Airmen Members of the Air Force Reserve*, paragraph 19, Fraudulent, Illegal or Erroneous Enlistment to medical reasons and he receive any warranted compensation.

His promotion to airman first class (E-3) be posted.

APPLICANT'S CONTENTIONS

His reason and authority for separation should be corrected to a medical reason based upon his service-connected injury. His low back condition was determined service-connected by the Board of Veteran's Appeals in Dec 19. His promotion in 1971 was signed by the commanding officer but was never posted.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force Reserve (AFR) airman first class (E-3).

On 23 Mar 70, according to DD Form 4, *Enlistment Contract - Armed Forces of the United States*, the applicant entered the AFR and was entered onto active duty for training.

On 1 Aug 70, according to DD Form 214, *Armed Forces of the United States Report of Transfer or Discharge*, the applicant was released with an honorable service characterization with narrative reason for separation of "Completion of Active Duty Training (Non-prior Service Ready Reservist)" and transferred to the AFR.

On 5 Feb 71, according to Reserve Order Number Work-Product the applicant was promoted to airman first class (E-3).

On 23 Mar 72, the applicant was found medically disqualified for military service and worldwide duty because of chronic recurring lumbosacral strain.

On 17 Apr 72, the applicant's commander notified the applicant that action had been initiated to determine whether or not he should be discharged and to outline the applicant's rights in the administrative determination.

On 8 May 72, the applicant acknowledged receipt of the discharge action, waived his right to a hearing, and requested an honorable discharge in lieu of further action under AFR 45-43.

On 18 May 72, according to Reserve Order **Work-Product**, the applicant received an honorable discharge.

On 5 Mar 19 and 12 Aug 19, the applicant submitted DD Forms 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*, and on 14 Aug 19 and 12 Jan 20, he submitted additional evidence for consideration. On 8 Apr 20, the Board closed the applicant's case as non-viable due to the evidence he provided was illegible and copies were unusable. The applicant was notified his case would be reopened to resume adjudication once he provided legible copies.

On 22 Apr 22, the applicant submitted a new DD Form 149 with legible supporting evidence and requested the Board reopen his case, accept his new application, and replace it with his previous applications.

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

APPLICABLE AUTHORITY/GUIDANCE

The military's Disability Evaluation System (DES), established to maintain a fit and vital fighting force, can by law, under Title 10, United States Code (U.S.C.), only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of law, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary [improve or worsen] over the lifetime of the veteran.

AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends denying the application. Based on an extensive review of the applicant's current submission and available records, the medical advisor finds insufficient evidence and significant inconsistent reporting to favorably support the applicant's request for a change of reason and authority for separation or consideration for disability compensation. The reviewed evidence suggests that no error or injustice on the part of the Military Department occurred during the separation processing.

In reviewing the applicant's brief by counsel [appeal to DVA Board of Appeals], the independent medical review (IMR) and personal letters from the applicant, the medical advisor noted historical inconsistencies and disparities in the written summaries when compared to one another. Inconsistencies included noting of facts, misleading statements, and changing diagnostic findings. Throughout the reviewed documents, differing providers listed the applicant's initial and ongoing diagnosis as a "sprain" and other times as a "strain"...there is a difference. One involves an acute injury to the ligaments which are attached to bone (vertebra) and the other is an acute injury to surrounding muscles. The stated fact of the applicant's ability to fully participate in weekend drills for a period of 13 months following the football incident when he continued to experience recurrent debilitating periods of back pain remains skeptical at best in light of the terms, "debilitating" and "recurrent." The applicant's private physician stating the football incident was an acute back sprain, superimposed on an old scoliosis clearly indicated the scoliotic condition was indeed pre-existing.

Given the varied documented inconsistencies within the reviewed records, thus posing a degree of uncertain complete accuracy coupled with the known degenerative progressive nature of this congenital condition [scoliosis], the medical advisor is of the opinion that it is at least as likely as not the applicant's pre-existing spine condition was *not* permanently accelerated or aggravated beyond what would reasonably be anticipated from a congenital scoliotic condition. Additionally, the applicant's stated ability to continue his Reserve duty weekends did not reveal any inability to perform the duties of his office, rank, grade or rating and therefore, not applicable for DES processing for possible disability compensation.

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 18 Jan 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 the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds the applicant's medical condition is not warranted to process through the Disability Evaluation System (DES) as a matter of equity or good conscience IAW DoDI 1332.18, *Disability Evaluation System*, Appendix 1 to Enclosure 3, paragraph 4. Specifically, the applicant's back condition was not a medical basis for career termination nor entry into the DES. Furthermore, the Board finds no error with his promotion to airman first class and finds he was appropriately promoted according to Reserve Order **Work-Product**. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Air Force Instruction 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. Therefore, the Board finds the application untimely and 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 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-2019-02162 in Executive Session on 23 Mar 23:

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

- Exhibit A: Application, DD Form 149, w/atchs, 22 Feb 22 and multiple other dates.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, BCMR Medical Advisor, dated 30 Dec 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 18 Jan 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.

X

Board Operations Manager, AFBCMR