Work-Product

UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2019-03846-2

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His not in the line of duty (NILOD) determinations for his medical conditions of Obstructive Sleep Apnea (OSA), hypertension, and myocardial infraction be overturned and found in the line of duty (ILOD).

2. He be given a medical retirement at a 70 percent disability rating or, in the alternative, be processed through the Disability Evaluation System (DES) for all of his medical disabilities that failed to meet retention standards.

RESUME OF THE CASE

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

On 3 Jun 20 and 9 Feb 21, the Board considered and denied his request to find his medical conditions as unfitting and be evaluated as disqualifying and disabling conditions. The conditions he wanted to be considered as disqualifying and disabling were an ankle injury, OSA, Post-Traumatic Stress Disorder (PTSD), a heart attack, hypertension, Folliculitis, Traumatic Brain Injury (TBI), tinnitus, and Irritable Bowel Syndrome. The Board took notice of the applicant's complete submission and Air Force guidance in judging the merits of the case and found a preponderance of the evidence did not substantiate his contentions to justify granting relief. He was subjected to the appropriate Air Force pre-Integrated Disability Evaluation System (IDES) process and was returned to duty based on sound clinical decision making; and, as such, did not required submission to the DES process.

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 F.

On 14 Nov 22, the applicant requested reconsideration of his request for his medical conditions to be found ILOD and he be given a medical retirement. He contends, through counsel, he was the victim of an arbitrary and capricious decision by AFRC/SG and HQ RIO, who without

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justification, overturned the ILOD determination for his medical conditions of OSA, hypertension, and myocardial infraction and returned him to duty. Furthermore, he was prejudiced by the provider who completed his Narrative Summary (NARSUM) and indicated this was a placeholder which would be amended after he completed his Department of Veterans Affairs (DVA) Compensation and Pension (C&P) examination which would be conducted as part of the Medical Evaluation Board (MEB). Due to that NARSUM, he was removed from the IDES process and returned to duty after his mandatory separation date (MSD) with a recommendation to follow up with the DVA for treatment. Had the provider correctly completed the NARSUM, there would have been no question his case needed to proceed to the MEB at which point his 70 percent rating from the DVA for his PTSD would have been provided to the Physical Evaluation Board (PEB) who would have found him unfit with a recommendation of permanent retirement. The AFRC/SGO misapplied the standards for referral to an MEB in the Initial Review in Lieu of (IRILO) process; relied upon inaccurate NARSUMs that were contradicted by the underlying records themselves; and disregarded the opinions of himself, his commander, his treating physicians, and the Deployment Availability Working Group (DAWG). This resulted in being retired for high year tenure as opposed to his medical disabilities creating an injustice which was perpetuated by the AFBCMR in its previous decision. This injustice caused a discrepancy in pay of approximately $2,000.00 per month.

In support of his reconsideration request, the applicant submitted the following new evidence: (1) his AF Form 348s, *Line of Duty Determination*, for OSA, Hypertension, Myocardial Infraction, and PTSD; (2) a correspondence from myPers regarding his MSD extension; (3) a sheet with lost pay computations; and (4) DVA medical records and a rating decision dated 18 Dec 19.

The applicant's complete submission is at Exhibit G.

STATEMENT OF FACTS

Dated 30 Dec 19, Reserve Order Work-Product, provided by the applicant, indicates he was placed on the USAF Retired Reserve List, effective 2 Jan 20.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for an upgrade to a medical discharge/retirement from a psychological perspective. While the applicant through counsel has made several requests, the Psychological Advisor will only be focused on the contentions related to psychological issues. The applicant through counsel is petitioning the Board to issue a medical disability retirement or in the alternative, refer the applicant for a complete MEB based upon the original, and updated, lLOD findings for a thorough review of his medical disabilities that did not meet retention standards and should have been deemed unfitting for further service. Counsel contends, had the provider correctly completed the NARSUM, it would have been obvious the applicant's case needed to proceed to an MEB thereby sending his 70 percent disability rating for his PTSD to the PEB lending to the finding a military disability retirement was not only appropriate, but was required under the circumstances. While the Psychological Advisor agrees with the AFBCMRs Executive Session findings dated 3 Jun 20 and 9 Feb 21, and the original

NARSUM dated 23 Jul 18, there is other compelling evidence to suggest the applicant was fit for duty during his military service and at discharge, from a psychological perspective.

The Record of Proceedings from the AFBCMR summarizes and outlines their findings which determined there was no evidence of an error or injustice and supported the finding he was fit for duty. It noted AFRC/SGO's recommendation of denying the application finding he was subjected to the proper Air Force pre-IDES process, IRILO, which was adjudicated by the Air Force Instruction mandated authority. He was then returned to duty, able to perform the duties of his office, grade, rank and rating based on sound clinical decision making; and, as such, did not require submission to the DES process. AFRC/SGO received the applicant's IRILO on 31 Oct 18. Upon review and deliberation, it was determined he was capable of performing the duties of his office, grade, rank and rating and thus granted a waiver returning him to duty on an Assignment Limitation Code (ALC) of C3 on 14 Dec 18. At the time of review/disposition by AFRC/SGO, per the documentation supplied and applicable standards in effect at the time, the applicant had three disqualifying conditions. Separately and in combination, the conditions were reviewed as to whether they would reasonably preclude him from performing the duties of his office, rank, rating, and grade. The determination after review of the available clinical information was he was fit to return to duty with an ALC of C3.

His original MEB NARSUM, dated 23 Jul 18, found he was able to perform his duties from a psychological perspective. The report confirmed he met the criteria for PTSD and found it was ILOD. The evaluator noted the applicant had a slight improvement when he agreed to engage in mental health treatment in 2013 with the DVA. He is described as having a normal energy level and concentration while at work. The evaluator noted mild social/industrial impairment. While the evaluator documented a moderate military impairment, the prognosis and recommendations were that his functioning was compatible with his current Air Force Specialty Codes (AFSC) and the rigors of military service in general. A second MEB NARSUM, dated 24 Nov 19, also confirmed his diagnosis of PTSD but found he was unfit for military service. With all due respect to this evaluator, the Psychological Advisor, after examining and evaluating the entire record, finds it is more likely than not, the applicant was fit for duty during his military service and at discharge. This NARSUM does not appear to correlate with his mental health documentation. While this newer NARSUM, dated 24 Nov 19 briefly summarized his mental health history, it neglected to detail documentation in these notes that would demonstrate whether he was showing improvement from treatment or that would show his duty performance was satisfactory. The complete mental health record documents he was getting benefits from mental health treatment, his symptoms were improving, and he was able to perform the duties of his office, grade, rank, and rating. Unfortunately, DVA mental health notes are somewhat less meticulous than military records. Whereas military records typically document fitness for duty and any duty-limiting conditions on every encounter, the DVA does not. Therefore, fitness for duty and assessing therapeutic benefits needs to be gleaned from the actual documented narrative.

His in-service and post-service mental health records clearly show a steady improvement in his PTSD symptoms with respect to his distress in social situations as evidenced by his being able to engage more in activities outside the house and become involved in community activities. These encounters also clearly document he did not have any issue in performing the duties of his office, grade, rank, and rating. This includes his civilian employment. It should be noted, being

diagnosed with a mental health condition and receiving mental health treatment does not automatically render a condition unfitting. More information is required to determine unfitness such as being placed on a permanent duty limiting condition (DLC) profile for a mental health condition, being deemed not worldwide qualified (WWQ) due to a mental health condition, and impact or interference of the condition on the ability to reasonably perform military duties in accordance with his office, grade, rank, or rating. The applicant does have a temporary duty limiting profile, dated 28 Dec 18, but it appears to be related to two medical conditions and not a psychological condition. He was never placed on a permanent profile or deemed not WWQ from a psychological perspective. From a review of the records, he was reasonably able to perform military duties in accordance with his office, grade, rank, and rating. There is a statement in his NARSUM dated 24 Nov 19 noting, per the patient, he has not been able to do his military responsibilities in the last year because of all his medical appointments. This appears to potentially be about his medical appointments, not his mental health appointments. His mental health appointments overall were less than weekly and at times only monthly.

Counsel contends the original NARSUM, dated 23 Jul 18 provided false information and was only a placeholder. The Psychological Advisor finds insufficient evidence to support this statement. This NARSUM is more in line with available documentation, which supports the applicant is fit for duty, from a psychological perspective. In order to be separated for a medical disability, the military has a process that begins with entry into the IDES. Referral to this system requires a designation of unfitness. A condition is considered unfitting when it results in one or more of the following: (1) a permanent physical profile; (2) a determination the identified condition fails to meet military medical retention standards; or (3) a finding that the identified medical condition renders the service member unable to perform the duties required of their AFSC or grade. Whenever there is a disability, it is necessary to compare the nature and degree of the disability present with the requirement of the duties the service member may reasonably be expected to perform because of their office, grade, rank, or rating. In the applicant's case, there is no evidence of the applicant receiving a permanent physical profile while on active duty for PTSD or any other psychological issues. There is insufficient evidence to indicate the applicant failed to meet military retention standards while on active duty. Finally, there is no evidence the applicant suffered from a psychological condition such as PTSD which rendered him unable to meet the requirements of his AFSC. In short, the applicant's military record indicates he did not have an unfitting mental health condition.

The military's Disability Evaluation System, established to maintain a fit and vital fighting force, can by law, under Title 10, 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 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 laws, 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.

Apart from his mental health record, his military records also document the applicant was fit for military service. All his performance evaluations show he met standards. They also document a dedicated, proven leader that has been recognized as one of the top one percent of rated officers. He was steadily promoted throughout his career to the grade of colonel (O-6), which again demonstrates a service member who cannot only perform his duties but excels at them.

The complete advisory opinion is at Exhibit H.

The AFBCMR Medical Advisor recommends denying the applicant's request finding insufficient justification for overturning the NILOD findings for his OSA, Hypertension, and Myocardial Infarction. Additionally, by a preponderance of available evidence, the Medical Advisor found an insufficient objective basis to support an unfit finding for the applicant's OSA, Hypertension, Asthma and TBI; the latter which occurred in 2009 while deployed. The Medical Advisor considered finding the applicant's Myocardial Infarction unfitting, but determined if referred into the IDES, it would not overcome the presumption of fitness. Accordingly, the Medical Advisor recommends denial of the petition to direct the applicant's medical retirement and denial of referring his case into the IDES.

The Medical Advisor determined the Air Reserve Component (ARC)/SGP or SGO, Chief Medical Officer, in this case the Air Force Reserve Commander (AFRC)/SGO, acted within its authority to return the applicant to duty in 2018, with an ALC of C3. Similarly, the ARC/SGP, or SGO, had the authority to, again, return the applicant to duty following his Annual Review in 2019, but not for execution of his retirement due to high-year tenure or due to his MSD. The Medical Advisor, nonetheless, considered the possibility the applicant was errantly or unjustly deprived of entering the IDES in 2019; with particular consideration of his cardiovascular condition(s). The Medical Advisor acknowledged the significance of the applicant's 40 percent ejection fraction in 2018. However, there is no follow-up ejection fraction supplied for an objective assessment of cardiac function during calendar year 2019. The next helpful cardiac assessment occurred on 5 Aug 19, documented in his digital health records which note Atherosclerotic heart disease of native coronary artery without angina pectoris and a chief complaint, which reads, the patient presents for follow-up to Cardiology clinic, history of coronary artery disease (CAD), denies chest pain, or shortness of breath, oxygen saturation on room air, 97 percent. The narrative continued stating the applicant had been doing well since his last visit. The medical official only reflected upon the results of the applicant's 2018 echocardiogram, then noted no recent signs/symptoms of ischemia, concluding with a focus on risk factor modification, such as weight loss and control of phospholipids. The next progress note of significance, dated 22 Jun 21, a year and a half after the applicant's retirement, showed a notable increase in ejection fraction to 52 percent and a negative cardiac perfusion stress test. There was a further increase in ejection factor to 55 percent on 22 Mar 22; albeit now with normal left ventricular size, concentric hypertrophy, and trace mitral and tricuspid valve regurgitation. The applicant ultimately earned service-connection for his Myocardial Infarction and CAD with assignment of a 30 percent disability rating released on 13 May 22; with an increased evaluation of 60 percent on 26 Apr 23. However, upon consideration of the date of occurrence Myocardial Infarction in 2015, chronic nature of the coronary artery disease, and the fact that the referral to the IDES would have occurred during the 12 months of his MSD, the Medical Advisor determined the applicant qualified for being returned to duty, under the Presumption of Fitness policy in DoDI 1332.18, *Disability Evaluation System*, which was

initially published on 5 Aug 14, and updated on 17 May 18 with no relevant changes in the 10 Nov 22 version. Per Section 5, under presumption of fitness, the DES compensates disabilities when they cause or contribute to career termination. Service members who are pending retirement at the time they are referred for disability evaluation are presumed fit for military service. Service members may overcome this presumption by presenting a preponderance of evidence that he or she is unfit for military service. The presumption of fitness may be overcome when (a) an illness or injury occurs within the presumptive period that would prevent the Service member from performing further duty if they were not retired; (b) a serious deterioration of a previously diagnosed condition, including a chronic one, occurs within the presumptive period, and the deterioration would preclude further duty if the Service member were not retiring, or (c) the condition for which the Service member is referred is a chronic condition and a preponderance of evidence establishes the Service member was not performing duties befitting either his or her experience in the office, grade, rank, or rating before entering the presumptive period because of the condition. The presumptive period is when the Secretaries of the Military Departments will presume Service members are pending retirement when the Service member's referral into the DES occurs after any of the following: (1) a Service member's request for voluntary retirement has been approved noting revocation of the voluntary retirement order for purposes of referral into the DES does not negate application of the presumption; (2) an officer has been approved for selective early retirement or is within 12 months of mandatory retirement due to age or length of service; (3) an enlisted member is within 12 months of his or her retention control point or expiration of active obligated service, but will be eligible for retirement at his or her retention control point or expiration of active obligated service; (4) a Reserve Component member is within 12 months of mandatory retirement or removal date and qualifies for a 20-year letter at the time of referral for disability evaluation; or (5) a retiree is recalled, to include those who transferred to the Retired Reserve with eligibility to draw retired pay upon reaching the age prescribed by statue unless the recalled retiree incurred or aggravated the medical condition while on their current active-duty orders and overcomes the presumption of fitness.

In consideration of the three criteria for overcoming the presumption of fitness, the Medical Advisor opines the applicant did not overcome the presumption of fitness. Specifically, the applicant's Myocardial Infarction and CAD did not occur during the presumptive period. There was also no objective evidence of serious deterioration of his cardiac condition during the presumptive period. Additionally, although the applicant was assigned a Military Personnel Appropriation (MPA) tour performing information technology (IT) duties, there is no evidence his assignment was due to his inability to perform duties befitting of his AFSC suggesting the assignment was not procured due to a medical frailty, his commander states, had he known of the nature and depth of the applicant's medical conditions, he would have denied the tour of duty, or words to that effect. Additionally, among factors considered in the reasonable performance of military duties, where a medical condition disqualifies a member from performing specialized duties, PEBs may take into consideration whether the member has an alternate branch or specialty; or reclassification or reassignment is feasible. Therefore, given the applicant was not referred into the IDES by AFRC/SGO nor found unfit for either of his disqualifying non-mental health medical conditions, neither Title 10, U.S.C., 1207a, (8-Year Rule) nor the Prior Service Impairment or Condition policy would be applicable to his case.

The complete advisory opinion is at Exhibit I.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 2 Oct 23 for comment (Exhibit J), and the applicant replied on 1 Nov 23. In his response, the applicant contends, through counsel, the advisory opinions fail to address the fact the Air Force knew he was unfit but returned him to duty anyway because he was nearing his mandatory retirement date (MRD) and would therefore cross into the window for the presumption of fitness. He should be granted a medical retirement with an effective date that coincides with his MRD because of the unjust manner to which his case was handled.

The medical advisory opinion concluded without explanation, ARC/SGP or SGO and AFRC/SGO acted within their respective authorities in returning him to duty with an ALC of C3 in 2018 and 2019, while conceding it would be improper to do so in order to execute his retirement due to high-year tenure or MSD. How long is it appropriate to retain an unfit member in an ALC-C3 status and under what circumstances is such a decision appropriate? This has never been answered. Logic would dictate the Air Force would only return a member to duty when they acknowledge they are unfit and cannot deploy if there is a valid basis to do so. To retain a member beyond their MRD under these circumstances makes no sense unless the intention is to afford the member the opportunity for full and fair consideration of their conditions in the IDES. He was returned to duty despite the DAWG's recommendation for a full MEB in 2018 while he was outside the presumption of fitness window. In doing so, the Air Force denied him the full and fair hearing he deserved and instead forced his case into the time period when the presumption would apply, and any argument that he was actually fit in 2018 when he was returned is without merit, as his commander determined he was unfit to perform the duties of his AFSC by May 18 and the return to duty was only accomplished through the use of the ALC-C3, which would be inappropriate if he was actually fit. Furthermore, the advisory opinion concluded there was insufficient evidence to overturn the NILOD finding for his conditions; however, it fails to address the fact his conditions were originally designated as ILOD and were unjustly overturned by the Air Force through improper processes. The advisory opinion considers this a moot point, however, because of its improper application of the presumption of fitness.

In the mental health advisory opinion, the advisor downplays all references to him exhibiting severe symptoms of PTSD. It is easy to cherry pick the records to show instances of improvement. For example, he went deep sea fishing in an attempt to get away from his PTSD triggers; however, the advisor opines the trip went well when it did not as it brought more of his symptoms to light. The advisory opinion goes on to highlight he was pushing for a medical retirement because it offered him a better deal as a means to discredit the severity of his condition, when a key component to his thoughts and comments were that he previously did not believe he was unfit, but now that he is actually facing the truth – admitting he was struggling and getting help to process his experiences – he realizes he was, and is, unfit to continue serving. The comment he had negative feelings about being "thrown away" highlights the continued deterioration of his PSTD and explains why his treating provider and the one who completed his NARSUM evaluation in 2019 felt he was unfit. Using the references to his employment at his civilian job as justification for determining he was fit for military duties and for interpreting his "pushing" for a medical retirement as evidence that one was not warranted, is flawed because he was forced out of his

civilian position at approximately the same time he was forced out of the Air Force due to his PTSD. Furthermore, he was told the NARSUM completed in 2018 was just a placeholder and it would be amended once all of the findings from the IRLO were publicized; however, that did not happen. Since the advisory opinion's conclusion directly referenced the 2018 NARSUM as a key component to its evaluation, it is readily apparent the importance of this document and why he was upset the provider shirked his responsibilities by entering a placeholder which has been used to continuously deny him the opportunity to be considered for a medical disability retirement.

The applicant's complete response is at Exhibit K.

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, the Board remains unconvinced the evidence presented demonstrates an error or injustice. Furthermore, the Board considered the additional evidence submitted by the applicant; however, it is not sufficient to overturn the previous Board's decision. The Board concurs with the rationale and recommendation of the AFRBA Psychological Advisor and AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board does not find any of the applicant's medical conditions near the time of his discharge unfitting. The mere existence of a medical or mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The applicant's military duties were not severely degraded due to his medical or mental health conditions. All his performance evaluations show he met standards and excelled in his military duties and the evidence presented did not demonstrate the applicant was unable to perform the duties of his office, grade, rank or rating near the time of his separation. The Board notes counsel's contention the original NARSUM, dated 23 Jul 18 provided false information and was only a placeholder; however, the Board finds insufficient evidence to support this finding. The NARSUM in question is supported by his medical records, which supports the finding the applicant did not have an unfitting mental health condition. The applicant was not on a permanent physical profile while on active duty for PTSD or any other mental health issues and the preponderance of evidence does not support he failed to meet military retention standards while on active duty. Furthermore, the Board finds the Air Force Reserve properly evaluated his medical conditions and acted within their authority to return the applicant to duty in 2018 and 2019, with an ALC of C3, nor did the Board find justification for overturning the NILOD findings for his OSA, Hypertension, and Myocardial Infarction. The Board notes counsel's question regarding the length of time it is appropriate to retain an unfit member in an ALC-C3 status and under what circumstances is such a decision appropriate. A medical ALC does not disqualify an airman from deployment and it does not identify an airman for a medical separation. The code, when applied to a member's profile for medical reasons, is one of the various tools the Air Force uses to put the right person in the right place at the right time. Being placed in an ALC does not mean an airman will remain coded for the rest of his or her career. Annual follow-up medical assessments ensure that those who can be medically cleared, will be. The length of time an unfit member can be retained in an ALC-C3 status is determined on a case-by-case basis by the Medical Standards

Branch of AFPC. The decision to retain an unfit member in an ALC-C3 status is appropriate when the member's medical condition requires specialized care that is not available at other locations. The member's commander may request waivers to send a member on deployment or permanent assignment in support of unit operations. The Board took note of the applicant's disability ratings from the DVA but did not find this evidence compelling to warrant relief. The military's DES established to maintain a fit and vital fighting force, can by law, under Title 10, 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 time of separation and not based on post-service progression of disease or injury to which the DVA can offer compensation. 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 evidence did not demonstrate material error or injustice, 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-2019-03846-2 in Executive Session on 30 Nov 23:

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

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

Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 3 Jun 20 and 9 Feb 21.
Exhibit G: Application, DD Form 149, w/atchs, dated 14 Nov 22.
Exhibit H: Advisory Opinion, AFRBA Psychological Advisor, dated 25 Jul 23.
Exhibit I: Advisory Opinion, AFBCMR Medical Advisor, dated 28 Sep 23.
Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Oct 23.
Exhibit K: Applicant's Response, w/atch, dated 1 Nov 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.

1/8/2024

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Board Operations Manager, AFBCMR
Signed by: USAF