



CUI//SP-MIL/SP-PRVCY

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2019-04633

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His medical condition of herniated nucleus pulposus with nerve root damage be found in the line of duty (ILOD).
2. He be medically retired with an effective date of 18 Apr 13 or 30 days after the injury occurred.
3. He receive all backpay and allowances.
4. His unfit medical condition of herniated nucleus pulposus with nerve root damage be found as combat-related, as a direct result of armed conflict as defined in 26 U.S.C. 104 combat-related determination.
5. He be paid incapacitation (INCAP) pay starting on 18 Apr 13.
6. He be promoted and medically retired as a master sergeant (E-7).

APPLICANT'S CONTENTIONS

He was disabled in the line of duty (LOD) from an injury while performing annual training. He was performing maintenance on a wing weapons pylon when he fell causing his injury. Because of this, he is requesting his injury be found ILOD and as combat-related caused by an instrumentality of war. He was found disqualified for continued military duty due to a diagnosis of herniated nucleus pulposus with nerve root damage and was unable to perform military duties for 55 months without pay. In his fitness determination letter from SAF/MRBP, dated 18 Jul 16, it states the military disability evaluation system can only offer compensation for those medical conditions that cut short a member's career and then only to the degree of severity present at the time of final disposition. He was separated for his medical condition and his disability was not a result of willful misconduct or alcohol or drug abuse. His career was cut short due to injuries he sustained while performing annual training, hence not allowing him the ability to complete 20 years of service. He was not given the opportunity to reenlist or extend by his unit. His unit transferred his records to ARPC without notification of his LOD determination. Once he was made aware of his situation in 2019, he has been in the process of trying to correct his records.

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Under the laws of disability severance pay 10 U.S.C. Section 1212, he is entitled to promotion to master sergeant and pay due to his career being cut short because of the injuries he sustained while on annual training.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force Reserve (AFR) technical sergeant (E-6) awaiting retired pay at age 60.

On 8 May 14, a notification to the applicant's commander indicates he was found to have had a medically disqualifying condition which did not meet the medical standards in accordance with AFI 48-123, *Medical Examinations and Standards*, and was placed on a code 37 profile and restricted from Reserve participation for pay and points.

On 18 Jul 14, the *Physical Evaluation Election Form* indicates the applicant desired to have his duty-related medical disqualification case referred to the Informal Physical Evaluation Board (IPEB) for a fitness for determination only.

On 23 Jul 15, AFRC, Physical Exams and Standards Branch determined the applicant was medically disqualified for continued military duty and was unable to perform the duties of his office and grade. It is noted his commander recommended disqualification due to the applicant being diagnosed with herniated nucleus proplulus (HNP) with nerve root compression L3-L4. Furthermore, it is noted, no LOD determinations were finalized or were in the process with a positive determination for his disqualifying condition.

On 11 Sep 15, ARPC, Physical Evaluation Board Program Management Branch determined the applicant was medically disqualified for continued military service. It is noted the applicant was a traditional Reservist with 18 years of satisfactory service. Furthermore, it is noted the applicant elected a fitness review and his case was referred into the Disability Evaluation System (DES) for a fitness determination.

On 29 Sep 15, the IPEB found the applicant unfit due to his medical condition of intervertebral disc syndrome (HNP with nerve root compression) and not combat-related. It is noted the applicant injured himself while working at his government civilian job. Furthermore, it is noted the applicant was not participating in his Reserve duties and was placed in a no pay/no points status.

On 14 Oct 15, the applicant disagreed with the Board's findings and elected to have his case referred to the Formal Physical Evaluation Board (FPEB) solely for a fitness determination.

On 23 Feb 16, the applicant's counsel submitted an appeal contending the applicant is eligible for disability compensation from the AFR because he sustained his injuries while performing his Reserve duties while in civilian status as an Air Reserve Technician (ART); therefore, an ILOD

CUI//SP-MIL/SP-PRVCY

determination should be made. He further contended the applicant's unit could have moved him to a sedentary job for the next two to three years to obtain a Reserve retirement.

On 24 Feb 16, the FPEB found the applicant unfit due to his medical condition of intervertebral disc syndrome (HNP with nerve root compression) and not combat-related. It is noted the board corrected the IPEB findings to indicate the applicant was an ART. It is further noted the applicant was not in a military status per his own testimony; therefore, his injuries are not ILOD. The Board noted that although the applicant could perform some light duties, he could not perform the common tasks of his Air Force Specialty Code (AFSC), could not perform any component of the physical fitness test, and was unable to deploy.

On 4 Mar 16, the applicant indicated he disagreed with the FPEB findings and elected to have his case referred to the Secretary of the Air Force (SAF).

On 14 Mar 16, the applicant's counsel submitted an appeal contending the board should find him fit for duty in the capacity as a trained Passenger Freight Traffic and Packing Clerk, his prior AFSC. Furthermore, his counsel contended his injuries were ILOD as he was performing his military duties as an Aircraft Ordnance System Mechanic in an ART status stating in order to be an ART, members have to maintain a military status. His counsel also recommended he be given INCAP pay and be compensated with points and pay for his last 35 months while injured in order to meet his eligibility for retirement.

On 18 Jul 16, the Personnel Board of the SAF, Personnel Counsel concurred with the determination of the prior PEBs and found the applicant unfit for continued military service in his current AFSC. The Board considered the applicant's request for placement in an alternate AFSC and for INCAP pay but found these requests were outside the Board's purview. However, regardless of the Board's authority over AFSC designation, they found the applicant's medical condition would likely continue to restrict his abilities to meet Air Force fitness standards and his utilization as a Total Force Asset even if retrained into an alternate career field.

Dated 10 Dec 19, Reserve Order Work-Product indicates the applicant was assigned to the Retired Reserve section in the grade of technical sergeant due to his medical disqualification which made him eligible for retired pay with 15 to 20 years of satisfactory service per 10 U.S.C. Section 12731(b), *Special rule for members with physical disabilities not incurred in the line of duty*, with an effective date of 27 Jan 18.

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

APPLICABLE AUTHORITY

AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, paragraph 5.12 (Grade on Retirement) states, unless entitled to a higher retired grade under some other provision of law, service members permanently retired for disability or placed on the TDRL retire in the highest of the following grades (10 U.S.C. § 1372): 1) Grade in Which Serving. The grade in which the

CUI//SP-MIL//SP-PRVCY

service member is serving on the date placed on the TDRL or on the date permanently retired for disability; (2) Service members who are retired on or after 23 Sep 96 may be retired in the regular or reserve grade to which they had been selected and would have been promoted, had it not been for the physical disability for which they were retired. (10 U.S.C. § 1372 was amended effective 23 Sep 96).

According to paragraph 5.13 (Grade on Discharge), the discharge grade will be the higher of the following: (1) *Grade in Which Serving*. The grade the service member is serving at time of discharge; (2) *Higher Grade Determined by SecAF [Secretary of the Air Force]*. A grade in which the service member served satisfactorily on active duty, as determined by the SecAF, pursuant to 10 U.S.C. § 1212; or (3) *Grade to Which Promoted*. The Fiscal Year 2002 National Defense Authorization Act amended 10 U.S.C. § 1212 to authorize separation with severance pay in the grade which a service member would have been promoted, had it not been for the physical disability.

DoDI 1332.18, *Disability Evaluation System (DES)*, Appendix 5 to Enclosure 3, "Combat-Related" covers injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A disability is considered combat-related if it makes the member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances; as a direct result of armed conflict; while engaged in hazardous service; under conditions simulating war; or caused by an instrumentality of war. Armed conflict is defined as a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which service members are engaged with a hostile or belligerent nation, faction, force, or terrorist.

AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, dated 8 Oct 15, paragraph 6.1 states the purpose of INCAP pay is to authorize pay and allowances (less any civilian earned income) to those members who are not able to perform military duties because of an injury, illness or disease incurred or aggravated in the line of duty; or to provide pay and allowances to those members who are unable to perform military duties incurred or aggravated in the line of duty; or to provide pay and allowances to those members who are able to perform military duties (see paragraph 6.2.2) but experience a loss of earned income as a result of an injury, illness or disease incurred or aggravated in the line of duty (37 U.S.C. § 204).

AIR FORCE EVALUATION

AFRC/SGO recommends denying the applicant's request to have his condition be found ILOD. On 17 Apr 13, medical records indicate the applicant tripped over a cable and hyperextended his knee which put his body in an awkward position and that he has been unable to work. A mishap report was filed which indicated the applicant sustained an injury of sharp pains and spasm in mid portion of back. On 9 Mar 15, an Initial Record In Lieu Of (IRILO) was initiated. In the narrative summary it states the applicant was injured performing his civilian job and not in Unit Training Assembly (UTA) or active duty (AD) status. On 18 Mar 15, he was found disqualified and was directed to a Fitness for Duty Determination board.

CUI//SP-MIL/SP-PRVCY

The evidence suggests that the applicant was performing his duties as a civilian (ART) when the injury occurred. If a LOD was filed, it would have been found not in the line of duty (NILOD). A LOD is required for INCAP and to enter the Integrated Disability Evaluation System (IDES) process if found unfit. The applicant was appropriately found to be unfit for continued military service as his AFSC requires mobility tasks that he was unable to complete. The duty restrictions in addition to taking narcotics makes the applicant unable to deploy and statements were submitted that he was not likely to improve. Medical review finds that the applicant was unfit for service as found by other reviewing agencies and the injury was NILOD while performing duties in a qualified military status. AFRC/A1 would be better able to confirm the duty status of the applicant at the time of his injury.

The complete advisory opinion is at Exhibit C.

AFRC/A1KK recommends denying the applicant's request for an ILOD determination finding no evidence of an error or injustice. The applicant has not provided any supporting documentation to prove he was in a military status at the time of the injury/incident. Furthermore, there is no evidence he was in a military status on 17 Apr 13. The applicant would need to provide a certified order or a certified AF Form 40A, *Record of Individual Inactive Duty Training*, proving he was in a military, "non-civilian," status on the date of the incident. Additionally, HQ AFRC/SG states there was no LODD case on the applicant which if there had, the applicant's status would have been verified at that time with a certified AF Form 40A or order and a Personnel Data Service History (PCARS) report.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 27 Apr 23 for comment (Exhibit D), but has received no response.

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 concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendations of AFRC/SGO and AFRC/A1K and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds no evidence the applicant was in a military status performing annual training, finding instead he was performing his duties associated with his civilian job when his injury occurred. Due to this, he was found disqualified and was directed to a Fitness for Duty determination only board which found him unfit for military service; therefore, the Board finds no reason his injury should be considered ILOD due to his civilian status. Furthermore, the Board finds no reason for a promotion to master sergeant nor do they find evidence to award INCAP pay due to his injury since he must be in a military status for either to be granted. Finally, the Board

did not find his medical condition as combat-related as a direct result of armed conflict; while engaged in hazardous service; under conditions simulating war; or caused by an instrumentality of war. The applicant was found to have not been in a military status and no direct causal relationship was established between combat-related duties and his unfit medical condition that demonstrated how or when hazardous service or instrumentality of war spurred the contended conditions. Therefore, the Board recommends against correcting the applicant's records.

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-2019-04633 in Executive Session on 24 May 23:

Work-Product [Redacted] Panel Chair
[Redacted], Panel Member
Work-Product [Redacted] Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 16 Jul 19 and 5 Jul 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRC/SGO, w/atchs, dated 20 Oct 22.
- Exhibit D: Advisory Opinion, AFRC/A1KK, w/atchs, dated 27 Apr 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 27 Apr 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.

1/3/2024

Work-Product [Redacted] _____
Board Operations Manager, AFBCMR
Signed by: *Work-Product* [Redacted]