ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXX

DOCKET NUMBER: BC-2019-04638-2

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. He be returned to duty, correcting his record to show he was not separated on 31 May 16.

2. He receive all back pay, benefits, and allowances to include unpaid leave.

3. He be medically evaluated and processed through the Disability Evaluation System (DES).

4. He receive any other relief the Board determines to be just, fair, and appropriate.

RESUME OF THE CASE

On 12 Aug 20, the Board considered and denied his request for a medical retirement and reimbursement for the accrued leave he lost, medical insurance premiums, and medical costs incurred since his discharge; finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board concurred with the finding and recommendation of the AFRBA Psychological Advisor. It is noted in the previous case, that according to the Defense Finance and Accounting Service (DFAS) and DFAS records, the applicant did not lose any leave.

The AFRBA Psychological advisory opinion dated 9 Mar 20 found no evidence that the applicant suffered from Post-Traumatic Stress Disorder (PTSD) or other mental health conditions at the time of military service. There were symptoms reported in Jan 10 but no subsequent recurrence of the symptoms were reported in follow-up assessments and during the Command Directed Evaluation (CDE). He was never assessed for PTSD and was never given a diagnosis of PTSD while in service. Liberal consideration was applied to the applicant's request due to a contended mental health condition, however; there was no substantiated evidence that a condition existed; therefore, it was not possible to opine if the condition or experience mitigated or outweighed the discharge.

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 31 Aug 22, the court remanded the applicant's case to the AFBCMR pursuant to Rule 52.2 of the Rules of the Court of Federal Claims in lieu of an answer to Plaintiff's Complaint, instructing the AFBCMR to evaluate all claims asserted by the applicant to include the following:

1. His Active Guard/Reserve (AGR) appeal was cancelled without his consent.
2. He was not provided the opportunity to attend the Transition Assistance Program (TAP) or receive a medical examination before his release from active duty.
3. He did not obtain access to or have the ability to access DFAS records.
4. The previous Board did not receive or review his response to the medical advisory opinion.

On 29 Sep 22, the applicant requested reconsideration of his request to be returned to duty and evaluated by the DES process. He again contends the Air Force wrongfully discharged him from active duty and did not properly assess him for retention on active duty. He was quickly and haphazardly out-processed and was not given a sufficient medical evaluation for his PTSD; allowed to complete TAP; or receive pay for his 60 days of accrued leave. The Air Force violated AFI 36-2132, *Active Guard/Reserve (AGR) Program*, when it cancelled his non-retention recommendation appeal and he was not provided an opportunity to review DFAS records in violation of 10 U.S.C. Section 1556, *Ex Parte Communications Prohibited*, and due process requirements.

Furthermore, the applicant contends he submitted an appeal to the AFRBA Mental Health advisory from the original case, but the previous Board never saw the rebuttal. In his response, the applicant's contended the Psychological Advisor stated inaccurate facts that he began receiving psychotherapy treatment on 27 Nov 18. He was diagnosed with PTSD on 3 May 17 and began receiving treatment in Jun 17. The Advisor also stated he did not receive a Compensation and Pension (C&P) Examination until 31 Dec 18. He began receiving payments in Jan 18 for his PTSD but his exam was completed in the fall of 2017. He agrees that his medical records lack significant documents to support his claim. When he tried to obtain these records from the Army, he was told they have no medicals records for him. He was not properly evaluated for PTSD during his CDE and was not given a final medical out nor sent to TAP before his discharge. He also lost his accrued leave which he was not given the opportunity to use. He submitted additional evidence to support his rebuttal to include witness testimonies and additional medical records.

In support of his reconsideration request, the applicant submitted the following new evidence: 1) emails from his unit from 2016 through 2017 regarding his final pay/leave and his AGR Review Board appeal; 2) medical documentation regarding his Personality Disorder diagnosis and PTSD; 3) a copy of his Command Directed Evaluation Report; 4) the rebuttal response to the AFRBA Mental Health advisory with attachments from the original case; and 5) his Department of Veterans Affairs (DVA) rating summary.

The applicant's complete submission is at Exhibit G.

STATEMENT OF FACTS

The applicant is a retired Air Force Reserve technical sergeant (E-6) who was separated on 4 Dec 16 and is awaiting retired pay at age 60.
On 21 Nov 15, SF 600, *Chronological Record of Medical Care*, indicates a preventive health assessment was completed on the applicant indicating he was qualified for worldwide duty (WWD).

On 10 Dec 15, Special Order XXXXX indicates the applicant was currently serving on extended active duty until 31 Jan 16 (voluntary) which was extended to 31 May 16.

On 1 Dec 15, DD Form 2648-1, *Transition Assistance Program (TAP) Checklist for Deactivation/Demobilizing National Guard and Reserve Service Members*, indicates the applicant acknowledged that he received transition counseling on the date he signed and that he understood the transition benefits and services available to assist him in his transition as required by Title 10 U.S.C., Chapter 58, Section 1142. In Section VI, *Remarks*, he indicates his counseling was conducted 89 days or less before his transition because of other which he annotates "waiting for legal."

Dated 21 Jul 16, a letter from ARPC/DPTTS, Separations Branch, indicates the applicant was notified he would be reaching his expiration term of service (ETS), 4 Dec 16 and he would be automatically discharged. He was told he had the option to complete his application for transfer to the Retired Reserve.

On 8 Jan 22, ARPC/DPTT sent the applicant the standard Notification of Eligibility for retired pay (20-year letter) informing him he had completed the required years under the provisions of Title 10 United States Code, Section 12731 (10 U.S.C § 12731), and is entitled to retired pay upon application prior to age 60.

For more information, see the excerpts of the applicant's record at Exhibits B and H and the advisories at Exhibits K, L, and M.

APPLICABLE AUTHORITY/GUIDANCE

AFI 48-123, *Medical Examinations and Standards*, dated 5 Nov 13, paragraphs 7.5.2 and 7.5.3 notes a medical examination by a credentialed provider and documented on DD Form 2697, *Report of Medical Assessment*, and supporting documents is mandatory when the service member has not had a Preventive Health Assessment (PHA) within one year.

AFI 36-3003, *Military Leave Program,* dated 26 Oct 09.

> Paragraph 4.6, *Payment for Accrued Leave*, states Title 37, U.S.C., section 501, is the authority for payment for accrued leave upon reenlistment, retirement, separation under honorable conditions, or death. It limits payment of accrued leave to 60 days in a military career effective 10 Feb 76. A military career includes former service in enlisted or officer status. Cumulative payment for accrued leave as an enlisted member, officer, or both cannot exceed 60 days. DoD 7000.14-R, Volume 7A, *Department of Defense Financial Management Regulation (Military Pay Policy and Procedures Active Duty and Reserve Pay*), states when members carry leave forward or receive payment for accrued leave when separating with or without immediate reentry on active duty.

Title 37 U.S.C, section 501, *Pay and Allowances of the Uniformed Services*.

Paragraph (3) Payment may not be made to a member for any leave he elects to have carried over to a new enlistment in any uniformed service on the day after the date of his discharge; but payment may be made to a member for any leave he elects not to carry over to a new enlistment. However, the number of days of leave for which payment is made may not exceed sixty, less the number of days for which payment was previously made under this section after February 9, 1976.

Paragraph (5) The limitation in the second sentence of paragraph (3) and in subsection (f) shall not apply with respect to leave accrued— (A) by a member of a reserve component while serving on active duty in support of a contingency operation; (B) by a member of the armed forces in the Retired Reserve while serving one active duty in support of a contingency operation; (C) by a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps or a member of the Fleet Reserve or Fleet Marine Corps Reserve while the member is serving on active duty in support of a contingency operation; or (D) by a member of a reserve component while serving on active duty, full-time National Guard duty, or active duty for training for a period of more than 30 days but not in excess of 365 days.

ANGI 36-101, *Air National Guard Active Guard and Reserve (AGR) Program*, dated 3 Jun 10.

Paragraph 8.5, *Involuntary Tour Curtailment*, states commanders considering involuntary curtailment must use all quality force tools available i.e. referral Officer or Enlisted Performance Reports (OPRs/EPR), Letters of Reprimand (LOR), Article 15 etc., prior to initiating an involuntary curtailment. Depending on the nature of the involuntary curtailment, commanders may consider discharge in lieu of involuntary curtailment.

Paragraph 8.5.2, *Involuntary Curtailment Reconsideration*, states an approved curtailment may be submitted for reconsideration to the Adjacent General (TAG) only if significant new information is obtained. Curtailment action will continue while pending reconsideration. If a written request for reconsideration is not filed, reconsideration rights will be waived.

Paragraph 8.5.2.1 states reconsideration memorandums, along with any supporting documentation, shall be submitted directly to Human Resource Office (HRO) for staffing to TAG. Airmen must notify HRO in writing of their intent to reconsideration an involuntary curtailment within 7 calendar days of receipt of notification memorandum. Reconsideration packages must be received by HRO within 21 calendar days of receipt of notification memorandum. HRO will notify the airman of the reconsideration outcome and notify the airman's chain of command of any further processing requirements.

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
b. Did that condition exist/experience occur during military service?
c. Does that condition or experience actually excuse or mitigate the discharge?
d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued supplemental guidance to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to the supplemental guidance, paragraphs 6 and 7.

The entire guidance can be found at Exhibit E from the original case.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of the applicant's rebuttal and newly submitted evidence and finds insufficient evidence to support the applicant's request for a medical retirement for his mental health condition to include PTSD. As a result, the opinion rendered in the original mental health advisory remains unchanged. This advisory supplements the previous mental health advisory dated 9 Mar 20 that was previously provided to the Board. It is

recommended the Board review this supplementary advisory in addition to the previous advisory for the applicant's mental health history as information provided in the previous advisory will not be fully reiterated in this advisory. This supplementary advisory will address his rebuttal and newly submitted evidence.

The Psychological Advisor has reviewed the applicant's rebuttal to the previous mental health advisory and the newly submitted evidence and finds the information presented is still insufficient to support his request. There are many reasons for this conclusion. Addressing his rebuttal regarding inaccurate facts documented in the original advisory about his post-service evaluation and treatment, it was mentioned in the original advisory he received a C&P exam from the DVA on 31 Dec 18. This information was found to be inaccurate but not because of the reason the applicant had stated. On this date, the applicant received an intake/consultation evaluation, not a C&P exam, for mental health treatment, specifically medication evaluation/service with a DVA provider, for having sleep disturbances and anxiety. He endorsed symptoms consistent to PTSD from his military combat trauma and was given a diagnosis of PTSD. Although it was erroneously reported he received a C&P exam instead of an intake/consultation evaluation, the information about his condition of PTSD in the original advisory was consistent. The applicant contends he received a C&P exam sometime in the fall of 2017, but this C&P exam report was not available in his electronic medical records maintained by the DVA nor did the applicant submit the report for review. It is possible he had received the C&P exam at that time but no evidence to confirm his report. Regardless of when he received the C&P exam, service-connection for his mental health condition by the DVA does not equate to him having an unfitting mental health condition resulting with a medical discharge from the military. Service-connection generally mean his condition was related or connected to his military service, which the Psychological Advisor does not dispute, but also does not signify his condition was unfitting for continued military service meeting criteria for a medical discharge.

The applicant contended there was an error with the date reported of when he was first diagnosed with PTSD and began treatment. He said he was diagnosed with PTSD on 3 May 17 from Baystate Medical Center, then received treatment with another provider in Jun 17, and then changed his provider in 2018. The record he had previously submitted was not clear for who had diagnosed him with PTSD as there were two providers listed but does indicate he met with the provider from Baystate Medical Center on 3 May 17. The information did not identify his traumatic experience for this diagnosis but presumably was related to his military experience per the applicant's report. The Psychological Advisor acknowledges the oversight; however, the date of when he was diagnosed or began treatment post-service also does not signify his mental health condition was unfitting that would meet criteria for a medical retirement from the Air Force. The information seemingly demonstrated he had developed PTSD from his military experiences.

The applicant had submitted statements from his former First Sergeant, former colleagues, and family members attesting to observations of his behavioral changes. His former First Sergeant and colleagues discussed the impact of his mental health condition on his ability to perform his duties and not being able to deploy or be armed. While the information is helpful in gaining more insight into his difficulties, there are some issues with their statements and/or their statements were not consistent to his objective military records. First and foremost, statements from his former First Sergeant and one of his former colleagues discussing his non-deployable status due to his

medical/mental health condition caused by his deployment experiences had occurred while he was enlisted in the Army and therefore, his mental health condition from his Army service would be considered a prior service condition/impairment. His mental health condition was never determined to be unfitting by the Army because he did not receive a medical discharge from the Army. He reported his Army records were missing significant documents to include his visits with psychologists at Evans Army Community Hospital (EACH) from the 2004-2005. This iteration of mental health treatment occurred prior to his service with the Air Force and would not significantly alter or affect his request for a medical retirement from the Air Force. After his Army service, the applicant transferred to the Air Force indicating again, his prior service mental health condition or impairment was not unfitting. This is because in order to transfer to another service branch, one must meet accession standards required of that branch. His successful transfer to the Air Force confirmed his prior-service mental health condition was not unfitting or disqualified him from enlisting into the Air Force Reserve. The applicant did report having PTSD symptoms of hypervigilance, easily started, being detached from others, and having depressed mood on his Post Deployment Health Assessment (PDHA) in 2010 following his return from deployment in Iraq with the Air Force, but there was no evidence these PTSD symptoms caused any impairment to his overall functioning. There was no evidence his deployment with the Air Force had permanently aggravated his prior-service condition. The applicant declined a referral to the mental health clinic during his PDHA for unknown reasons but possibly because his condition was not severe or serious enough for him to seek treatment. He did not report having PTSD symptoms sans depressed mood, albeit for a different reason, to any of his medical providers after this PDHA, signifying his PTSD symptoms may have resolved or were not impairing to him. He made complaints of sleep disturbances and depressed mood caused by discrimination from a superior a few years later but denied these problems caused him any difficulties. This information would also suggest a reason he did not need or receive mental health treatment.

The applicant alleged he was placed on "Do Not Arm" restrictions since Nov 15 until he was discharged from service, but the applicant and his unit could not produce paperwork to substantiate this restriction. His former colleagues from the Air Force claimed in their witness statements he had behavioral problems, mental health issues, and safety concerns causing him to not be armed and impaired his ability to perform his duties. The applicant received a CDE in Feb 16 for his behavioral changes which would corroborate some of their observations, but the results of the CDE performed by a duly qualified mental health provider yielded no mental disorder diagnosis and no duty limitations or restrictions were required or necessary. This CDE was performed during the time he was allegedly placed on "Do Not Arm" restriction by his unit yet, his CDE provider did not find he needed duty limitations or restrictions. If his mental health condition had caused him to be not armed as they claimed, then he would have received a duty limiting condition profile for restriction to firearms. This event did not occur. Moreover, if his mental health condition had caused significant impairments to his ability to perform his duties, he would be placed on a duty limiting condition profile, be referred to mental health treatment, and/or be referred to the Medical Evaluation Board (MEB) and enter the DES. None of these events occurred according to his available records. His CDE results were not congruent to his witnesses' reports and their statements were not corroborated by his military records. The Psychological Advisor acknowledges the applicant had made earnest efforts to obtain his records, but the burden of proof is still placed on the applicant to submit the necessary records to support his claims. The Psychological Advisor finds his witness statements were not sufficient to supersede the results of

his CDE. His colleagues were not in his chain of command who could formally or reliably confirm his restriction status, the actual reason for his restriction, or the existence of an official restriction.

The applicant claimed he was not evaluated for PTSD during his CDE and was not evaluated for this condition before his discharge. The standard operating procedure of a CDE includes a thorough assessment of various mental health conditions and symptoms to include PTSD and so it was more likely than not, he was assessed for PTSD. The fact that he did not receive a diagnosis of PTSD from his CDE would indicate he did not meet diagnostic criteria for this condition because he did not endorse the required symptoms for a confirmed diagnosis. The applicant stated he was not evaluated for PTSD prior to his discharge and this may have occurred. Nevertheless, he did receive a CDE in close proximate time of his discharge producing no diagnosis and there was no evidence or records the applicant had made any complaints or endorsed any PTSD or trauma related symptoms to his providers at or near the time of his discharge. Due to this situation, an evaluation for PTSD was not warranted. The applicant stated he did not receive a final medical out before his discharge. The applicant was discharged from the Air Force Reserve for reason of "Completion of AGR Military Duty Tour" and due to this reason, it was not necessary or required that he received a medical evaluation before his discharge. There was not a compelling reason he needed a medical evaluation especially since he did not report having any significant or serious mental health issues at or near his time of discharge.

The applicant acknowledged his military and service treatment records were scant and requested consideration his condition of PTSD had existed during service. The Psychological Advisor will give the applicant the benefit of the doubt his condition of PTSD may have existed during service since there was evidence he reported having some PTSD symptoms during his PDHA. However, the existence of a mental health condition, diagnosis or symptoms does not automatically render a condition as unfitting meeting criteria to be referred to the MEB/DES. More information is required to meet this eligibility. As stated in the original advisory, the applicant was never placed on duty limiting condition profile for his mental health condition, he was never deemed not worldwide qualified due to his mental health condition, and no reports from his commander or providers his mental health condition had interfered with his ability to reasonably perform his military duties in accordance with his office, grade, rank, or rating. Furthermore, since the applicant was an Air Force Reserve member, an In Line of Duty (ILOD) or Line of Duty (LOD) determination for his mental health condition is required. This determination is required to be eligible for a compensable medical discharge/retirement. His record was absent for all of these required markers to illustrate his mental health condition was unfitting causing career termination that may potentially result with his desired medical retirement. Therefore, the Psychological Advisor finds no evidence he met criteria for a medical retirement for his mental health condition.

Liberal consideration was applied to the applicant's request in the original advisory. To give the applicant the benefit of the doubt that his condition of PTSD had existed during military service as requested, the following are revised answers to the four questions from the Kurta Memorandum:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends he developed PTSD from his military service, his condition of PTSD had impacted his ability to perform his duties causing him to be on "Do Not Arm" restrictions for the

last six and a half months of his time in service, and he was not deployable because of his condition. He believed he should have received a medical retirement for PTSD due to these reasons.

2. Did the condition exist or experience occur during military service?
There is no evidence in the applicant's available objective military and service treatment records he was diagnosed with PTSD during his military service. He did report during his PDHA in 2010 after his return from Iraq he had PTSD symptoms of hypervigilance, easily startled, detachment from others, and depressed mood. From this information and the applicant's personal testimony, it is accepted his condition of PTSD had existed or occurred during military service.

3. Does the condition or experience actually excuse or mitigate the discharge?
There is no evidence the applicant had any potentially unfitting mental health conditions to include PTSD that would meet criteria to be referred to the MEB and DES for a medical discharge. He was never placed on a duty limiting condition profile, he was never deemed not worldwide qualified due to his mental health condition, and there are no records his mental health condition had interfered with his ability to reasonably perform his military duties in accordance with his office, grade, rank, or rating. Since he was a member of the Air Force Reserve, there was also no record or evidence he received an ILOD or LOD determination for his mental health condition. This determination is required in order to be eligible for a compensable medical discharge/retirement. Therefore, his mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?
Since the applicant's mental health condition does not excuse and mitigate his discharge, his condition would also not outweigh his administrative discharge. There is no evidence to support the applicant should have been referred to the MEB or DES to potentially receive a medical discharge/retirement.

The complete advisory opinion is at Exhibit J.

HQ ARPC/DPA recommends denying the applicant's request to correct his military record to reflect that he was not separated from the AGR program on 31 May 16. The applicant met an AGR Review Board on 9 Mar 15 at which time the board determined to separate him on his date of separation (DOS) of 31 Jan 16. Email correspondence from 20-21 Jan 16 show that there was an extension granted to 31 May 16 to allow for a Command Directed Mental Health Evaluation or MEB. The applicant was separated from the AGR program effective 31 May 16. Based on limited documentation available to HQ ARPC/DPA and provided by the applicant and analysis of the facts available, he intended to appeal the AGR Review Board decision to separate him on his DOS of 31 Jan 16. His evidence includes what appears to be a signed AGR Review Board Appeal request, though the signature page and date page clearly appear to be from two different scans. Regardless, ARPC/DPA was not able to locate his appeal documentation or any evidence the appeal was properly filed as there is no record of such appeal in any applicable system. Furthermore, there is no evidence to support his claim his ARB Appeal was denied at his Commander's request.

The complete advisory opinion is at Exhibit K.

On 6 Feb 23, an email was sent to AFPC/DPP, the Military Pay Personnel Office, to inquire about the applicant's contention he was not paid nor allowed to take his 60 days of accrued leave before he separated. On 8 Feb 23, the office responded stating he was only able to sell 3.5 days of his 60 days of accrued leave as he already sold 56.5 days and that he can only sell a total of 60 days in his career. On 8 Feb 23, an email was sent inquiring about the applicant's leave and if Title 37 Section 501 would apply. On 17 Mar 23, it was determined by AFRC/A1KK, Force Management Branch, that the applicant's leave he sold back in 2011, 56.5 days was from his training in 2007 and his mobilization in 2009-10. Both of these periods were under 365 days. This leave did not count towards his 60 day maximum according to Title 37 Section 501, paragraph (3) and (5). However, according to his DD Form 214 from his time in the Army, block 16 shows he was paid 55 days of accrued leave which does count towards his 60 day maximum according to Title 37 Section 501, paragraph (3).

The complete advisory opinion is at Exhibit L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant's counsel on 17 Mar 23 for comment (Exhibit M) and again on 17 Apr 23 after counsel stated he did not receive the original email with attachments. On 16 May 23, the applicant's counsel replied. In his response, the applicant's counsel states the 7 Feb 23 Psychological Advisor opines that the applicant exhibited symptoms consistent with PTSD from his military combat trauma and was disarmed, but arbitrarily states that the evidence is still insufficient and fails to explain the reasoning and relies on the unit's failures to provide proper care, treatment, and evaluation to the applicant as purported proof that he was fine. Consistent with *Nyan v. United States*, 153 Fed. Cl. 324 (2021), the evidence shows that the applicant was unable to perform his duties due to PTSD, was disarmed, and his unit's failure to ensure proper medical examination and treatment was inconsistent with the applicable DoDI and Air Force standards. He presented witness accounts and other evidence and the advisory opinion conceded to it, that he suffered from symptoms of PTSD when he was on active duty. Specifically, the advisory opinion analyzed several witness statements that corroborated he experienced mood changes, displayed a quiet almost depressed state and was disarmed and unable to perform his duties and further attempts to discount the DVA's PTSD diagnosis.

Additionally, the advisory opinion makes impermissible assumptions that the applicant was fine because no medical evaluation board was scheduled for him. He did not receive a full medical evaluation before his discharge because the unit improperly cancelled his AGR retention appeal. The applicant's unit misrepresented to him that his appeal concerning his AGR retention was still pending, when in fact the unit improperly cancelled it without telling him. Once he discovered the misrepresentation in May 2016, the unit quickly processed him for separation without allowing him to complete TAP and without properly medically evaluating him to determine whether he should undergo MEB proceedings. The evidence shows that the Air Force had incomplete records, it discharged him without full medical evaluation, and the evidence of him suffering from PTSD-like symptoms as witnessed by other airmen and his family was ignored and unexplained.

Furthermore, the applicant did not receive a complete Separation History and Physical Examination (SHPE). During such evaluations, he would have been allowed to provide his own

input and additional physical examinations and assessments would have been documented. It is fundamentally unfair for his unit to fail to follow correct pre-separation medical evaluation procedures and then for the advisory opinion to assert that there is insufficient evidence to grant relief. The CDE he received was not adequate to address his PTSD. After the CDE, the unit assumed that no further evaluations were necessary even though DoDI 6040.46, *the Separation History and Physical Examination (SHPE) for the DoD Separation Health Assessment (SHA) Program*, stated otherwise.

The advisory opinion recognized that the applicant's medical conditions were connected to his military service but still denied relief. The evidence shows he sought help from the DVA, and he was diagnosed with PTSD as early as May 2017. The Kurta memorandum states that a determination by the DVA that a veteran's mental health condition, including PTSD … is connected to military service, while not binding on the DoD, is persuasive evidence that the condition existed or experience occurred during military service. For this reason, the applicant is entitled to relief.

Finally, concerning the applicant's leave, he would like to point out that he planned to properly dispose of his leave, either by selling it or taking it. However, the unit quickly processed him out and he lost it because he was misled about the status of his appeal which affected his planning for leave.

The applicant's complete response is at Exhibit N.

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 report provided by the Court remand order, and the applicant's new evidence, rebuttals, and additional advisories, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds no evidence to support he had any potentially unfitting mental health conditions to include PTSD that would meet the criteria for a medical separation. The mere existence of a medical/mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The applicant's military duties were not degraded due to any mental health condition. A Service member shall be considered unfit when the evidence establishes the member, due to a disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. The Board took note of the applicant's DVA disability ratings; however, 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. The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not

sufficient to grant the applicant's request. Specifically, the Board notes the AFRBA Psychological advisory opinion dated 9 Mar 20 found there was insufficient substantiated evidence that a condition existed at the time of the applicant's military service, and therefore, it was not possible to opine if the condition or experience mitigated or outweighed the discharge. The Board noted the eyewitness statements and post-service health records provided by the applicant; however, the results of his CDE indicated no PTSD diagnosis, no imminent safety concerns, and no duty limitations or restrictions. This examination was conducted during his alleged "Do Not Arm" restriction but the CDE did not indicate a need for duty limitations or restrictions nor was there evidence in his record his unit put him on a "Do Not Arm" restriction. Furthermore, the Board finds no evidence from his commander or medical providers which indicate his mental health condition interfered with his ability to reasonably perform his military duties in accordance with his office, grade, rank, or rating resulting in a medical separation.

Furthermore, the Board finds the preponderance of evidence fails to establish any error or injustice with respect to the applicant's AGR appeal. Legally, in the absence of evidence to the contrary, the Board is authorized to rely upon the presumption of regularity that attaches to agency action, which includes appeal cancellations for AGR positions. To challenge this presumption and demonstrate an error or injustice, the applicant must provide sufficient objective evidence. In this case, the applicant failed to overcome this presumption and failed to prove an error or injustice. The only evidence the applicant provides of an alleged error or injustice related to his AGR appeal are the emails between himself and the Mission Support Group Commander and the email from ARPC notifying him of his cancelled appeal. This evidence is insufficient on its own to overcome the presumption of regularity or establish by a preponderance an error or injustice. Furthermore, his evidence is undermined by objective evidence available. Contrary to the applicant's claims, the available evidence demonstrates it was his own actions that caused the cancellation of his AGR appeal and not unilateral command action taken without consent. In particular, his appeal became moot due to a retraining request, as confirmed by an email dated 6 May 16, from ARPC. This email informed the applicant his appeal was cancelled months ago at the beginning of his health screening when he notified his unit of his intention to no longer work in his current position. The Board finds no evidence the applicant reinitiated his appeal following his request for retraining, nor does the record demonstrate he rescinded his retraining request. The request for retraining, promoted by his desire to switch to another career field and concerns about his safety in his unit, makes it more likely than not, the appeal was no longer necessary, and cancellation was not improper. The appeal cancellation is consistent with the regulations in place as retraining necessitates applying for a new AGR position which would render the appeal of his current position moot. Additionally, this conclusion is supported by the evidence demonstrating he was advised to apply for AGR positions for which he was qualified following his request for retraining per the email dated 6 May 16, from ARPC. Per AFI 36-2132, paragraph 2.3.2, does not state retraining requests are guaranteed, but are considered on a case-by-case basis. Therefore, the Board concludes the applicant has presented insufficient evidence that under the circumstances his command actions amounted to an error or injustice.

The Board likewise finds no error or injustice with respect to his use of leave. The evidence demonstrates the applicant was given ample time to schedule and utilize his leave as he was not released from the AGR program until 31 May 16. Per AFI 36-3003, *Military Leave Program*, both management and members share responsibility in managing leave balances throughout the fiscal

year. In providing leave, Congress intended for members to use their leave as it accrues. Congress provides for payment of accrued leave when members are unable to use their leave because of military necessity. However, Congress did not intend for members to accrue large leave balances expressly for payment of accrued leave. Members who are unable to use leave due to military necessity may accumulate a maximum of 60 days by the end of a fiscal year. Title 37, U.S.C., section 501, is the authority for payment for accrued leave upon reenlistment, retirement, separation under honorable conditions, or death and limits payment of accrued leave to 60 days in a military career. The Board finds no evidence to suggest the applicant could not use his leave because of military necessity and it is the applicant's responsibility to gain access to myPay, the military pay website, prior to separation. However, the Board does find the applicant's allowable leave payment was not maximized; therefore, the applicant is awarded another 1.5 days of compensation for his leave.

Lastly, the Board finds the preponderance of evidence does not support the applicant's contention he was denied a separation physical or transition assistance. IAW AFI 48-123, *Medical Examinations and Standards*, dated 5 Nov 13, paragraphs 7.5.2 and 7.5.3, physical examinations may be accepted between 90 days and up to 12 months prior to the scheduled date of separation from active duty to which the applicant was provided a preventive health assessment within this timeframe. Additionally, the Board felt the applicant was provided transition assistance as evident on his signed DD Form 2648-1 acknowledging he understood the transition benefits and services available to assist him in his transition. The applicant did indicate he was waiting for legal but the Board felt it was the applicant's responsibility to follow through with this request. Therefore, the Bard recommends against correcting the applicant's records except for the award of the 1.5 days of leave as indication above.

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 the award of 1.5 days of excess leave payable to the applicant.

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 the 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-2019-04638-2 in Executive Session on 21 Jun 23 and 14 Jul 23:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 12 Aug 20.
Exhibit G: Recon Application, DD Form 149, w/atchs, dated 29 Sep 22.
Exhibit H: Excerpts from Military Human Resource Records
Exhibit I: Court of Federal Claims Remand Order, dated 31 Aug 22.
Exhibit J: Advisory Opinion, AFRBA Psychological Advisor, dated 7 Feb 23.
Exhibit K: Advisory Opinion, HQ ARPC/DPA dated 14 Mar 23.
Exhibit L: Emails regarding Applicant's Leave, dated 17 Mar 23.
Exhibit M: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Mar 23 and 17 Apr 23.
Exhibit N: Applicant's Response, w/atchs, dated 16 May 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