



CUI//SP-MIL/SP-PRVCY

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

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2020-00638-2

COUNSEL:

Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for a medical retirement.

RESUME OF THE CASE

The applicant is a retired Air Force Reserve (AFR) technical sergeant (E-6) who was honorably separated on 31 Aug 18.

On 19 May 21, the Board considered and denied his request for AFRC/SGO's decision to be overturned and given a medical retirement due to his generalized anxiety disorder (GAD), sleep apnea, and knee injuries; finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board concurred with the rationale and recommendations of the AFBCMR Psychological Advisor, the AFBCMR Medical Advisor and AFRC/SGO and found a preponderance of the evidence did not substantiate the applicant's contentions. The Board noted while the applicant contended, he was deprived of a Medical Evaluation Board (MEB), he did not provide substantial evidence showing he had unfitting medical conditions to include GAD, sleep apnea, and knee injuries which would have required his processing through the military's Disability Evaluation System (DES), a prerequisite to a medical discharge. The Board further noted the applicant stated the Office of Personnel Management (OPM), the Department of Veterans Affairs (DVA), and the Social Security Disability Insurance (SSDI) concurrently recognized his conditions as disabilities before he was discharged; however, the military's DES, established to maintain a fit and vital fighting force, can by law, 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 or near the time of separation. The evaluating military mental health provider indicated the applicant's anxiety did not independently interfere with duty performance necessitating limitations of duty or required extended or recurrent hospitalization and concluded he met retention standards meaning he could be retained with an assignment limitation code (ALC). The applicant's contentions were duly noted; however, the applicant did not provide sufficient evidence to persuade the Board AFRC/SGO's decision to return him to duty was in error or contrary to the governing Air Force instructions and found the applicant failed to sustain his burden of proof he suffered from an error or injustice.

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Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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 J.

On 26 Apr 23, the applicant requested reconsideration of his request for a medical retirement. He again contends, through counsel, he suffered from GAD, sleep apnea, knee problems, and breathing issues in service. The prior Board's decision did not consider material evidence submitted with his previous case. Documents detailing his Social Security Administration (SSA) disability qualification, OPM disability findings, and DVA disability rating provide concrete evidence he was severely disabled and unable to return to duty when ordered. He should have been referred to a full MEB and medically retired. These ratings and decisions from alternative government agencies recognize his disabilities and are necessary to be considered as they lend significant credence that the Air Force failed to provide him with a legitimate MEB and appropriate discharge.

The military's decision was inconsistent with the facts. On 21 Nov 17, his updated AF Form 469, *Duty Limiting Condition Report*, indicated a MEB was currently underway, and his Commander's Impact Statement (CIS) indicated he could not perform his duties due to his disabilities. On 14 Jun 18, an updated AF Form 369 indicated he was fit for duty with certain mobility restrictions and was not eligible for deployment or mobility positions and stated he could only be assigned to bases with fixed medical treatment facilities. This was contrary to past documentation outlining his service-connected disabilities as he was medically disqualified from worldwide duty (WWD) due to his anxiety disorder multiple times previously. Despite the initial review in lieu of (IRILO) findings, he was returned to duty. One month prior to his expiration term of service (ETS), he was ordered to return to duty and report for drills; however, he was physically unable to due to his disabilities. He had not been participating in drills since 2015 due to his disabilities which is extensively documented. The return to duty order seems to stem from one instance (23 Jan 17) about him experiencing some relief.

His fit for duty decision and subsequent physical therapy test were administered without regard to his actual medical conditions. The failure to consider his conditions, despite OPM, DVA, and SSDI concurrently recognizing them as disabilities before his discharge, resulted in a wrongful discharge and loss of benefits. The fitness determination was capricious and contradicted by paperwork available from the relevant agencies. His records from the Air Force are replete with his command doubting his fitness and detailing his inability to complete his duties. The IRILO from Apr 18, just two months before his fitness determination, was the most recent record demonstrating as such. The abrupt change of plans for the applicant robs the Air Force of a consistent narrative regarding his fitness, making its decision capricious. The Board's previous decision found he did not provide substantial evidence showing he had unfitting medical conditions to include GAD that would have required processing through the military's DES and he did not have any potentially unfitting mental health conditions that required a medical discharge. Far more than a preponderance of the evidence now provided demonstrates otherwise. The OPM, DVA, and SSA found he could not maintain any (less rigorous civilian) employment before the Air Force decided otherwise. The AMC/ICQ dismissal of his original complaint was wrong because it failed to notice or rectify the error within his AF Form 469. The AMC/ICQ Headquarters' dismissal of his appeal was wrong because it failed to correct the clearly

contradictory decision to order him to return to duty rather than conduct a full MEB. The Government's decision to discharge him contained manifest error because this decision was based on his failure to participate in drills he was physically incapable of performing, as evidenced by extensive documentation in his medical record.

The previous medical opinions do not demonstrate a good faith review of the relevant facts, deprived him of a sufficient review of his petition, and were contradictory to Air Force regulations. He should have been referred to an MEB. He suffered from GAD, sleep apnea, and leg conditions all of which hindered his ability to serve. This was documented extensively throughout his service. This documentation and appeal should have led to a referral through the MEB process, but this never occurred and for all intense purposes, was unjustly delayed for several years. For all purposes outside (but during) his military career, he is disabled for less rigorous civilian employment per federal agencies; yet the military fails to recognize this fact. His LOO demonstrates his disability is a result of his service in the military and his records reflect he was unfit for service for many years.

In support of his reconsideration request, the applicant submitted the following new evidence: (1) a letter from the SSA, dated 20 Jul 16, indicating a fully favorable decision for disability and disability insurance benefits; (2) a letter from OPM, dated 1 Feb 16, indicating he was found disabled for his Supply Technician's position due to GAD (3) a benefits letter from SSA, dated 29 Sep 16; (4) a letter from the DVA, dated 28 Jun 18, indicating he is being paid at the 100 percent disability rating due to his unemployability; and (5) court documents from the United States Court of Federal Claims, dated 27 Feb 19, detailing his complaint/nature of the action, jurisdiction and venue of the action, parties involved, and factual allegations to include his diagnoses, treatment, and referral to the MEB.

The applicant's complete submission is at Exhibit K.

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 the desired changes to his record, specifically medical retirement for his mental health condition. This is a supplemental advisory to the original mental health advisory which was previously provided to the Board (Exhibit C). 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 advisory is limited to his mental health condition.

A review of the newly submitted records continues to find insufficient evidence to support the applicant's request for a medical retirement for his mental health condition. The new records did not provide any substantive information that would suggest he was unfit for military service. His existing military records revealed he received an IRILO by the AFRC/SGO and was returned to duty with an ALC of C3 with re-evaluation in a year. The AFRC/SGO cited his mental health provider had determined his anxiety, although he did receive mostly supportive counseling/therapy for this condition, did not interfere with his duty performance that would necessitate duty restrictions or require an extended or recurrent higher level of care such as hospitalization or more

intensive treatment. His mental health provider concluded he met retention standards, and he was retained in the service as a result. The new evidence of his more recent DVA letter dated 28 Jun 18 maintained his combined disability rating of 90 percent with no break downs of this percentage according to each service-connected condition. His previous DVA letter dated 14 Dec 15 stated he received a 70 percent rating for panic disorder with agoraphobia and GAD (previously rated as unspecified anxiety disorder under diagnostic code 9413) effective 12 Nov 15. It is assumed his remaining 20 percent rating, totaling 90 percent, was for other non-mental health condition(s). The DVA letter dated in 2018 did not state he received an increase in rating for his mental health condition but regardless of whether or not he received a rating increase, his DVA rating for service-connected condition(s) does not indicate his mental health condition was unfit for duty. The assignment and purpose of DVA ratings differ from ratings from the military/Department of Defense. The same concept is applied to his SSDI and OPM designation of his disability for his mental health condition. Each entity or agency has its own requirements and definition for disability. As a reminder, 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 or near 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 law, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length of 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.

The complete advisory opinion is at Exhibit L.

The AFBCMR Medical Advisor recommends denying the application. After a review of the newly submitted documents, the Medical Advisor cannot identify any distinct reasons under applicable regulations to grant a favorable outcome to the request. The additional evidence the applicant submitted was assessed to not support such an action. The application to the Board, legal brief response, SSA and OPM documents, informal LOD for mental health, the duty limiting conditions (DLC) report returning the applicant back to duty, AFRC physical standards division advisory, and partial court papers were the only new evidence provided for this reconsideration. All other submissions were previously submitted and therefore, not considered in this review. Although the new submission provided information as to what the applicant is currently receiving in terms of compensation, they did not bring forth any new and or compelling medical evidence to overturn or negate the prior Board's adjudication.

The complete advisory opinion is at Exhibit M.

AFRC/SG recommends denying the application finding no evidence of an error or injustice. The applicant had due process via an IRILO which resulted in a return to duty (RTD) decision; therefore, he is not eligible for medical retirement based on this information. The new evidence presented does not alter the previous advisory recommendation. The applicant had two LOD determinations. On 15 Dec 14, the LOD for obstructive sleep apnea was found not in the line of

duty (NILOD). On 25 Feb 15, a second LOD for anxiety disorder was found in the line of duty (ILOD). Both conditions were below the continued service (retention) standards as outlined in AFI 48-123, *Medical Examinations and Standards*, and the associated Medical Standards Directory (MSD). As a result, he was entered into the Pre-Integrated Disability Evaluation System (IDES) process (IRILO). On 14 June 18, AFRC/SGO finalized adjudication, granting the applicant a retention waiver and returning him to duty on an ALC C3 status. As a result, the applicant did not require entry into the MEB/IDES. AFRC/SGO is the designated authority to make this determination. All proper procedures occurred as required in both the LOD and IRILO process, and the appropriate authorities dispositioned his case as well. At the time of the IRILO review by AFRC/SGO, the prognosis was compatible with a return to duty on an ALC, to be reevaluated in a year.

The complete advisory opinion is at Exhibit N.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 14 Dec 23 for comment (Exhibit O), and the applicant replied on 15 Feb 24. In his response, the applicant contends, through counsel, the entire decision is arbitrary and capricious. The AFRC/SG advisory opinion does not appear to evaluate his LOD or other issues on appeal raised in his 4 Apr 23 application. The advisory denied him a medical retirement because no new evidence was submitted. This is not the appropriate standard to use and is insufficient. The AFBCMR has broad discretion in administrating a correction as long as they are supported by reasoned decision-making as referred in case *Hasselwander v. McHugh*. The Board is responsible for filling in any gaps, correcting its own contradicting information, and making correct conclusions. He had a DLC and was entered into the IDES, suffering from GAD, sleep apnea, knee problems, and breathing issues and was medically disqualified for WWD and referred to the MEB. His conditions were below retention standards for continued service as outlined in AFI 48-123 and the MSD; however, he was issued a waiver and returned to duty. This happened three years after the process began and the waiver was issued by AFRC/SG and not by the PEB which should have made the determination if a waiver can be granted when a member is potentially unfit for service not AFRC/SG. The Board must use its equitable powers to fill in the gaps when it failed to create records after the illegal action of AFRC/SG's decision to retain him. The Board must obtain a medical opinion to determine whether he is unfit for all medical conditions.

The applicant's complete response is at Exhibit P.

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 applicant's new evidence, the advisories from the AFRBA Psychological Advisor, the AFBCMR Medical Advisor, and the Air Force Reserve Command Surgeon General's (AFRC/SG) Office, and the applicant's response, the Board remains

unconvinced the evidence presented demonstrates an error or injustice. The new evidence the applicant submitted did not provide any substantiating medical evidence which would convince the Board he was unfit for continued service. The mere existence of a medical or mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. He was rightly found fit for duty with an ALC. The applicant is a former Air Force Reserve member; therefore, per AFI 48-123, the AFRC/SGO is the designated authority to have made the initial review in lieu of (IRILO) a Medical Evaluation Board (MEB) with a decision of returning the applicant to duty with an ALC. He was to be reevaluated in a year; however, he chose to retire prior to his next annual RILO. His Commander's Impact Statement essentially revolves around his anxiety and his absences to which his commander stated he was unable to perform multiple duty-related tasks; however, according to the Narrative Summary for the MEB, he had a history of non-compliance for his mental health conditions which raises concerns about the stability of his condition and symptoms. His treatment recommendations included psychiatric and psychotherapy services and there were varying reports his condition and symptoms were fluctuating with moments of deterioration and then followed by improvements. Furthermore, the Board noted the documents from the DVA, OPM, and SSA; however, was not swayed by this evidence as each agency has its own requirements and definition for disability impairments. 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 or the disability impairment regulations/guidance of other agencies. 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-2020-00638-2 in Executive Session on 28 Feb 24:

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

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

Exhibit J: Record of Proceedings, w/ Exhibits A-I, dated 19 May 21.

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Exhibit K: Application, DD Form 149, w/atchs, dated 3 Apr 23.
Exhibit L: Advisory Opinion, AFRBA Psychological Advisor, dated 10 Aug 23.
Exhibit M: Advisory Opinion, AFBCMR Medical Advisor, dated 23 Aug 23.
Exhibit N: Advisory Opinion, AFRC/SG, dated 13 Dec 23.
Exhibit O: Notification of Advisory, SAF/MRBC to Applicant, dated 14 Dec 23.
Exhibit P: Applicant's Response, w/ atchs, dated 15 Feb 24.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

2/29/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF