



FOR OFFICIAL USE ONLY – PRIVACY ACT OF 1974 APPLIES

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-00834

Work-Product

COUNSEL: *Work-Product*

Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. Her separation from the Air Force be changed from discharge with severance pay (DWSP) to a medical disability retirement with a disability rating of 50 percent.
2. Her unfit medical condition of Post-Traumatic Stress Disorder (PTSD) be found as combat-related, as a direct result of armed conflict as defined in 26 U.S.C. 104 combat-related determination

APPLICANT'S CONTENTIONS

She was placed on the Temporary Disability Retired List (TDRL) upon her separation from the Air Force effective 5 Nov 94. She was re-evaluated and removed from the TDRL effective 11 May 96 and given a separation with severance pay at 10 percent. She was given no counsel; she did not realize she would not be considered "retired" and she was no longer entitled to military benefits as a retiree. Her injuries were a direct result of combat-related missions; she should be listed as a combat veteran as she flew as a combat aircrew on RC-135 and EC-130H on top-secret missions. The fear and degradation she suffered during training and on her combat missions contributed to her PTSD, and her other medical conditions of irritable bowel syndrome and fibromyalgia. Because she is not considered medically retired or a combat veteran, her claims to the Department of Veterans Affairs (DVA) are being denied.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force staff sergeant (E-5).

Dated 29 Aug 94, the applicant was referred to the Physical Evaluation Board (PEB) for her medical conditions of PTSD and Dysthymia.

Dated 8 Sep 94, AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to her medical condition of PTSD

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with a disability compensation rating of 30 percent with a recommendation of “Temporary Retirement.” The PEB noted her condition incurred in line of duty, during a time of war but not a direct result of an armed conflict or was caused by an instrumentality of war and incurred in the line of duty during a period of war.

On 13 Sep 94, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant agreed with the findings of the board.

Dated 26 Sep 94, Special Order Number [Work-Product] indicates the applicant was placed on the TDRL effective 4 Nov 94, with a compensable percentage for physical disability of 30 percent.

On 4 Nov 94, DD Form 214, *Certificate of Release or Discharge from Active Duty*, indicates the applicant was discharged in the grade of staff sergeant after serving 12 years, 3 months and 8 days of active duty. Her narrative reason for separation is “Retirement: Disability, Temporary.”

Dated 17 Apr 96, AF Form 356 indicates the applicant was found unfit due to her medical condition of PTSD with a disability compensation rating of 10 percent with a recommendation of “Discharge with Severance Pay.”

On 26 Apr 96, AF Form 1180 indicates the applicant agreed with the findings of the Board.

Dated 1 May 96, Special Order Number [Work-Product] indicates the applicant was removed from the TDRL effective 11 May 96 (corrected w/ Special Order [Work-Product]), with entitlement to disability severance pay.

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

APPLICABLE AUTHORITY/GUIDANCE

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.

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.

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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 paragraphs 6 and 7 of the Wilkie Memorandum.

On 3 Nov 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit J).

AIR FORCE EVALUATION

AFPC/DPFDC recommends denying the application. There is no evidence of an error or injustice to support the contention she was incorrectly removed from TDRL and discharged with severance pay. Additionally, she did not appeal the “non-combat” determination from her initial PEB. When the PEB finds a disability may be permanent in character, but not stable in degree, and the applicant

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qualifies for disability retirement, the PEB places the applicant on the TDRL to allow for further medical observation. This allows the applicant time for medical reevaluation so the PEB can accurately assess the degree of severity, percent of disability, or final disposition.

The complete advisory opinion is at Exhibit C.

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 her record. The applicant was placed on TDRL as her symptoms were not considered stable at the time and this period was intended to continue to monitor her symptoms and to provide time and opportunity for potential symptom stability. During the TDRL period, the applicant was reported to have only received psychiatry services in which she was only seen twice with no reports of any changes to her medication regimen. There was also no higher level of care through psychiatric hospitalization and no additional services of psychotherapy that were needed or required during TDRL. These indicators signify her symptoms/conditions were considered to be relatively stable and mild. The applicant reported during her TDRL evaluation her PTSD symptoms were "much better" and her dysthymic/depressive symptoms were controlled with medications. There was no impairment reported with her overall functioning as she was able to work part-time, attended school full-time, and also cared for her two young daughters simultaneously without any reported significant difficulties or caused an exacerbation of her symptoms. The TDRL evaluator also specified her conditions of PTSD and Dysthymic Disorder were "in partial remission" to reflect she did not meet diagnostic criteria for either of these disorders for less than two months and was in the process to potentially be in full remission. Based on these reports from the TDRL evaluation, the IPEB reduced her disability rating to 10 percent due to improvements and stability of her symptoms/conditions. The Psychological Advisor concurs with the IPEB's reduced rating for the same reasons. The applicant's symptoms were deemed not severe or impairing enough to meet criteria for a 30 percent or 50 percent disability rating. The 10 percent disability rating was appropriate based on her functioning and degree of impairment and there was no error identified with the reduced rating.

The applicant also contends she received improper counseling during the PEB. There was no evidence to corroborate this contention. The proposed rating from the IPEB matched her reported clinical presentation at the time in which the applicant had concurred to the IPEB's findings on 26 Apr 96. The applicant stated in her petition she had requested a 50 percent disability rating on her Statement of Record Data dated 30 Aug 94. Disability ratings are assigned not based on the service member's desire or request but based on criteria of the degree of impairment of the condition(s). Again, the level or degree of her symptoms/conditions and functional impairment during the TDRL period would not warrant a disability rating higher than the revised and reduced rating of 10 percent.

For awareness, the applicant submitted records reporting the DVA has increased her disability rating for her mental health conditions. The military's Disability Evaluation System (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 "snapshot" in time of separation and not based on post-service

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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.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant contends she should have received a permanent retirement for PTSD.

2. Did the condition exist or experience occur during military service?

There is evidence her conditions of PTSD and Dysthymic Disorder occurred and existed in service. The reported onset date of these conditions was Nov 93.

3. Does the condition or experience excuse or mitigate the discharge?

The applicant's conditions of PTSD and Dysthymic Disorder were found unfitting by the IPEB resulting with a medical discharge with entitlement with disability severance pay.

4. Does the condition or experience outweigh the discharge?

There is no evidence the applicant's symptoms and clinical presentation would warrant a higher disability rating than the proposed and accepted 10 percent disability rating for PTSD and Dysthymic Disorder. Her concluding 10 percent disability rating was consistent to her clinical presentation as reported in the TDRL evaluation report.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 10 Feb 21 for comment (Exhibit E), and the applicant replied on 10 Mar 21 asking for her case to be closed (Exhibit F). On 21 Jun 21, the applicant submitted a response. In her response, the applicant's counsel contends the Psychological Advisor argues there is insufficient evidence to support her request for a higher rating and permanent medical retirement for her PTSD. This opinion seems to rest entirely on the IPEB's decision to reduce the applicant's rating for PTSD to 10 percent based on its assessment that her "social and industrial impairment" was mild. She should have been assigned a higher rating under VASRD code 9413 as her occupational and social impairment more closely aligns to the 50 percent disability rating. At the time of her PEB, she did not have legal counsel and did not understand the TDRL reevaluation process. The PEB's assessment of her social and industrial impairment was not accurate. She was unable to convey the severity of her condition which can be attributed to the fact she did not have legal counsel at the time of her TDRL reevaluation. The medical and lay evidence prior to and immediately following the TDRL evaluation indicates her

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condition was worse than what was reflected in the PEB decision. Additionally, the evidence presented demonstrates her PTSD was caused by an instrumentality of war/training/secret deployments.

To support her contention, the applicant submitted records from the DVA and Social Security Administration outlining her disability ratings and appeals, and her medical records.

The applicant's complete response is at Exhibit G.

ADDITIONAL 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 her record finding no error or injustice with her final 10 percent rating assigned by the IPEB. The opinion rendered in the original mental health advisory remains unchanged. Although the DVA had maintained her 30 percent rating during the TDRL period, this rating decision was based on her Compensation and Pension (C&P) examination that was performed about a month after she entered the TDRL. She most likely was still adjusting to leaving the military and transitioning to civilian life, was in the process of achieving stability, and was still trying to cope with her symptoms that may cause her to have moderate levels of depression. Her 30 percent rating from the C&P examination performed in Dec 94 was congruent to the 30 percent rating she received from the Air Force/IPEB a few months earlier in Sep 94, just prior to her entrance into the TDRL. Therefore, this 30 percent rating was appropriate and better aligned to her clinical presentation at that time, the beginning of the TDRL period. The applicant was on the TDRL for a total of 18 months. Apart from a note written sometime in late 1994 or early 1995, for refills of Zoloft, there were no other records submitted reflecting she received any mental health treatment or evaluation after she received the C&P examination. The only other evaluation she received during the TDRL period was her TDRL re-evaluation/medical evaluation that was performed on 1 Apr 96, a little over a year after her last evaluation, the C&P examination. Her clinical presentation and mental health symptoms were reported to be vastly different during the TDRL re-evaluation than her C&P examination. The differences were not unusual or unexpected especially since symptoms often change with time in response to various life events. During her TDRL re-evaluation, she reported her PTSD symptoms were "much better" and her symptoms of Dysthymia were generally well-controlled as long as she continued taking her medication. She was working part-time and attending school full-time. She did not report being very depressed, had suicidal ideation, sleep disturbances, or anxiety and did not appear to be on the verge of tearfulness or was in a depressed mood during the TDRL re-evaluation as she was during the C&P examination. These were the reasons her disability was reduced from 30 percent to 10 percent by the IPEB because her condition was stable and had her mental health condition had minimal or mild impairment to her overall functioning.

The applicant's legal counsel contends she struggled maintaining employment since leaving the Air Force. Her records during the TDRL period reported she had quit her job due to carpal tunnel syndrome and apparently gained part-time employment by the time her TDRL re-evaluation was completed. She made no complaints of any occupational issues during this re-evaluation. Her legal counsel submitted a copy of her psychological evaluation for C&P examination dated 9 Jan 97, within a year after she was removed from the TDRL, reporting her father had died in Apr 96

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and she had gotten fired from her work and had a lawsuit pending. The reason for her termination was not reported, but her legal counsel claims it was due to her mental instability. The termination of her employment occurred about a month prior to her removal from TDRL. There was no evidence stating she was actually terminated due to her mental instability or mental health condition. Furthermore, this psychological evaluation reported her depression was largely controlled by Zoloft, she admitted to infrequent nightmares at present time occurring every six months, her sleep was “pretty good”, and her mood was “okay” with occasional crying spells for no reason. She had a tendency toward a schizoid lifestyle but mentioned she had few if any friends, does not go out much, and plays computer games on her computer to occupy her time. She preferred a solitary life. She was currently a junior at the University of South Alabama working on her Bachelor’s degree in Finance. She was goal-directed, pleasant, and cooperative, her mood was euthymic, no memory problems, judgment was reasonable and had no safety concerns. These reports were somewhat consistent to her TDRL re-evaluation results and no indication she had any mental instability or significant emotional distress that would cause employment issues. Her psychological test results did report she had “chronic dysthymia with a tendency to engage in chronic rumination and worry, at times to the point of being overwhelmed by her perceived problems and rather ineffective at coping with the routine demands of day to day living.” She also had occasional suicidal thought but was not at suicidal risk and had no plans or intent. She had chronic fatigue and lack of enthusiasm and motivation. Her psychological test results were applicable to her problems and stressors at the time she was administered the tests in Jan 97 and no evidence she had any of these problems at the time she was removed from TDRL. To reiterate, there were no significant mental health issues that would cause serious impairments to her, overall, to include occupational, functioning during the TDRL period.

Other documents reporting her occupational issues that were submitted included a DVA form completed by one her former employers dated 21 May 04 reporting she was terminated from her employment due to excessive absenteeism from being sick or on vacation affecting her job performance and to their knowledge, was not due to a disability. Another letter from the same employer dated on 14 Jun 04 by an attorney at the law firm declared she was terminated from her job due to a high rate of absenteeism, not being able to get to work on time, and having an unacceptable number of errors with the content of her work. Lastly, a letter from the applicant dated 23 Jun 10 disputing the Supplemental Statement of the Case, she explained she was fired from her sedentary job as a paralegal due to missed work, medical problems, sickness, and incomplete, substandard job performance and her inability to concentrate or focus. Her claim was different from her former employer’s reports. It appeared through time the applicant had occupational problems most likely complicated by post-service stressors. Again, at the time of her TDRL re-evaluation, she was assessed not to have any mental instability nor had occupational problems. Her problems appeared to have occurred after her evaluation was completed and several years after she was removed from the TDRL. There was no evidence she had these problems during the TDRL period.

For awareness, the applicant had received different ratings from the Air Force and DVA and had received increased ratings from the DVA through the years. During the TDRL re-evaluation and adjudication process, DoD is not bounded by the DVA’s ratings and makes its decision independently considering the DVA and/or civilian medical records and the results of the TDRL reevaluation. The decision by the DoD is based upon the evidence present and available at the

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“snapshot” time of TDRL assessment, albeit within reasonable proximity to the date of an examination and recommendation by the DVA. Nevertheless, we are also reminded of recognized reasons for disparities in disability ratings and variances in diagnostic impressions within the mental health profession; some base upon variances in clinical presentation at a given time, different disclosures during a subsequent interview, clinical bias between equally competent clinicians, or legitimate differences due to new observations made over the longer period of care.

The complete advisory opinion is at Exhibit H.

APPLICANT’S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 3 Nov 22 for comment (Exhibit I); however, the applicant has not replied.

FINDINGS AND CONCLUSION

1. The application was not timely filed.
2. The applicant did exhaust 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/or recommendation of AFPC/DPFDC, Disabilities Office and the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant’s contentions. Specifically, the Board finds the applicant’s mental health condition had minimal or mild impairment to her overall functioning finding no significant mental health issues that would cause serious impairments to include occupational functioning during the TDRL period. Additionally, the Board notes the applicant’s increased DVA ratings; however, during the TDRL re-evaluation and adjudication process, DoD is not bounded by the DVA’s ratings and makes its decision independently considering the DVA and/or civilian medical records and the results of the TDRL reevaluation which found the applicant’s condition was stable and well controlled. Furthermore, the Board notes counsel’s contention that at the time of her PEB, she did not have legal counsel and did not understand the TDRL reevaluation process but finds no evidence to corroborate this. Additionally, the Board did not find her PTSD 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 Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. The Board does not find it in the interest of justice to waive the three-year filing requirement. Therefore, the Board finds the application untimely and recommends against correcting the applicant’s records.

RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2020-00834 in Executive Session on 25 Jan 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 A: Application, DD Form 149, w/atchs, dated 12 Mar 20.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFPC/DPFDC, dated 5 Nov 20.
- Exhibit D: Advisory opinion, AFBCMR Mental Health, dated 8 Feb 21.
- Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 10 Feb 21.
- Exhibit F: Applicant’s Request to Close Case, dated 11 Mar 21.
- Exhibit G: Applicant’s Response, w/atchs, dated 21 Jun 21.
- Exhibit H: Advisory opinion, AFBCMR Mental Health, dated 2 Nov 22.
- Exhibit I: Notification of advisory, SAF/MRBC to applicant, dated 3 Nov 22.
- Exhibit J: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 3 Nov 22.

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.

10/18/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: *Work-Product*