

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXX

DOCKET NUMBER: BC-2020-02308-3

COUNSEL: XXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for a medical retirement finding his left hip Femoroacetabular Impingement (FAI) and bilateral lower extremity radiculopathy unfitting with a combined disability rating of 30 percent or higher.

RESUME OF THE CASE

The applicant is a medically separated Air Force technical sergeant (E-6) who, on 31 Jul 15, was discharged with severance pay (DWSP) with a compensable rating of 20 percent for his medical condition of FAI syndrome of the right hip and Degenerative Disc Disease (DDD), lumbosacral spine. The Formal Physical Evaluation Board (PEB) found his left hip, FAI was not currently unfitting due to the medical evidence presented at the time.

On 17 Mar 21, the Board considered and denied his request for a medical retirement. The Board found the prior request was not timely submitted and found the preponderance of evidence did not support the applicant's request; therefore, the Board did not waive the three-year filing requirement. The AFPC/DPFDD advisory opinion noted the applicant received disability compensation from the Department of Veterans Affairs (DVA) for his left hip FAI and bilateral lower extremity radiculopathy; however, the PEB did not see evidence these conditions were severe enough to significantly affect his ability to perform his duties and be classified as unfitting for military service. This advisory opinion further noted 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 time of separation and not based on post-service progression of disease or injury. Under the DVA system (Title 38, U.S.C.), the member may be evaluated over the years and their rating may be increased or decreased based on changes in the member's medical condition at the current time. However, a higher rating by the DVA based on new and/or current exams conducted after discharge from service, does not warrant a change in the total compensable rating awarded at the time of the member's separation.

On 24 Aug 22, the Board considered and denied his request for a medical retirement and award of legal costs and attorney fees. The Board reviewed all Exhibits, the report provided by the Court remand order, the applicant's new evidence and rebuttal, and the AFBCMR Medical Advisory,

and concluded the applicant was not the victim of an error or injustice and recommended against correcting his records. The Board concurred with the rationale and recommendation of the AFBCMR Medical Advisor and found a preponderance of the evidence did not substantiate the applicant's contentions. Specifically, the Board did not find the applicant's medical conditions of radiculopathy or his left hip injury, even considering the combined effect of his injuries, unfitting to the extent that it rendered him unable to perform his duties at the time of his discharge. Additionally, the Board did not find any evidence an error or injustice occurred at the time the PEB processed his disability case. Furthermore, the Board found inconsistencies in the subjective reporting by the applicant versus the objective evidence in his medical records. Since the applicant was seeking reconsideration of a previous decision of the Board, this reconsideration request, no matter when filed, was considered timely. In accordance with Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, the panel considered the relevance and weight of the new evidence and rendered a decision based on merit.

For an accounting of the applicant's original request and the rationale of the earlier decisions, see the AFBCMR Letters and Records of Proceedings at Exhibits E and K.

On 26 Jun 23, 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 the plaintiff's complaint, instructing the AFBCMR to evaluate his claims that his left hip FAI and radiculopathy rendered him unfit to perform the duties of his office, grade, rank, or rating. In conducting its review, the Board shall, further its proceedings consistent with this opinion:

1. Determine whether the plaintiff's application was untimely, and if so, address the plaintiff's reasons for delay and whether the three-year time limit should be waived.
2. Review and consider all of the relevant evidence regarding the impact of the plaintiff's left hip and radiculopathy on his fitness to perform the duties of his office, grade, rank, or rating, including (but not limited to) the evidence this Court found the Board did not address. Consider what duties a service member in the plaintiff's office, grade, rank, or rating were reasonably expected to perform; (2) determine whether the plaintiff's conditions, either alone or collectively, rendered him unfit; and (3) consider the risk and burden criteria.
3. Determine whether a preponderance of the evidence exists to show the plaintiff's left hip FAI and radiculopathy, individually or in combination with other medical conditions, rendered him unfit to perform the duties of his office, grade, rank, or rating.
4. Determine the appropriate rating to be assigned to his unfitting conditions.
5. Provide a complete explanation of the Board's determinations.

Furthermore, the Court found the following evidence needed to be addressed; the entirety of his medical record and the testimony from his supervisors. The medical opinion ignored part of the medical record to include three test results that his neurosurgeon reviewed before diagnosing him

with radiculopathy and failed to address his performance after his surgery, specifically, how his left hip and radiculopathy hindered his ability to stand and sit for long periods of time during administrative tasks and training exercises and impacted his concentration and short-notice decision making during wing flying and large force exercises. Furthermore, it failed to address his duties not to include controlling (DNIC) status in determining the individual and collective impact on his radiculopathy.

On 11 Aug 23, the applicant requested reconsideration of his request for a medical retirement. He again contends, through counsel, during the final years of his career, he suffered from such debilitating pain and numbness in his hips, back, and lower extremities that he could not reliably perform either the duties of an air traffic controller or the administrative duties to which he was eventually relegated. Despite the severity of his various conditions, he was discharged from the Air Force with severance pay rather than awarded a medical retirement. His left hip FAI syndrome and bilateral lower extremity radiculopathy individually and collectively with his other conditions, rendered him unfit to continue serving as an air traffic controller. These conditions interfered with his ability to reasonably perform his duties, created risks to his health and safety and that of his fellow Service members, and imposed unreasonable burdens on the Air Force.

His left hip FAI and radiculopathy and their impact on his ability to perform his duties as an air traffic controller, when analyzed under the applicable fitness standard, is clear they were unfitting conditions and rendered him unfit to continue serving as an Air Force air traffic controller. Additionally, there is significant evidence which demonstrates the combination of his radiculopathy with the lumbar DDD and his hip conditions caused his duty limitations. His duties as a Watch Supervisor typically consisted of eight-hour shifts that required standing for long periods of time and constantly moving around to track aircraft, sitting for extended periods for data entry, and in the event of an elevator failure, descending or climbing 11 flights of stairs and a vertical ladder. The job also required periods of deep concentration and quick decision making during complex wing flying or large force exercises. He was also responsible for the overall operations of an air traffic control facility during his shift, maintaining a general situational awareness of air traffic. As a technical sergeant, he was expected to be physically ready to accomplish the mission, attain and maintain excellent physical conditioning to always meet Air Force fitness standards, and set a positive example for subordinates. It was his radiculopathy diagnosis that ultimately led him to be placed on DNIC status and removed from controlling duties altogether. When his neurosurgeon, Doctor S-----, diagnosed him with radiculopathy on 30 Apr 15, his back condition had already been diagnosed and presented to the MEB by Doctor H----- in Feb 15; however, the MEB did not even consider radiculopathy. It was only after receiving the diagnosis and recommendation from Doctor S----- that Doctor H----- concluded he needed to be placed on DNIC status during the MEB process and further stated the radiculopathy diagnosis and limitations would essentially prevent him from performing controlling duties for the remainder of his Air Force career. There is no clearer example of an air traffic controller's disability interfering with his ability to reasonably perform his duties than him being told, as a result of the pain and numbness caused by his condition, he cannot climb the control tower and must be relegated to DNIC status. Furthermore, his doctors and supervisors observed his radiculopathy interfered with his ability to perform common military tasks, deploy, and perform specialized duties as an air traffic controller and this evidence demonstrated how he struggled to perform his duties both after

his left hip surgery and as his radiculopathy progressed. His medical record is littered with his own statements regarding the duty limitations caused by his radiculopathy.

His radiculopathy and left hip FAI not only interfered with his ability to perform his duties, but also presented further risks to the safety and welfare of himself and other Service members and imposed unreasonable burdens on the Air Force in order to keep him safe. His supervisors directly attested to the risks and burdens his health posed for other members and the Air Force at large. As his conditions worsened, he became more of a liability and detrimental to the Air Force's mission.

On 4 Nov 15, the DVA diagnosed and rated his left and right lower extremity radiculopathy each at 10 percent disabling based on an exam performed on 2 Nov 15. The exam notes his radiculopathy had a functional impact on his ability to work, explaining how prolonged standing, lifting or carrying heavy items aggravated his radicular pain. Together, with the right hip FAI and lumbar DDD, the DVA assigned a combined rating of 50 percent for all of his conditions from the date of discharge. The law requires the AFBCMR to consider his disability rating as relevant evidence in determining whether he was unfit for duty.

In support of his reconsideration request, the applicant submitted new medical evidence, a radiology report.

The applicant's complete submission is at Exhibit L.

AIR FORCE EVALUATION

The AFBCMR Medical advisor recommends granting the applicant's request for a medical retirement with an overall disability rating of 40 percent. After a complete review of the court remand order and a re-review of the applicant's case file, the Medical Advisor opines an error of oversight did occur within the DoD in determining the applicant's fitness status by not singularly assessing the condition of bilateral lumbar radiculopathy in the performance of his ability to perform the duties of his office, rank, rate, or rating. Based upon the findings and explanations outlined in the complete advisory opinion, it is recommended each leg should have been identified as a separately unfitting condition of mild impairment at 10 percent each.

The entirety of the medical record was reviewed and considered in rendering a Board recommendation. No specifics were purposely omitted from the pre-advisory review. Although a detailed written analysis of the three letters from the applicant's supervisors were not included in the prior advisory, they were reviewed and considered, cited within the advisory; however, contained inconsistencies that when compared to timelines and symptoms contained in the medical records, would not have been of sufficient benefit in a decision favorable to the applicant and therefore, in an attempt to benefit the applicant, a decision for a detailed explanation of each letter was assessed to be futile.

As previously noted, the instructional Air Force guidance defines unfitness as the inability of the member to perform duties of his or her office, grade or rank as a result of physical or mental disability. In this case, the comparison of radiographic tests between Feb and Apr 15 documented the findings being similar, when allowing for differences in technique. However, despite such

documentation of being similar, the described findings clearly noted a worsening of spinal degeneration which caused bilateral narrowing of the nerve exiting canals, indicative of symptomatic and intermittent pain which can extend into the buttock and lower extremities.

The applicant's worsening spinal condition as seen in Apr 15 included spinal levels of lumbar 4 (L4) thru Sacral 1 (S1), which makes up over 60 percent of the nerve fibers comprising the Sciatic nerve. Anatomically, the applicant's peripheral painful symptoms in late 2015 did identify with the normal routing of the sciatic nerve, bilaterally. The Veterans Affairs Schedule for Rating Disabilities (VASRD) impairment ratings for Sciatic nerve pain (AKA Neuralgia) are 10, 20, 40, or 60 percent corresponding to mild, moderate, moderately severe, and severe with marked muscular atrophy, respectively. In this case, the radiculopathy was of a wholly sensory (pain/tingling) component and therefore per VASRD guidance, when the involvement is wholly sensory, the rating should be for the mild, or at most, the moderate degree.

Despite the appearance of an unbalanced history of subjective complaints corresponding with objective clinical evidence in a previous review, the Medical Advisor acknowledges and concedes the apparent/stated rapid decline in the applicant's physical condition in early 2015 (pain and abnormal sensation in his legs) coupled with the new and worsening x-ray findings, would indeed render him unfit to perform all aspects of an air traffic controller or to maintain any other aspect of flying duties to include his prior Air Force Specialty Code (AFSC) of Tactical Aircraft Maintenance. Simply stated, individually, his component of radiculopathic painful symptoms should be considered as separately unfitting. This coincides with the Medical Standards Directory (MSD) Line L24 which states peripheral nerve injury, when manifested by paralysis, weakness, lack of coordination, sensory disturbance or other specified paralytic syndromes. Such a condition is disqualifying for service retention as well as flying or controlling duties.

The medical record evidence did not bear out a significant worsening of his left hip pain to where either singularly or collectively gave rise to render the applicant to a level of unfitness. This pre-surgery interim normal physical assessment coupled with his ability to bear full weight on the left lower extremity within a 2-week period after surgery only fortified a significant degree of fitness to perform his occupational duties as it pertained to his left hip.

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 2 Nov 23 for comment (Exhibit O), and the applicant replied on 1 Dec 23. In his response, the applicant contends, through counsel, he agrees with the Advisory Opinion's conclusion and recommendation his bilateral lumbar radiculopathy should be identified as an independently unfitting condition and his records should be corrected to reflect a medical retirement with an overall 40 percent disability rating; however strongly disagrees, with the Advisory Opinion's conclusion his left hip FAI syndrome did not render him unfit to perform the duties of his office, grade, rank, or rating and requests the Board (1) adopt the Advisory Opinion's conclusion and recommendation with respect to his radiculopathy and (2) reject the Advisory Opinion's conclusion with respect to his left hip FAI and instead find that condition unfitting as well.

As explained in detail in the brief submitted to the Board, his left hip FAI is independently unfitting when evaluated under the fitness standards required by DoDI 1332.18, *Disability Evaluation System*. The condition interfered with his ability to perform his duties as a Watch Supervisor, as well as his ability to deploy and complete physical fitness tests. His supervisors identified and documented the ways in which his left hip FAI interfered with his ability to perform his duties as an air traffic controller and Watch Supervisor. His primary care physician and commanding officer, the opinions of which the Advisory Opinion afforded significant weight with respect to his radiculopathy, found his left hip FAI prevented him from completing a physical fitness test and deploying. Due in large part to his left hip, his fitness testing was limited to waist measurements, and he was restricted from being tested on the run, walk, sit-ups, and push-ups. His left hip FAI created risks to the safety and welfare of himself and other Service members and imposed unreasonable burdens on the Air Force to keep him safe. Beyond the risks his conditions clearly posed to himself, his supervisors also attested to the risks and burdens his conditions, including the left hip FAI, posed to other Service members and the Air Force at large. Moreover, his left hip FAI is unfitting upon consideration of its combined effect with his other conditions. As explained in the brief, significant evidence demonstrates the combination of his radiculopathy with his lumbar disc disease and hip conditions caused duty limitations.

The Board should reject the Advisory Opinion's conclusion his left hip FAI is not unfitting because (1) it ignores the Court's remand instructions to closely evaluate his supervisors' letters and (2) it misconstrues the relevant medical records. Had the Medical Advisor given the supervisors' letters proper consideration, the Advisory Opinion would have acknowledged the many ways in which his supervisors found his left hip FAI interfered with his ability to perform the duties of his office, grade, rank, or rating, including climbing the stairs of the control tower, standing for extended periods of time, completing a physical fitness test, and deploying.

The Advisory Opinion's discussion of his left hip FAI is primarily focused on the flawed logic his left hip FAI was not unfitting prior to surgery, then it was not unfitting after surgery either. The Advisory Opinion does not meet the substantial evidence standard in reaching this conclusion because it cherry-picks evidence. Simply noting two points in time shortly before and after surgery when he was cleared to return to work does not tell the whole story. This incomplete portrayal of events ignores the fact he was not referred into the DES by a MEB until 26 Feb 15. The DES process then played out over the course of several months, so there was no reason why a final fitness determination would have been made at the time of the Mar 15 medical notes, let alone the pre-surgery Jan 15 medical note. Thus, any determination he could return to work during those periods should not be treated as dispositive when subsequent medical notes and letters from supervisors indicate his left hip pain quickly returned in the months after surgery and the condition interfered with his ability to perform his duties. Not to mention the fact the DES process was still months away from any final determinations.

The applicant's complete response is at Exhibit P.

FINDINGS AND CONCLUSION

1. The application was timely filed. Since the applicant is seeking reconsideration of a previous decision of the Board, this reconsideration request, no matter when filed, is considered timely. In

the applicant's original case, the Board did consider the evidence but did not find it warranted relief, therefore, the Board did not waive the time requirement. All other requests thereafter were considered timely and therefore were judged based on merit.

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, the applicant's new evidence, the AFBCMR Medical Advisory, and the applicant's response, the Board concludes the applicant is the victim of an error or injustice finding a preponderance of the evidence substantiates the applicant's contentions, in part. Specifically, the Board finds evidence to support granting a medical retirement with an overall disability rating of 40 percent for the following conditions of bilateral lumbar radiculopathy, right hip Femoroacetabular Impairment (FAI), and Degenerative Disc Disease (DDD). Based on the Veterans Affairs Schedule for Rating Disabilities (VASRD) the condition of bilateral lumbar radiculopathy is rated at 10 percent for each leg (bilateral factor included) under VASRD code 8720 involving Neuralgia of the Sciatic nerve. Rating under this code includes pain descriptors of mild, moderate, moderately severe, and severe with marked muscular atrophy. Additionally, as per VASRD guidance, when the radicular component is wholly sensory (not motor) in its presentation, the rating cannot exceed that of a moderate degree. The Board meticulously considered all diagnostic tests performed by the applicant's Neurosurgeon, his definitive diagnosis, his degree of continued pain, and the recommended removal from flying and or controlling duties in rendering its decision in rating the radiculopathy under a mild pain condition at 10 percent for each leg.

However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. Specifically, the Board finds the preponderance of evidence does not support his left hip FAI was unfitting, either alone or collectively with his other medical conditions. The Board noted the three reference letters describing his difficulties at work but finds inconsistent timelines and physical symptoms when compared to his medical records. Only one of the letters specifically mentioned the left hip and only spoke of it in the context of stating after his left hip surgery, the applicant's back and right hip pain worsened. Counsel noted examples of the applicant's inability or the interference in the applicant's ability to perform activities such as climbing stairs, standing for extended periods of time, completing a physical fitness test, and deploying which the Board finds were near exclusively due to the worsening condition of his back and right hip pain; not specifically, his left hip pain. Less than 3 weeks after surgery, the applicant reported the ability to move around with less pain and resistance than before the procedure and he requested to return to work. He was cleared to return to work as well as controlling duties.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show the following:

- a. On 2 June 2015, he was found unfit to perform the duties of his office, rank, grade, or rating by reason of physical disability, incurred while he was entitled to receive basic pay; the diagnosis in his case was bilateral lumbar radiculopathy, under the Veterans Affairs

Schedule for Rating Disabilities (VASRD) code 8570, rated at 10 percent for each leg; when combined with his initial disability rating of 10 percent each due to Femoral Impingement Syndrome, right hip (DVA rated as Femoral Impingement Syndrome, right hip with Osteoarthritis, Impairment of the Thigh) and Degenerative Disc Disease (DDD), lumbosacral spine; results in a combined [not added] disability rating of 40 percent. It is noted the degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during a period of unauthorized absence; and the disability was not as a direct result of armed conflict or caused by an instrumentality of war and was not combat-related.

b. On 31 July 2015, he was discharged from the Air Force and on 1 August 2015, he was permanently retired with a compensable percentage for physical disability of 40 percent.

c. His election of the Survivor Benefit Plan option will be corrected in accordance with his expressed preferences and/or as otherwise provided for by law or the Code of Federal Regulations.

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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2020-02308-3 in Executive Session on 30 Nov 23 and 26 Dec 23:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 17 Mar 21.
Exhibit K: Addendum Record of Proceedings, w/ Exhibits F-J, dated 24 Aug 22.
Exhibit L: Application, DD Form 149, w/atchs, dated 11 Aug 23.
Exhibit M: Court of Federal Claims Remand Order, filed 26 Jun 23.
Exhibit N: Advisory Opinion, AFBCMR Medical Advisory, dated 24 Oct 23.
Exhibit O: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Nov 23.
Exhibit P: Applicant's Response, w/atchs, dated 1 Dec 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.

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Board Operations Manager, AFBCMR