



**CUI//SP-MIL/SP-PRVCY**  
**UNITED STATES AIR FORCE**  
**BOARD FOR CORRECTION OF MILITARY RECORDS**

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**ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

*Work-Product*

**DOCKET NUMBER:** BC-2020-02422-2

**COUNSEL:** *Work-Product*

**HEARING REQUESTED:** YES

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**APPLICANT'S REQUEST**

The Board reconsider his request and correct the following:

1. His timely-filed response to the second advisory opinion (AFPC/DPFDD, dated 23 Feb 21), which the BCMR's decision incorrectly stated it never received, be considered.
2. He is allowed to respond to the first advisory opinion (AFPC/DPFDD, dated 12 Jan 21), which the BCMR's decision stated was sent on 13 Jan 21, but he never received.
3. The 3-year time limitation be waived in the interest of correcting an error or removing an injustice.
4. He receive a disability rating of 20 percent for his upper spinal condition, as required by 10 U.S.C. § 1216a and 38 C.F.R. § 4.71a.
5. He receive a medical retirement based on the previous lower spinal condition's rating of 10 percent by the Physical Evaluation Board (PEB), creating a combined disability rating of 30 percent.

**RESUME OF THE CASE**

The applicant is an honorably discharged senior airman (E-4).

On 24 Mar 21, the Board considered and denied his request finding the prior request was not timely submitted.

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 20 Jul 21, the applicant requested reconsideration of his request. He now contends he responded to the second advisory, but never received the first advisory. In addition, he would like the 3-year requirement waived based on having to exhaust the Physical Disability Board of Review (PDBR) process prior to applying to the AFBCMR. He now requests a disability rating of 20 percent for his upper spinal condition, that when combined with his previously awarded percent by the PEB, makes him eligible for a medical retirement at 30 percent. The AFBCMR relied on factual inaccuracies and misstatements of law in its decision. The evidence and relevant law establish that the applicant's upper spinal condition, in combination with his lower spinal condition, rendered him unable to reasonably perform his duties. In support of his reconsideration

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request, the applicant submitted the following new evidence: (1) Counsel's Brief; (2) Applicant Declaration; and (3) Response to the second advisory opinion (AFPC/DPFDD, dated 23 Feb 21).

The applicant's complete submission is at Exhibit G.

On 7 Apr 22, based on counsel's contention the AFPC/DPFDD Advisory Opinion, dated 12 Jan 21, was never received, the Board sent a copy of the advisory opinion to counsel (Exhibit H), but has received no response.

**AIR FORCE EVALUATION**

AFPC/DPFDD recommends denial of applicant's reconsideration request. Based on the documentation provided by the applicant and analysis of the facts, there is no indication an error or injustice occurred at the time the PEB processed his disability case. Regarding the upper spinal condition, two areas were considered. The upper thoracic spine and the cervical spine. Concerning the cervical spine, the Informal PEB (IPEB) found no documentation in the medical record or the Medical Narrative Summary, dated 11 Mar 07 of chronic or recurrent neck (cervical) pain or dysfunction, no reported imaging, diagnosis, or treatment of a cervical spine condition, and no recorded evidence any claimed cervical/neck pain required prolonged duty, fitness, or mobility restrictions. The IPEB did find evidence in the medical documentation supporting the upper/mid thoracic spine condition. On 21 May 07, the applicant was found unfit IAW DoDI 1332.18, "Disability Evaluation System (DES)," Appendix 2 to Enclosure 3 and AFI 36-3212, "Physical Evaluation for Retention, Retirement and Separation," Chapter 1, paragraph 1.3 for mid thoracic back pain. His recommended disposition was Discharge with Severance Pay (DWSP) at 10 percent; however, he elected to non-concur with the findings and the recommended disposition and requested a formal hearing of the case, but after meeting with legal counsel, he requested to waive his demand for a formal hearing and concurred with the IPEB's findings. Finally, although the Department of Veterans Affairs (DVA) provided service connection for Chronic Cervical Strain there is no evidence the condition was severe enough to consider it unfitting for military service. While we note, the DVA recently increased his disability rating for Mid Thoracic Back Pain, rated as Low Back Strain with Levoconvex Scoliosis of the Upper Thoracic Spine by the DVA, it does not warrant change to his Disability Evaluation System (DES) rating over 13 years after the fact.

The complete advisory opinion is at Exhibit I.

**APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to counsel on 19 Jan 23 for comment (Exhibit J), and counsel responded 17 Feb 23. In the response, according to counsel he is responding to the letter dated 19 Jan 23, and the corresponding advisory opinion dated 29 Jul 22 ("Second Advisory Opinion"). The non-binding Second Advisory Opinion repeats the mistakes of the First Advisory Opinion by ignoring relevant evidence and law. As a result, the Second Advisory Opinion's recommendation the AFBCMR deny the applicant's reconsideration request is unwarranted. The evidence demonstrates the IPEB failed to consider and evaluate the applicant's upper spinal condition, which it was legally obligated to consider. There was plenty of recorded evidence his cervical condition required prolonged duty, fitness, or mobility restrictions.

The counsel's complete response is at Exhibit K.

**FINDINGS AND CONCLUSION**

1. The application was timely filed.

2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DPFDD and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board finds no evidence an error or injustice occurred during the applicant's DES processing. A service member shall be considered unfit when the evidence establishes the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating and the boards found his disability unfitting at a 10 percent rating and recommended he be discharged with severance pay. Furthermore, 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. 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. 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 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-2020-02422-2 in Executive Session on 27 Apr 22 and 26 Apr 23:

 <i>Work-Product</i>	Panel Chair
 <i>Work-Product</i>	Panel Member
 <i>Work-Product</i>	Panel Member

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

- Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 29 Mar 21.
- Exhibit G: Application, DD Form 149, w/atchs, dated 20 Jul 21.
- Exhibit H: Notification of Previous Cases's Advisory, SAF/MRBC to Counsel, dated 7 Apr 22.
- Exhibit I: Advisory Opinion, AFPC/DPFDD, dated 29 Jul 22.
- Exhibit J: Notification of Advisory, SAF/MRBC to Counsel, dated 19 Jan 23.
- Exhibit K: Counsel's Response, dated 17 Feb 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.

5/5/2024

*Work-Product*

Board Operations Manager, AFBCMR

Signed by

*Work-Product*