

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-03113-2

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT’S REQUEST

The Board reconsider his request to increase his compensable percentage for his disability retirement from 50 percent to 70 percent due to his unfitting mental health condition.

RESUME OF THE CASE

The applicant is a medically retired Air Force captain (O-3).

On 23 Nov 21, the Board considered and denied his request for an increase to his disability retirement due to his mental health condition, adjustment disorder with anxiety and depressed mood and to find his knee and back issues as unfitting, Category I conditions; finding the applicant had provided insufficient evidence of an error or injustice to justify relief.

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 M.

On 23 May 22, the applicant requested reconsideration of his request for an increase to his disability retirement. He again contends, through counsel, that his disability rating was increased from 50 percent to 70 percent by the Department of Veterans Affairs (DVA) for his unfit mental health condition while he was on the Temporary Disability Retired List (TDRL). A preponderance of evidence was submitted with his previous case that shows his condition worsened while he was on the TDRL; yet the AFBCMR, through its adoption of deficient advisory opinions, failed to meet Administrative Procedure Act (APA) standards that have long been required of agency final decisions and represents the type of case that federal courts have routinely held to be unlawful.

The applicant was placed on the TDRL for chronic adjustment disorder with anxiety and depression with a Veteran Affairs Schedule for Rating Disabilities (VASRD) rating of 50 percent. His placement on the TDRL required he undergo a physical examination at least once every 18 months, to determine whether there had been a change in the disability for which he was temporarily retired. His TDRL re-evaluation was conducted on 7 Mar 18. Thereafter, the DVA increased his 50 percent rating for VASRD code 9440 to 70 percent retroactive to 5 Jan 17. In Jul 18, the Physical Evaluation Board (PEB) directed he be permanently retired with an unchanged 50 percent VASRD rating and he was retired effective 15 Aug 18. The AFRBA Psychological Advisory Opinion from the previous case applied the “snapshot in time” standard

to the case but failed to rely on any evidence generated after the TDRL placement nor did it mention the criteria required for a 70 percent VASRD rating.

The AFBCMR Board adopted the rationale of the advisory opinions in lieu of providing its own analysis and failed to adequately explain its result. When a board hinges its decision in whole on an advisory opinion, it does not satisfy the arbitrary and capricious standard because it failed to address meaningful objections that were put before the agency.

The applicant's complete submission is at Exhibit N.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and considered the information in the applicant's rebuttal statement and finds insufficient evidence to support the applicant's request for the desired changes to his record. The applicant did not submit any new or additional evidence or records for consideration with his rebuttal statement. While the Psychological Advisor acknowledges the applicant may not agree with the advisory opinion, the opinion rendered by the Psychological Advisor in the previous case remains unchanged. As noted in the previous advisory, when a service member enters the medical evaluation board (MEB) process, under the Integrated Disability Evaluation System (IDES), the DVA is the rating authority and the Department of Defense (DoD), to include the Air Force, must accept the DVA rating for the unfitting condition(s); in the applicant's case this was an Adjustment Disorder with Anxiety and Depressed Mood. However, during the TDRL re-evaluation and adjudication process, DoD is not bound by the DVA's ratings and makes its' decision independently, considering the relevant DVA and/or civilian medical records and the results of the TDRL re-evaluation examination. The decisions rendered by DoD are based on evidence presented and available at the "snapshot in time" of the TDRL assessment. In considering the applicant's request for an increase from 50 percent to 70 percent, the disability rating is a functional symptom based rating determined by the VASRD at the "snapshot in time" the applicant becomes unfit for duty. The Psychological Advisor concurs with the findings of the PEB. The applicant's social and occupational functioning impairments (due to his adjustment disorder with anxiety and depressed mood) did not rise to the level of a 70 percent rating during the "snapshot in time" at which he was removed from TDRL and permanently retired, even when considering the points the applicant's raised on rebuttal. As noted in the previous advisory, the IPEB found the applicant remained unfit for military service and recommended discharge with permanent retirement with a disability rating of 50 percent in accordance with the VASRD. The Psychological Advisor concurs and finds no error or injustice in this rating determination. As noted above, during the TDRL re-evaluation and adjudication process, DoD is not bound by the DVA's ratings and makes its' decision independently, considering the relevant DVA and/or civilian medical records and the results of the TDRL re-evaluation examination. The decisions rendered by DoD are based on evidence presented and available at the "snapshot in time" of the TDRL assessment. The military's DES, 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 to the degree of impairment present at the "snapshot in time" of separation from service and not based on post-service progression of disease or injury. In contrast, the DVA, operating under

a different set of laws, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus to military service, without regard to its impact on a member's fitness to serve, the narrative reason for release from service, or the length of time that has transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating as the level of impairment from a given condition may improve or worsen over the life of the veteran.

The complete advisory opinion is at Exhibit O.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 7 Sep 22 for comment (Exhibit P), and the applicant replied on 30 Sep 22. In his response, the applicant's counsel contends the previous AFBCMR decision failed to meet clear, longstanding decision-making standards required under the Administrative Procedure Act (APA), which is an error or injustice. In *XXXXX*, decisions that fail to respond to favorable evidence that could well have supported a different decision are deemed arbitrary and capricious under the APA. The Psychological Advisory Opinion repeats these errors. Specifically, it did not respond to numerous pieces of favorable evidence that supported the applicant's request for his mental health disability to be increased to 70 percent following his TDRL reexamination and, importantly, contradicted the IPEB's rationale for a reduced 50 percent; let alone articulate an adequate reason as to why the evidence does or does not support an increase to 70 percent.

Second, the IPEB's findings constitute the very error the applicant challenges in his AFBCMR materials. The Psychological Advisory Opinion engages in the same type of faulty reasoning that the AFBCMR adopted in its initial decision, which the AFBCMR Reconsideration Memorandum argues was a violation of the APA. In *XXXXX*, the XX Circuit chided the Army Board for Correction of Military Records for basing its denial on the very error the plaintiff had sought to correct.

The applicant's complete response is at Exhibit Q.

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 the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. As noted in the advisory opinion above, during the TDRL re-evaluation and adjudication process, DoD is not bound by the DVA's ratings and makes its' decision independently. The Board considered all the relevant evidence at the "snapshot in time" of the applicant's removal from the TDRL and finds the applicant's social and occupational functioning impairments aligned with the VARSD rating of 50 percent and did not rise to the level of a 70 percent rating. 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 2.5, considered Docket Number BC-2020-03113-2 in Executive Session on 30 Nov 22:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit M: Record of Proceedings, w/ Exhibits A-L, dated 23 Nov 21.
Exhibit N: Application, DD Form 149, w/atch, dated 23 May 22.
Exhibit O: Advisory Opinion, AFRBA Psychological Advisor, dated 6 Sep 22.
Exhibit P: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Sep 22.
Exhibit Q: Applicant's Response, dated 30 Sep 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.

X

Board Operations Manager, AFBCMR