RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXX

DOCKET NUMBER: BC-2021-00083

COUNSEL: XXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. He be entered into the Integrated Disability Evaluation System (IDES), his back and neck injuries be found unfit by the Physical Evaluation Board (PEB) with a combined rating of at least 80 percent, and he be placed on the permanent disability retired list.

2. His neck and back injuries be categorized as combat related, as direct result of an instrumentality of war as defined in 26 USC 104 combat related determination.

APPLICANT'S CONTENTIONS

He incurred a line of duty (LOD) injury to his back and neck while performing a heavy G-force load maneuver in an F-16 aircraft, which rendered him non-deployable for more than 12 months and further precluded him from performing the duties of his office, grade, rank, or rating. Despite recent Department of Defense (DoD) policy requiring referral into the IDES for members like him who were non-deployable for medical reasons in excess of 12 months, the Air Force conducted an Initial Review-in-Lieu-Of (IRILO) Medical Evaluation Board (MEB), after which he was returned to duty. The Department of Veteran's Affairs (DVA) found his condition to be 80 percent disabling. Not only did the Air Force violate regulations requiring he be processed into the IDES, the error deprived him of a disability retirement for conditions that clearly would have been deemed unfitting.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force Reserve lieutenant colonel (O-5), awaiting retired pay at age 60.

Dated 12 Apr 18, AF Form 348, *Line of Duty Determination*, provided by the applicant indicates his diagnosis of Spondylosis without myelopathy or radiculopathy, cervical region – Degenerative Disc Disease and Spondylosis and facet arthrosis was found In the Line of Duty (ILOD), Existed Prior to Service (EPTS) and was service aggravated. In Part VI and VIII, ARC LOD Determination Board Review, it is noted the Medical Reviewer non-concurred with the Appointing Authority and found the applicant's conditions not ILOD.
Effective 10 Feb 19, Aeronautical Order 0071, indicates the applicant was terminated from aviation service due to being medically disqualified.

On 23 May 19, AF Form 1185, *Commander's Impact Statement for Medical Evaluation Board*, provided by the applicant indicates his commander recommended he not be retained, noting, based on recent AFGM 2019-36-01, *Non-Deployable Airmen Retention Determination Policy Guidance*, it is my responsibility as a commander to evaluate airmen who are not wartime mission capable or who are non-deployable for more than 12 consecutive months. This member has been both non-deployable and not wartime mission capable for the past 16 months, I am referring him into the DES in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*.

Dated 16 Aug 19, AF Form 348, provided by the applicant, indicates his diagnosis of Spondylosis with radiculopathy, cervical region was found ILOD and did not EPTS. In Part VI and VIII, ARC LOD Determination Board Review, it is noted the Medical Reviewer concurred with the Appointing Authority and found the applicant's conditions ILOD.

On 17 Sep 19, according to the documentation provided by the applicant, the DVA proposed a 30 percent disability rating for his service connected medical condition of radiculopathy, left upper extremity; a 30 percent disability rating for his service connected medical condition of radiculopathy, right upper extremity; and a 40 percent disability rating for his service connected medical condition of cervical spine degenerative disc disease/spondylosis. The DVA also provided a disability rating for tinnitus with a combined rating of 80 percent.

Dated 14 Nov 19, the MEB Narrative Summary (NARSUM), provided by the applicant indicates he was diagnosed with cervical disc disorder with radiculopathy, unspecified cervical region with the following prognosis:

> The present condition of his cervical spine has improved, but not to a point that he will ever be able to resume flight activities in high G aircraft. Single-level fusion is a waiverable condition; however, his condition would require multilevel spinal fusion. This is not waiverable for ejection seat aircraft. Further, he is unsure if he wants to complete a fusion at this time. Based on conversations with his doctors, it is clear that he will not be able to fly a viper again. While it is reasonable that he be given a waiver for non-ejection seat aircraft, i.e. heavy or commercial aircraft, it is likely that he may not be deployable even in such aircraft. At this time, we request disposition from HQ AFRC/SG.

Dated 6 Dec 19, a Memorandum from HQ AFRC/SG, provided by the applicant indicates he was medically qualified to be returned to duty with an Assignment Limitation Code (ALC) of C1 with the following restrictions: Reserve participation in unit training assemblies (UTA), annual tours (AT), and man-days is approved. Member may be deployed only to DoD installations with fixed medical treatment facilities. Member may be assigned to a mobility position. These restrictions are permanent and may not be removed without approval from HQ AFRC/SG.

On 31 Jul 20, DD Form 2992, *Medical Recommendation for Flying or Special Operational Duty*, provided by the applicant indicates he was found qualified by medical authority and cleared after

flight duty medical examination. On 1 Aug 20, the applicant acknowledged that he may perform flight duties.

Effective 31 Oct 20, Reserve Order XX-XXXX, provided by the applicant indicates he was relieved from his current assignment and assigned to the retired Reserve section and placed on the USAF Reserve retired list.

Dated 25 Aug 21, Memorandum from AFPC/DPTT indicates the applicant completed the required years of service under the provision of Title 10, U.S.C., Section 12731, and he will be entitled to retired pay upon application, normally at age 60.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends denying the application finding insufficient evidence to support the applicant's request for the desired changes to his records. The applicant's counsel contends "plain error" was in violating AFGM 2019-36-01. The guidance stipulates that "If an airman reaches 12 months of non-deployability, the airman and his or her commander will work through the next steps to make a retention or separation recommendation. Wing commanders, or the appropriate separation authority in the Guard or Reserve, have the final say, even if someone is nearing eligibility for retirement." The applicant's counsel further contends that the 80 percent impairment rating offered by the DVA should equate and be integrated via the Services DES for a permanent military retirement. In this case, there is no question that an acute injury, or the aggravation of a pre-existing condition occurred on 5 Feb 18 when pulling a heavy G-load while flying an F-16 aircraft in duty status. The radio graphic studies noting multi-level degenerative findings (spondylosis) would indicate that the overall neck condition was a pre-existing condition and not caused by the single G-load incident itself. Over a long period of time (greater than one year), this applicant's ILOD injury significantly improved with non-surgical conservative treatment. Due to the prolonged period of non-deployability, as well as failing retention standards as previously described in the Medical Standards Directory (MSD), the proceedings within the Pre-IDES timeframe occurred in accordance with taking the next steps as noted in the AFGM 2019-36-01. The local Deployment Availability Working Group (DAWG) properly identified the condition for further review and submitted the IRILO for final disposition. The applicant was returned to duty with an ALC by the AFRC/SG. Such action and disposition complete the Pre-IDES portion of the disability evaluation system and negates further processing within the IDES. Having a disqualifying ILOD condition would have been referred to the IDES (i.e., start a Medical Evaluation Board) **only** if AFRC/SG **did not** return him back to duty. This medical advisor opines that no "plain error" of any cited instructions were violated resulting in unfair processing of the applicant.

Lastly, in order to support the applicant's request to find his injury as being combat related, based on an instrumentality of war, a direct causal relationship between the instrument of war (the aircraft) and the disability must exist. In this case, this incident was a local, near home base, training mission of routine flight in a non-hostile environment. All flight maneuvers were

intended and performed without the additional stress of losing one's life due to hostile aircraft fire. This advisor opines that such *routine* and *daily* flight activity of a fighter pilot is simply innate to the specialized occupation and when conducted within a home-based peaceful environment, would not support the disability as combat related.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 30 Aug 21 for comment (Exhibit D), and the applicant's counsel replied on 15 Sep 21 asking for the case to be closed stating he needed more time to prepare a rebuttal. On 17 Sep 21, the case was closed. On 14 Jan 22, the applicant's counsel provided a rebuttal, and the case was reopened.

In his response, the applicant's counsel contends the advisory opinion's rationale is based solely on the premise that the applicant was returned to duty through the pre-IDES RILO process and that he was not entitled to referral into the IDES for evaluation for his fitness for duty and accordant disability benefits. The applicant should have been entered into the IDES process because he could not perform the duties required of his office, grade, rank, or rating. At the time, the applicant was a F-16 fighter pilot and had one or more medical conditions that prevented him from performing the duties as a fighter pilot which resulted in him being placed in a Duties Not Including Flying (DNIF) status on 5 Feb 18. His medical condition was deemed stable and permanent and was noted that his condition was disqualifying for retention under the MSD. The notion that AFRC/SG's decision to return the applicant to duty negated his entitlement to IDES processing is specious. He was not cleared for flight duties with the F-16 and F-35, core duties of his Air Force Specialty Code (AFSC). He was only cleared to fly non-high-performance aircraft without ejection seats but, as explained in the Commander's Impact Statement (CIS), he had no alternate branch or specialty. Reclassification or reassignment into another flying assignment or position was not feasible.

Furthermore, the applicant's medical condition should be considered as an injury caused by an "Instrumentality of War." An F-16 is indisputably a military combat vehicle and the applicant's operation of the aircraft caused his injury. It is irrelevant whether he performed the maneuver in a "hostile environment" or "home-based peaceful environment" or under "the stress of losing one's life due to hostile aircraft" as the Advisory Opinion suggests. Indeed, the provision does not even require occurrence during a period of war and contemplates an injury might be incurred during "training for armed conflict."

The applicant's complete response is at Exhibit G.

ADDITIONAL AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends denying the application finding insufficient evidence to support the applicant's request to be referred into and processed through the IDES with an impairment rating consistent with a medical retirement. If the Board decides to grant the applicant's request for a medical separation or retirement, the Medical Advisor recommends his

medical condition of radiculopathy, right upper extremity condition (DVA impairment rating at 40 percent) be found as combat related. In agreement with the applicant's counsel, he correctly identifies and presses the criteria for referral into the DES when there is a medical condition that ***may*** prevent the applicant from reasonably performing the duties of their office, grade, rank, or rating. In his rebuttal, the emphasis centered on the applicant not being able to perform to his *rating* as a fighter pilot. There was little to no emphasis on either category of performing duties within the applicant's office, grade, or rank. However, the specific verbiage in DoDI 1332.18, *Disability Evaluation System*, Appendix 2 to Enclosure 3, paragraph 2 states, a Service member will be considered unfit when the evidence establishes that the member, **due to disability**, is unable to reasonably perform duties of his or her office, grade, rank, or rating. Often utilized in various guidance instructions are terms that may be construed to imply the same meaning. To avoid improper interpretations, DoDI 1332.18 (Part 2) as well as AFI 36-3212, Attachment 1 has standardized approved definitions for the purpose of these instructions. Approved definitions that could be germane to this advisory will be noted below.

> Disability is defined as "any condition due to disease or injury, regardless of degree, that reduces or prevents an individual's actual or presumed ability to engage in gainful employment or normal activity. A medical condition, or physical defect standing alone does not constitute a disability. To constitute a disability, the medical condition or physical defect must be severe enough to interfere with the Service member's ability to adequately perform his or her duties."

One important aspect to consider in this particular case is that although the applicant could no longer fly the F-16, he clearly maintained an ability to perform duties in line with instructional definitions of "Office" (A position of duty, trust, and authority to which an individual is appointed); "Grade" (A step or degree in a graduated scale of office or military rank that is established and designated as a grade by law or regulation); and "Rank" (The order of precedence among members of the Military Services). The evidence of his ability to perform within these other parameters included that as of Aug 19, he completed all aspects of a Command Staff position as noted in the NARSUM and additional duties to include teaching academics and performing supervisor of flying duties for a 16-month period as cited in the CIS. A vast majority of such duties, except for actual flying the F-16, are clearly spelled out in his fighter pilot position description.

A question to explore in this case is, was a "disability" actually present as defined by DoDI and AFI given the x-ray work-up performed shortly after his high G-force flight? His x-ray studies revealed a significant amount of spondylosis, which is a term synonymous with osteoarthritis and or degenerative disc disease. It is a degenerative disorder that develops over many years and can cause loss of normal spinal structure and function. Therefore, such a termed condition could be seen as EPTS. Osteophytes (bony type spurs) are also associated with spondylosis, and with age, can grow on any bone in the body; most commonly they are found in the cervical spine. Such age-related spurring often surrounds the foramen (holes in vertebra where nerves travel through). Additionally defined by instruction, a "disability" is any condition due to disease or injury, regardless of degree, that reduces or prevents an individual's actual or presumed ability to engage in gainful employment or normal activity. Many reviewed documents within this case file noted that the applicant's civilian job was flying aircraft for UPS and such documented

activity would be considered as being gainfully employed. As for a reduction of normal activities, such employment is also in line with normal activities. Clearly, from an anatomic standpoint, the above synopsis explains the prolonged time to develop spondylosis. However, in this case, there remains no doubt that an adverse acute incident took place in and around the surrounding structures about the applicant's neck during that particular flight. This undoubtedly is medically evidenced by the immediate resolution of his radicular arm pain upon reducing the elevated G-force. Such an abrupt force could easily increase pressure and tension of surrounding cervical tissue or bony spurs as they (while under high G-force) immediately compress or pinch nerve impulses within the already narrowed nerve canals. Once the G-force was released off the aircraft, so was the compression of exiting nerves and the initial radicular symptoms quickly subsided. Continued neck pain is often expected due to the instant strain and spasms surrounding the neck muscles when the G-forces were rapidly applied. If considered as being EPTS, then the focus should be placed on the question of service aggravation. Was the multi-level spondylosis condition permanently aggravated beyond the natural progression of the EPTS condition? The medical advisor opines that the single incident of his high G-force exposure *did* acutely precipitate the onset of radicular symptoms due to a pre-existing spondylitis arthritic condition but did not permanently worsen or accelerate the degenerative process over and above the natural progression of the condition. Medical literature has concluded that pilots frequently exposed to high G-forces cause pre-mature degeneration of the cervical spine. Nonetheless, the 2018 flight did cause a *non-permanent* worsening of an arthritic condition that continued with a lingering pain condition that eventually recovered to where the applicant was able to perform service required fitness testing. As for the time of the applicant being in treatment and non-deployable, no counter argument can be made. During his continued medical treatment, the applicant was properly assessed and was considered to have a condition that could *potentially be or become unfitting* for continued military service. Per AFI 41-210, *Tricare Operations and Patient Administration*, paragraph 4.51.1.2 states, "In order to minimize inappropriate referrals to the IDES, there will be a two-step [pre-IDES] screening process on all potential MEB cases. The first step will be accomplished by the MTF's DAWG. The second step will be accomplished [in Reserve cases] by the ARC/SGP (surgeon's office) which includes a review of the IRILO for determining one of two possible outcomes. Cases that the ARC/SGP directs for MEB will be entered into the IDES process. The ARC/SGP may also adjudicate a case as return to duty (RTD). A RTD disposition by the ARC/SGP is *final*, and has the same effect and authority as a MEB." The finality of this process thus ceases the applicant's further processing within the DES/IDES (previous authored as "negated" in prior advisory). Additionally stated in paragraph 4.52.6, "For reserve component Service members, the RILO will be forwarded to the appropriate ARC/SGP for review. The ARC/SGP, who possesses the same authority for ARC cases as the Medical Standards Branch (DPAMM) at Air Force Personnel Center (AFPC) possesses for active-duty cases, will provide final disposition instructions to the Service member's supporting Reserve Component." Paragraph 4.76.5 notes that the appropriate ARC/SGP will provide profiling instructions and other guidance on AF Form 422, *Physical Profile Serial Report*. This particular case followed all such processes as outlined above and per DoDI 6130.03-V2, *Medical Standards for Military Service: Retention*, Section 4: "pilots eligible for waiver will be restricted to a Flying Class (FC) IIB waiver, non-ejection seat aircraft" for which [the applicant] was granted. In considering military retention standards, the Medical Standards Directory (MSD) and DoDI 6130.03 (General Issuance Information) section 1, paragraph 1.2, are primary documents of concern. The applicant's x-ray findings of spondylosis are specifically addressed

in the MSD and states that "when symptoms and associated objective findings are of such a degree as to require repeated hospitalization, duty restrictions or frequent absences from duty is disqualifying for all flying classes as well as service retention." In this case, it's the "duty restrictions" that meets the disqualifying description as listed in line K8 of the MSD. Additionally, the cited DoDI notes that any potential referral into the DES is conducted on case-by-case basis. Nonetheless, the ARC/SGP, having the same authority as DPAMM, returned the applicant back to duty with an ALC, a deployment waiver, and the aeromedical consult service granted the FC IIB waiver. The ARC/SG acted within its authority to retain the applicant, but with reevaluation of his fitness to serve in a subsequent RILO. The process implementation and conclusion were in accordance with instructional guidance and were without willful or random error or a calculated injustice.

Lastly, the applicant's counsel additionally put forth that the applicant's disability is combat related. Counsel correctly references both AFI 36-3212 and DoDI 1332.18 in detailing this subject. AFI 36-3212, paragraph 3.16 under Combat Related Determinations states that "The PEB shall make a determination as to whether each condition that is *unfitting* or *contributes to an unfit determination* was incurred in combat or combat related, (1) as a direct result of armed conflict, (2) was caused by an instrumentality of war, (3) was incurred while engaged in hazardous service, or (4) was incurred under conditions simulating war**."** DoDI 1332.18, Appendix 5 to Enclosure 3, Section 1, paragraph (a) states, "The PEB renders a final decision on whether an injury or disease that makes the Service member *unfit* or *that contributes to unfitness* was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during war." Lastly, under Section 2 (b) defines 'combat related' as "A disability is considered combat-related if it makes the Service member *unfit* or *contributes to unfitness* and the preponderance of evidence shows it was incurred under certain circumstances." The first flawed point to emphasize in this case is that the definitions and criteria listed above requires the Service member to first be found unfit. That was certainly not the rendered outcome in this case; for the applicant was aptly RTD per ARC/SG. Therefore, the issue at hand is essentially futile. However, given a more comprehensive review from this action officer's prior advisory, there are 3 "certain circumstances" or "criteria" under combat relatedness that are defensible in this particular case involving the aircraft and his painful condition; they are (1) while engaged in hazardous service; (2) under conditions simulating war; and (3) caused by an instrumentality of war, citing *aerial flight duty, airborne operations, and caused by a military weapon*, respectively. The medical advisor has amended his prior response and opines that despite the issue of being fit or unfit, clearly the criteria of aerial flight, airborne operations and caused by a military weapon are indeed irrefutable.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 24 Feb 22 for comment (Exhibit I), and the applicant replied on 21 Mar 22. In his response, the applicant's counsel contends the advisory opines incorrectly states the extent of the applicant's stenosis which occurs throughout his cervical spine and upper neck not just at the C2-C3 level of the cervical spine. The advisory also ignores other potentially unfitting conditions, disc herniation and retrolisthesis

and mischaracterizes his spondylosis as EPTS without service aggravation. His spondylosis was permanently worsened as a result of the 5 Feb 18 flight and frequent exposure to high-G forces, above and beyond its natural progression. The applicant should have been referred to the IDES in accordance with DoDI 1332.45, *Retention Determinations for Non-Deployable Service Members*, because he suddenly could not perform his core 11F AFSC task of flying an F-16 and would never be able to high-G aircraft again; could not perform numerous common military tasks; and was non-deployable well beyond a period of 12 consecutive months. AFRC/SG's decision to return the applicant to duty was erroneous and unjust because, even after he was returned to duty with significant restrictions, he still did not meet deployment standards and it appears the CIS was not taken into consideration as required by AFMAN 41-210 when making the RTD decision.

The applicant's complete response is at Exhibit J.

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 concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. DoDI 1332.18 states, a Service member will be considered unfit when the evidence establishes that the member, due to disability, is unable to reasonably perform duties of his or her office, grade, rank, or rating. In the applicant's case, although the applicant could no longer fly the F-16, he clearly maintained an ability to perform duties in line with instructional definitions of "Office" (A position of duty, trust, and authority to which an individual is appointed); "Grade" (A step or degree in a graduated scale of office or military rank that is established and designated as a grade by law or regulation); and "Rank" (The order of precedence among members of the Military Services). The evidence of his ability to perform within these other parameters included that as of Aug 19, he completed all aspects of a Command Staff position as noted in the NARSUM and additional duties to include teaching academics and performing supervisor of flying duties for a 16-month period as cited in the CIS. A vast majority of such duties, except for actual flying the F-16, are clearly spelled out in his fighter pilot position description. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-00083 in Executive Session on 27 Apr 22:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 15 Nov 20.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFBCMR Medical Advisor, dated 24 Jul 21.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 30 Aug 21.
Exhibit E: Applicant's Request to Close Case, dated 15 Sep 21.
Exhibit F: Letter (Admin Close), SAF/MRBC to Applicant, dated 17 Sep 21.
Exhibit G: Applicant's Response, w/atchs, dated 14 Jan 22.
Exhibit H: Advisory Opinion, AFBCMR Medical Advisor, dated 22 Feb 22.
Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 24 Feb 22.
Exhibit J: Applicant's Response, w/atchs, dated 21 Mar 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR