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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-00474

XXXXXXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXXXXX

**HEARING REQUESTED:** NO

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**APPLICANT'S REQUEST**

1. His diagnosis of Post-Traumatic Stress Disorder (PTSD) be found as an unfitting condition and categorized as combat-related, as a direct result of armed conflict as defined in 26 USC 104 combat-related determination.
  
2. His diagnosis of bilateral knee pain; right and left knee sprain, and right hip bursitis, which were found as unfitting conditions be categorized as combat-related, as a direct result of instrumentality of war as defined in 26 USC 104 combat-related determination.

**APPLICANT'S CONTENTIONS**

The Medical Evaluation Board/Physical Evaluation Board (MEB/PEB) process completely and utterly failed to assign proper coding for his knee and hip injuries as combat-related from an instrumentality of war. These injuries were sustained when he fell while exiting from the top of the Mine Resistant Ambush Protected (MRAP). He was exiting the military combat vehicle during pre-departure checks prior to getting underway on a combat mission. This is not the case of someone "falling on a deck while participating in a sporting activity." He was not participating in an off-duty activity when he fell from the MRAP; the design of the MRAP, combined with the awkwardness associated with movement in battle gear, was caused by the military combat vehicle which is an instrumentality of war. Because of these injuries, his gait changed which caused further injury to his hips. He was referred to the MEB/PEB process which recommended discharge with a 20 percent rating due to bilateral knee pain and was coded as combat-related, as a direct result of instrumentality of war. He appealed this decision and the Secretary of the Air Force Personnel Council (SAFPC) increased his disability rating to 30 percent additionally finding his right hip bursitis to be unfitting but found this injury, along with the bilateral knee pain not combat-related. Originally, the AF Form 356, *SAFPC Findings and Recommended Disposition of the USAF Physical Evaluation Board*, annotated the bilateral knee pain; right and left knee sprain was combat-related, for duty under conditions simulating war but on 14 Mar 18, this form was corrected by a case manager within the Air Force Physical Disability Division indicating these injuries were not combat-related stating "the typo was corrected." This correction is disconcerting as there is no indication whether this decision was made by SAFPC and the signature dates on both documents are the same which leaves a perception that this document was digitally altered after the original was signed. Additionally, the MEB/PEB process and SAFPC failed to consider his documented PTSD diagnosis and Major

Depressive Disorder (MDD), which they should have found was also unfitting and properly determined to be incurred in combat. He made several deployments to Iraq and came under life-threatening attacks, saw many horrific sights, and lost friends and comrades which have had a profound and debilitating effect on him. The cumulative effects of the stress of combat afflicted him with PTSD. Unfortunately, his condition was not properly diagnosed and the MEB/PEB and appeal processes failed to properly consider his illness.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is a medically retired Air Force technical sergeant (E-6).

On 9 Mar 17, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for bilateral knee pain.

On 2 May 17, the Department of Veterans Affairs (DVA) proposed a disability rating for his Category I unfitting medical condition of bilateral knee pain; right knee sprain at 10 percent and left knee sprain at 10 percent. The DVA also provided disability ratings for several other service-connected disabilities with a combined rating of 100 percent.

On 12 May 17, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of bilateral knee pain; right and left knee sprain with an overall disability compensation rating of 20 percent with a recommendation of "Discharge with Severance Pay (DWSP)." This form indicates in section 9, column F, "yes – combat-related determination as defined in 26 USC 104" for the left knee sprain.

On 22 May 17, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings and disposition of the board and requested a formal hearing.

On 21 Feb 20, AF Form 356, *Formal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of bilateral knee pain; right knee sprain at 10 percent and left knee sprain at 10 percent with an overall disability compensation rating of 20 percent with a recommendation of "DWSP." This form indicates in section 9, column F, "S – combat related, for duty under conditions simulating war as defined in 26 USC 104" for the left and right knee sprain. His bilateral hip pain, lumbar strain, and cervical spine spondylosis were listed as Category II, conditions which are not unfitting at this time.

On 25 Sep 17, AF Form 1180, indicates the applicant disagreed with the findings of the Board and requested his case be referred to SAFPC for review and final decision. He did request a one-time reconsideration of the disability ratings for the conditions found unfitting by the SAFPC.

On 5 Mar 18, AF Form 356, indicates the applicant was found unfit by the SAFPC Personnel due to his medical condition of bilateral knee pain; right knee sprain at 10 percent and left knee

sprain at 10 percent, and right hip bursitis at 10 percent with an overall disability compensation rating of 30 percent with a recommendation of “Permanent Retirement.” This form indicates in section 9, column F, “S – combat-related, for duty under conditions simulating war as defined in 26 USC 104” for the left and right knee sprain. His left hip bursitis, lumbar strain, and cervical spine spondylosis were listed as Category II conditions. The Board found insufficient evidence to find his neck pain, lumbar strain, and left hip pain unfitting.

Dated 12 Mar 18, Special Order XXXXXX, indicates the applicant was permanently retired with compensable percentage for physical disability of 30 percent, effective 29 May 18.

On 14 Mar 18, an email was sent by AFPC/DPFDD indicating there was a typo on the SAFPC AF Form 356 correcting section 9, column F, for the left and right knee sprain to “No – combat-related determination as defined in 26 USC 104.” A corrected AF Form 356, dated 5 Mar 18, was attached to this email.

On 28 May 18, DD Form 214, *Certificate of Release or Discharge from Active Duty*, indicates the applicant was discharged in the grade of TSgt (E-6) after serving 13 years and 5 days of active duty. His narrative reason for separation is “Disability, Permanent (Enhanced).”

On 31 Mar 22, an email from SAF/MRBP indicates combat relation was never adjudicated by SAFPC as the applicant never raised the issue to the Board. The applicant wanted his additional unfitting conditions considered as Category I. The correction made to the AF Form 356 by AFPC was based on a determination made elsewhere.

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

## **APPLICABLE AUTHORITY**

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.

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 the supplemental guidance, paragraphs 6 and 7.

On 29 Jun 21, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

## **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 his record. There is no evidence a MEB was being considered for the applicant's mental health condition(s) prior to his medical retirement. A review of the available records revealed the applicant stated he was seeing improvement through treatment, both medication and therapy. There is no evidence the applicant's mental health condition(s) had progressed to the level of unfitting during his time in service, and thus a medical board would not be considered by the treating providers. The mere presence of a mental health condition or mental health symptoms does not indicate the condition is- in and of itself- unfitting for duty. Evidence must exist that the condition or symptoms impair the applicant's ability to effectively complete his duties and that the condition(s) and/or symptoms are not expected to resolve with treatment. Furthermore, AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, details that simply receiving a mental health diagnosis does not mandate an MEB. A review of the applicant's records reveals he sought and received mental health treatment for the near entirety of his time in service with successful symptom mitigation and resolution. The military's Disability Evaluation System (DES), can by law under 10 USC only offer compensation for those service incurred

diseases or injuries which specifically render 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. When the applicant was notified that he would need a MEB for his knee issues, he appropriately reported the additional conditions of “depression/anxiety” and “sleep apnea.” The applicant was not medical boarded for “depression/anxiety” or any other mental health condition because it was determined by the treating mental health providers, and this psychological advisor concurs based upon review of the records, that the applicant’s mental health condition(s) did not rise to the level of unfitting. In contrast to the military’s DES, the DVA, operating under a different set of laws, 38 USC 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.

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 was diagnosed with mental health conditions in service, including Adjustment Disorder with Anxiety and Depressed Mood, Social Anxiety Disorder, Depression NOS, Insomnia, Major Depressive Disorder, Recurrent, Moderate, Unspecified Anxiety Disorder, and PTSD. The applicant received treatment in service for his mental health conditions.

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

There is evidence the applicant received mental health diagnoses and treatment in service. However, there is no evidence any of the applicant’s conditions rose to the level of an unfitting mental health condition during his time in service.

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

Although the applicant was given a mental health diagnoses in service and received treatment, there is no evidence the applicant’s mental health condition(s), including (but not limited to) PTSD and/or Major Depression, progressed to unfitting while in service. There is no evidence that the applicant had any unfitting mental health conditions while in service, and therefore the discharge is not excused or mitigated.

4. Does the condition or experience outweigh the discharge?

There is no evidence the applicant’s mental health condition had progressed to unfitting and at the time of his discharge he had no unfitting mental health conditions, his conditions/experiences do not outweigh his original discharge.

The complete advisory opinion is at Exhibit C.

The AFBCMR Medical Advisor recommends denying the applicant's request to include additional musculoskeletal conditions as unfitting and their inclusion in his final disability rating computation and finding the applicant's knee and hip conditions as either combat-related or due to an instrumentality of war. The Medical Advisor considered the applicant's cervical spondylosis and lumbar strain could potentially interfere with his ability to perform his primary military duties and common military tasks. However, the Medical Advisor adopts the rationale of SAFPC, noting insufficient objective service evidence that either of these interfered with or prevented the applicant from reasonably performing the duties of his office, grade, rank, or rating; notwithstanding witness statements presented on his behalf. The Medical Advisor also acknowledged that SAFPC found the applicant's right hip bursitis unfitting, but not his left hip bursitis. While it appears counterintuitive to reach different fitness decisions, when both hips demonstrated the same painful motion on a DVA examination and each was issued a 10 percent disability rating, the Medical Advisor is of the opinion that it was the recurring complaint of right hip pain and the labral tear involving the right hip, which differentiated it from the left hip; the latter which demonstrated no such anatomic defect, from a fitness to serve perspective. The Medical Advisor also considered all other somatic complaints in the applicant's treatment record, and, again, found no objective evidence that either condition imposed a risk to the applicant's health or safety and welfare of others, nor imposed unreasonable requirements on the military to maintain or protect the service member.

Addressing the applicant's petition for the designation combat-related or Instrumentality of War for his bilateral knee pain and possibly hip condition, the Medical Advisor noted that at one point, the PEB(s) had reportedly designated the applicant's knee condition as combat-related; but was later rejected or removed from the document; reportedly due to unintended error, or words to that effect. The applicant's legal counsel makes a compelling argument that the Military Department deployed a piece of equipment, the Mine Resistant Ambush Protected Vehicle (MRAP or MRAP), that posed a safety design hazard or risk to its occupants during egress. The Medical Advisor found no basis to designate the applicant's knee or hip conditions as combat-related, or due to an Instrumentality of War, as there has been no evidence to reflect that movement, motion, or use of the vehicle, e.g., driving, navigating terrain, of the vehicle caused the fall; as opposed to merely losing his footing while exiting the Instrumentality of War. Per DoDI 1332.18, *Disability Evaluation System*, E3.P5.2.2.4, caused by an instrumentality of war states incurrence during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury, or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the injury.

Finally, the Medical Advisor is appreciative of the applicant's demonstrated willingness to serve and deploy, despite his medical conditions. However, operating under 10 USC, the Military Department only offers compensation for the condition(s) that caused career termination; that is, the condition that interfered with the ability to perform the duties of his office, grade, rank, or rating. In this case, it was the applicant's longstanding profile restrictions due to his knee and

possible hip condition, which generated the Deployment Availability Working Group (DAWG) review, and the AF Form 469, *Duty Limiting Condition Report*, coded “37,” requiring MEB/PEB processing, which resulted in the unfit finding. On the other hand, operating under 38 USC, the DVA is authorized to offer compensation for any medical condition determined service-connected, without regard to its proven or demonstrated impact upon a service member’s retainability or fitness to serve.

The complete advisory opinion is at Exhibit D.

### **APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 24 Jun 21 for comment (Exhibit E), and the applicant replied on 23 Jul 21. In his response, the applicant’s counsel contends the Psychological Advisor failed to recognize that mental health disorders, such as PTSD, are often not diagnosed for many years after they first manifest themselves. This is evidence in *Hassay v. United States*, 150 Fed. Cl. 467 (Fed.Cl., 2020), where the Court chastised the Board for its lack in following the guidelines prescribed in the Hagel, Kurta and Wilkie Memoranda. His counsel also contends there is sufficient evidence to show his musculoskeletal injuries are not only combat-related, but they were also unfitting and should have been included in his final disability compensation.

The applicant’s complete response is at Exhibit G.

### **ADDITIONAL AIR FORCE EVALUATION**

AFPC/DPFDD recommends denying the applicant’s request for his knee and hip conditions to be categorized as combat-related, as a direct result of instrumentality of war as defined in 26 USC 104 combat-related determination. Based on the documentation provided by the applicant and analysis of the facts, there were multiple administrative errors made on the various AF Forms 356 during DES processing which should have been caught and corrected before being sent to the applicant. However, these errors were eventually caught and corrected in a timely manner, the applicant was notified and provided with the rationale of why the final SAFPC AF Form 356 was corrected.

Under 10 USC, the PEB must determine if a member’s condition(s) renders them unfit for continued military service relating to their office, grade, rank or rating. Additionally, per DoDI 1332.18, Appendix 5 to Enclosure 3, 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. 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 any of the following circumstances:

- a. As a Direct Result of Armed Conflict. Injury or disability was incurred in combat with an enemy of the United States.

b. While Engaged in Hazardous Service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

c. Under Conditions Simulating War. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

d. Caused by an Instrumentality of War. Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

On 12 May 17 the IPEB found the applicant unfitting for bilateral knee pain and determined that the condition was incurred in a combat zone but not combat-related. Although Block 9A indicated the condition was combat zone/not combat-related, Block 9F incorrectly listed "Yes" for the left knee sprain S/P Arthroscopic Surgery condition. Block 9F indicates whether a condition is determined to be combat-related as defined in 26 USC 104 and should either include "No" if a condition is not determined to be combat-related or use one of the following combat indicator codes: "A" for direct result of armed conflict; "I" for direct result of instrumentality of war; "S" for duty under conditions simulating war; or "H" for while engaged in hazardous service. Therefore this column was incorrectly filled out as it did not list "No" or an applicable combat indicator code and is at odds with the determination in Block 9A. This administrative oversight was not caught prior to forwarding to the member for concurrence, however, it is noted that the IPEB's intention was never to consider this condition combat-related as the Unfit AF Form 356 dated 7 Apr 17 used to request disability ratings from the DVA correctly listed Combat Zone Not Combat-Related in Block 9A and Block 9F was marked "No." The MEB Narrative Summary used during the PEB processing states the patient has chronic bilateral knee pain with running since falling off an MRAP seven years ago. Additionally, Section V of the member's BCMR submission states while deployed to Iraq in 2008 it was during this time that the applicant was injured. While preparing for a convoy, he and others were practicing exiting the MRAP vehicle. The applicant was exiting from the top of the MRAP when he fell off the back left corner while trying to climb down, injuring both knees. The PEB opines that this incident does not qualify for combat-related because the applicant's injuries were not caused by the operation or movement of the MRAP. Rather, he suffered a fall that would be better classified as a ground safety accident. In order to qualify for combat-related (either simulating war or instrumentality of war), the injury would need to be caused by or related to the



operation/movement of the vehicle. Additionally, his knee pain clearly was not the result of enemy action or hazardous service as defined above.

The applicant disagreed with the IPEB findings and appealed to the Formal PEB. He contended that in addition to bilateral knee pain that he should also be found unfit for 1) Left Hip Bursitis; 2) Right Hip Bursitis; 3) Lumbar Strain/Sprain; and 4) Cervical Spine Spondylosis. On 14 Sep 17 the FPEB disapproved the appeal but instead added the additional conditions to Category II – Conditions That Can Be Unfitting But Are Not Currently Unfitting. The FPEB continued the unfitting conditions for Bilateral Knee Pain only and again determined that the conditions were incurred in a combat zone but not combat-related. However, they incorrectly marked “S” in Column 9F indicating that the conditions were combat-related due to a simulation of war. However, as stated above, since the injuries were not caused by or related to the operation/movement of the vehicle this determination was also an administrative error. The applicant disagreed with the FPEB findings and appealed to SAFPC to have the Category II conditions moved to Category I. The 29 Sep 17 appeal request submitted by the applicant’s disability counsel seems to acknowledge that he was aware that his bilateral knee conditions were considered combat zone only as the memo makes reference to the conditions being combat zone only. Furthermore, the appeal did not seek to make any of the Category II conditions combat-related. On 5 Mar 18, SAFPC added the Right Hip Bursitis to the Category I unfitting conditions. Block 9F for this condition is listed as “No,” however, the rating decisions for the Bilateral Knee Pain was not adjudicated by SAFPC so the AF Form 356 simply carried over the previous decisions from the FPEB and again listed the conditions as incurred in a combat zone but not combat-related but incorrectly marked “S” in Block 9F. On 12 Mar 08 the applicant’s disability case was finalized and Special Order **ACD-01907** was published directing his permanent disability retirement. The retirement order correctly indicated that his disability was not the direct result of a combat-related injury as defined in 26 USC 104 and the final disposition message correctly indicated that the E53 taxation code was taxable. For reference, if a member’s medical condition is determined to be combat-related the E53 taxation code is non-taxable. Additionally, the following statement would have been added to the final disposition message: “THE DISABILITY WAS A DIRECT RESULT OF A COMBAT-RELATED INJURY AND RETIRED PAY IS NOT TAXABLE PER 26 USC, 104(A) and (B).” It appears that shortly after the applicant’s case was finalized, his disability case manager noticed the discrepancies on the SAFPC AF Form 356 and a corrected copy was issued on 14 Mar 18 changing Block 9F for the bilateral knee pain conditions to “No” to show that these conditions were not combat related and also match the determination made in Block 9A. The Physical Evaluation Board Liaison Office (PEBLO) was also notified of the correction in order to notify the member.

The complete advisory opinion is at Exhibit I.

## **APPLICANT’S REVIEW OF ADDITIOANL AIR FORCE EVALUATION**

The Board sent a copy of the additional advisory opinion to the applicant on 26 Apr 22 for comment (Exhibit J), and the applicant replied on 19 May 22. In his response, the applicant’s counsel contends the advisory opinion from AFPC/DPFDD is erroneous by attempting to show that the PEB documents showing the applicant’s injuries suffered during conditions of simulated war were administrative errors. However, a more logical version of events would demonstrate

that the FPEB recognized the applicant's injuries as unfitting and combat-related. The FPEB reviewed the facts and came to an accurate conclusion; not only did they mark "S" in column 9F, but they specified how the injury took place in the remarks section. This decision was upheld by SAFPC. It is noted that SAFPC was never asked to reevaluate the "S" coding of the applicant's knee pain. The charter of SAFPC in this case was to determine if additional conditions were unfitting. They were not requested to, nor did they reevaluate the applicant's knee pain. Thus, the decision of the FPEB made on 14 Sep 17 stood unrebutted. Despite the fact that the FPEB found the applicant's knee pain as combat-related and SAFPC never evaluated the combat coding, changes were made to the documents indicating his knee injury was not combat-related. Per DoDI 1332.18 and AFI 36-3212, the Case Manager for the Air Force Physical Disability Division had no authority to change these documents, hence reversing the boards' decisions.

The implication that an instrumentality of war, in this case a military combat vehicle, can only cause injury when it is moving is absurd. The vehicle is in operation when it is being utilized. The applicant and his team were operating the vehicle when he fell, operating various components of the vehicle. They were operating the hydraulic rear door, the top escape hatch and the footholds. The MRAP was in operation; thus, his fall, caused by the way the MRAP was loaded with gas and water jerry cans placed in the manufacturer-installed storage racks and the way the foot holds were placed in proximity to them, happened while the vehicle was in operation and were caused by an instrumentality of war.

It was noted that the applicant's counsel did not originally receive the email correspondence from SAF/MRBP, so the correspondence was emailed to the applicant and counsel again on 2 Jun 22 for comment. On 9 Jun 22, the applicant's counsel responded by again stating the civil service employee had no authority to correct the document from a representative of the Secretary of the Air Force.

The applicant's complete response is at Exhibits K and L.

## **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 the victim of an error or injustice. While the Board notes the recommendation of the AFBCMR Medical Advisor against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the Narrative Summary (NARSUM) outlining the injuries he sustained while exiting the combat vehicle which was viewed by the previous boards in making their determination, the IPEB, FPEB and SAFPC, his affidavit, and a description and pictures outlining the manufacturing defects with the vehicle design that contributed to his injuries which is sufficient to justify granting the applicant's request to have his bilateral knee pain; right and left knee sprain be categorized as combat-related, as a direct result of instrumentality of war as defined in 26 USC 104 combat-related determination. Additionally, the Board noted the advisory from AFPC/DPFDD denying the applicant's request; however,

finds counsel's argument compelling that a civil service employee had no authority to correct the document from a representative of the Secretary of the Air Force. 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. Therefore, the Board recommends correcting the applicant's records as indicated below.

## **RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to the APPLICANT be corrected to show that on 5 Mar 18, his physical disability, bilateral knee pain; right knee sprain at 10 percent and left knee sprain at 10 percent, was found as a direct result of armed conflict as defined in 26 USC 104 combat-related determination.

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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-00474 in Executive Session on 28 Jul 21, 3 Jan 22 and 28 Jun 22.

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 6 Oct 20.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 20 May 21.  
Exhibit D: Advisory Opinion, AFBCMR Medical Advisor, dated 22 Jun 21.  
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 24 Jun 21.  
Exhibit F: Letter, SAF/MRBC to Applicant (Clarifying Guidance), dated 29 Jun 21.  
Exhibit G: Applicant's Response, w/atchs, dated 23 Jul 21.  
Exhibit H: Email from SAF/MRBP, dated 31 Mar 22.  
Exhibit I: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 26 Apr 22.  
Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Apr 22.  
Exhibit K: Applicant's Response, dated 19 May 22.  
Exhibit L: Applicant's Response, dated 9 Jun 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.

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Board Operations Manager, AFBCMR