[redacted]

UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: BC-2021-00877-2

COUNSEL: [redacted]

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request he be granted a medical retirement.

The applicant also makes the following new alternative requests:

1. His case be referred to the Disability Evaluation System (DES).
2. He be retired with 20 years of creditable service, with retroactive back pay from his effective date of retirement.

RESUME OF THE CASE

The applicant is a former Air National Guard (ANG) senior airman (E-4).

On 10 Jun 03, the applicant enlisted in the ANG. The applicant served in the Navy and Army Reserve prior to his enlistment in the ANG.

On 2 Nov 05, he was honorably discharged from the ANG for physical disqualification.

On 15 and 21 Sep 21, the Board considered and denied his request for a medical retirement. The applicant contended he was improperly discharged after he was reported for using a handicap parking spot. He was directed to report to medical and was put on a profile due to his Department of Veterans Affairs (DVA) rating. The Board found no evidence to show he incurred an injury or illness while on active duty or that he was referred for DES processing by a medical evaluation board (MEB) to warrant granting the applicant a medical retirement. The Board also found the applicant's request was not timely filed and did not find it in the interest of justice to waive the three year filing requirement.

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 E.

On 10 Apr 23, the applicant requested reconsideration of his request. Counsel, on behalf of the applicant, contends the applicant was unjustly removed from service over medical concerns after he was observed parking in a handicap spot, which he was legally allowed to do for his medical condition. At the time of his enlistment in the ANG, he had a 40 percent DVA disability rating

[redacted]

[redacted]

[redacted]

due to injuries he sustained while in the Army, which he specified in his application to the ANG. During drill weekend of 3 Apr 04, he was running an errand for his unit and was observed parking in a handicap space. He was directed to report to medical, issued a profile and was precluded from attending unit training assemblies (UTA) due to his back condition. His supervisor at the time told him the actions against him were discriminatory. A year and a half later, he was unjustly discharged from the ANG with 18 years of service without ever being evaluated for a medical disability retirement. The failure to notify him of the findings and allow him to exercise his due process rights were in error and contrary to regulations and was likely motivated by his ethnicity and race. Had it not been for the errors and malicious abuse of authority, he would have either been medically retired or complete the remaining two years needed for a 20 year retirement.

He has a combined DVA service connected disability rating of 100 percent for his medical and mental health conditions. Per AFI 36-3212*, Physical Evaluation for Retention, Retirement and Separation,* and DoDI 1332.18, *Disability Evaluation System*, once a commander or physician becomes aware of unfitting conditions, they must refer the member to the appropriate medical board. They do not possess the authority to withhold referral to DES. His medical providers were duty bound to refer the applicant to the DES the moment he was issued a permanent profile for his back.

He was suffering from numerous medical conditions that called into question his ability to perform the duties of his office, rank, grade or rating. A medical profile indicates he was precluded from bending, stooping, lifting over 10 pounds, prolonged sitting or standing and performing intense physical training. He was separated unaware he lacked a line of duty (LOD) determination. He was not informed he was being processed for separation until Aug 05 when he received correspondence from his State ANG that he had been found medically disqualified and he was recommended for discharge. The notification occurred three months after his separation date.

His discharge was the culmination of racial and disability discrimination and justice requires he be granted a retirement. In May 20, the Protect our Defenders report was released which found disparities between punishment received by servicemembers of color, compared to their white counterparts. A rational deduction from the data indicates African American airmen often receive less favorable treatment than white airmen when facing administrative action as well. He was the victim of impermissible racial discrimination and outright denial of due process. This is demonstrative of the comment made by his supervisor after the handicap parking spot incident that the actions against him were discriminatory.

His previous application did not include the evidence provided in this case. Accordingly, the requirement for the Board to reconsider his case has been met. In support of his reconsideration request, the applicant submitted the following new evidence: (1) Letter dated 25 Jun 97 from a chiropractor; (2) Chronological Record of Medical Care dated 5 Jun 04 and 7 Aug 04; (3) AF Forms 422, *Physical Profile Serial Report*, dated 4 Apr 04 and 5 Jun 04 (4) DVA Rating Decision dated 6 May 22; (5) Letters of support; (6) DD Form 2807, *Report of Medical History*, dated 2 Nov 02 and (6) Protect Our Defenders, Racial Disparities in Military Justice, report dated May 20.

The applicant's complete submission is at Exhibit F.

On 30 Apr 24, the applicant's case was administratively closed per counsel's 29 Apr 24 request for additional time to provide a response to the advisory opinions.

APPLICABLE AUTHORITY/GUIDANCE

[redacted]

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, Paragraph 3.14, Physical Disqualification. Discharge a member who is unfit to perform the duties of the member's office, grade, or rank because of disease or injury. The convening or discharge authority is authorized to finalize cases processed under this section. Paragraph 3.14.6, the discharge authority finds the member's physical disqualifying condition makes them unfit for duty.

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 issued supplemental guidance, known as the Wilkie Memo, 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 paragraphs 6 and 7 of the Wilkie Memo.

On 4 Apr 24, the Under Secretary of Defense for Personnel and Readiness issued a memorandum, known as the Vazirani Memo, to military corrections boards considering cases involving both

[redacted]

liberal consideration discharge relief requests and fitness determinations. This memorandum provides clarifying guidance regarding the application of liberal consideration in petitions requesting the correction of a military or naval record to establish eligibility for medical retirement or separation benefits pursuant to 10 U.S.C. § 1552. It is DoD policy the application of liberal consideration does not apply to fitness determinations; this is an entirely separate Military Department determination regarding whether, prior to "severance from military service," the applicant was medically fit for military service (i.e., fitness determination). While the military corrections boards are expected to apply liberal consideration to discharge relief requests seeking a change to the narrative reason for discharge where the applicant alleges combat- or military sexual trauma (MST)-related PTSD or TBI potentially contributed to the circumstances resulting in severance from military service, they should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised.

Accordingly, in the case of an applicant described in 10 U.S.C. § 1552(h)(l) who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the military corrections boards will bifurcate its review.

First, the military corrections boards will apply liberal consideration to the eligible Applicant's assertion that combat or MST related PTSD or TBI potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief, such as an upgrade or change to the narrative reason for discharge, is appropriate.

After making that determination, the military corrections boards will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

On 27 Nov 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit H). On 24 May 24, the Board staff provided the applicant a copy of the updated liberal consideration guidance (Vazirani Memo) (Exhibit Q).

AIR FORCE EVALUATION

AFRBA Psychological Advisor finds insufficient evidence to suggest the applicant had any mental health condition that was unfitting during his time in service. There is insufficient evidence to demonstrate he was unable to perform the duties of his office, grade, rank and rating from a psychological perspective.

There is no evidence he sought mental health service while in the military, nor is there any evidence to show he was suffering from a mental health disorder while in the military. A post-service encounter dated 13 Jun 08 confirms he denied any past mental health treatment. A Report of Medical History dated 2 Nov 02 indicated he did not have trouble sleeping, excessive worry or depressive symptoms and that he was qualified and fit for service from a psychological perspective. His two AF Forms 422 dated 4 Apr 04 and 5 Jun 04 also specified his psychiatric profile was S-1 (normal) and that he was fit for service from a psychological perspective. The applicant’s service connection for major depressive disorder (MDD) was effective 9 Sep 08, three years after his military service.

The applicant is 100 percent service connected for MDD, with an original effective date of 9 Sep 08, approximately three years after his military discharge date, and a current effective date of 10

[redacted]

Apr 19. Despite the DVA determining the applicant has a service connection for a mental health condition, this does not indicate he was unfit for military service from a psychological perspective. The military's DES, established to maintain a fit and vital fighting force, can by law, under 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. To the contrary, the DVA, operating under 38 U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service or the length of time that transpired since the date of discharge. The DVA may also conduct periodic re-evaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary (improve or worsen) over the lifetime of the veteran.

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 the applicant on 18 Feb 24 for comment (Exhibit J) and the counsel replied on 18 Mar 24. In his response, counsel disagreed with the advisory opinion as there is ample evidence to grant the applicant a medical retirement from a psychological perspective, as well as from a physical perspective.

The advisory opinion fails to acknowledge the providers who examined the applicant in Nov 02, Apr 04 and Jun 04 who indicated he was not suffering from a mental health condition were not mental health professionals. The advisory opinion also places too much emphasis on his Nov 02 retention physical and lack of psychiatric profile at the time since a disability retirement looks at how severe the condition is at the moment before separation/retirement and not the severity of the condition three years prior to separation. The advisory opinion also places emphasis on the fact he did not receive a rating from the DVA until years after he was separated. This does not speak to his symptoms at the time of discharge but that he did not immediately file for service connection for his mental health condition upon leaving service.

The applicant received a L-4 and P-4 profile due to conditions related to his spinal cord. He was instructed not to report to drill due to the profiles and he was told he would be contacted by a member of the ANG. Over 18 months passed before the applicant received correspondence from his unit indicating he was found not physically qualified for retention and would be separated from service. The 9 Aug 05 letter informed him he was being referred to the DES; however, he was denied the opportunity to present evidence to the physical evaluation board (PEB) in violation of ANG and DoD instructions. The applicant's spinal condition incurred in the LOD and the medical documentation dated 25 Jun 97 indicates the injury was incurred in the LOD. The applicant was reporting to his Reserve unit for the first time when he injured his back. This was in a qualified duty status at the time of his back injury and the injury qualified for a disability rating for retirement purposes.

The applicant's complete response is at Exhibit K.

AIR FORCE EVALUATION

AFBCMR Physician Medical Advisor finds insufficient evidence to grant the applicant's request for a medical retirement or further medical evaluation.

[redacted]

The Medical Advisor addresses the medical (non-mental health) condition cited in counsel's brief as a "back condition." First, counsel provides the letter from the chiropractor dated 25 Jun 97, which noted the applicant injured his neck and back on 11 Jun 97 and that he received chiropractor treatment. Having such a letter of testament in the absence of actual treatment notes coupled with the actual primary care note of early 2003 that he never tried chiropractic care diminishes the validity of the testament letter and appears as a significant inconsistency. Second, counsel states the applicant was not informed by his unit of the actions they were taking against him and he was never contacted by his unit until he received his notification of separation over a year later. This statement is inaccurate as the applicant was examined by an ANG provider on 5 Jun 04 and 7 Aug 04 with clearly stated plans of a P-4 profile for his chronic back and neck pain condition as well as him not being worldwide qualified (WWQ). Thirdly, counsel included the applicant had a 40 percent DVA rating due to injuries he sustained while in the Army. While it was true he did have a 40 percent DVA rating, there was no evidence he specified such information on his application to the ANG. The DD Forms 2807, *Report of Medical History*, and 2808, *Report of Medical Examination*, were included but the evaluation was dated 2 Nov 02 and was for retention in the Army Reserve and not the ANG. Lastly, counsel contends AFI 36-3212 prescribes guidance and instructions on discharging or retiring service members unable to perform their duties due to a disability. The Medical Advisor does not dispute counsel's contention citing the AFI reference, however this version of the AFI became effective in 2019 and was not in effect at the time of the applicant's discharge and is not applicable.

The applicant in his personal statement dated 24 Jun 22 states his enlistment in the ANG occurred on 10 Jun 03 and the 40 percent DVA rating was known at the time of his enlistment. However, there is no evidence his DVA rating was known by any ANG personnel. The only non-DVA or non-civilian medical records available were the sole records dated 9 Aug 08 (pre-employment physical examination) and the submitted records of 5 Jun 04 and 7 Aug 04. It is important to note that the hundreds of medical/clinic encounters were conducted in various DVA facilities. In accordance with AFI 48-123, *Aerospace Medicine, Medical Examinations and Standards,* Each Air Reserve Component (ARC) member is responsible for promptly reporting a disease, injury operative procedure or hospitalization not previously reported to their commander, supervisor or supporting medical facility personnel. Further, it states each ARC commander or supervisor ensures an ARC member is medically qualified for WWQ. Each commander and supervisor notifies the servicing medical facility when they become aware of any changes in an ARC member's medical status.

The applicant's spinal condition of symptomatic spondylolisthesis is disqualifying for service retention per AFI 48-123. Once discovered and in receipt of a profile with significant physical restrictions coupled with documentation of an upcoming spinal fusion surgery in the fall of 04 and the encounter in Jun 04 indicated a 4T profile under the physical capacity column. In accordance with AFI 48-123, a 4T profile temporarily disqualifies ARC members from military duty and precludes them from military participation in UTAs, annual tours (AT) or any other type of active duty until the profile is removed. Further in the case of an ARC member who has a medical condition that resulted from an illness, injury or disease, a LOD determination should be considered.

In going back to the parking spot issue, the command was simply notified of a visual scene, a uniformed service member on a duty status parking in a handicap spot as appearing unusual. The reported incident prompted further investigation as to ensure the service member was medically WWQ per regulatory guidance. There was no injury or illness that acutely occurred when the command received notice of the applicant's prior diagnosis and the DVA compensatory

[redacted]

impairment. Therefore, an LOD determination was not applicable. The DVA records do include the applicant was provided with a disabled parking permit in the beginning of 2004 for a six month period.

The applicant's DVA records documented the applicant was on AT orders effective 12 Jun 97 for 17 days and on 18 Jun 97 he reported to the medical clinic for emergency treatment for a neck injury sustained while lifting a duffle bag. He was diagnosed with a trapezius muscle strain. Neither his military orders nor his treatment records were available for review. However, it appears the completion of the 17 days of active duty did not occur as his Point Credit Service (PCARS) history noted only four days of active duty for the period of Jun 97. The previous year's PCARS history for the period of 18 Jul 95 to 17 Jul 96 revealed zero days of active duty. However, the DVA decision report dated 23 Sep 04 cited a 17 day period of Army Reserve duty from 12 Jun 97 to 29 Jun 97, which is inconsistent with his PCARS history showing only four days of active duty. The significance of inconsistent and altering statements of reported dates and varying described mechanisms of an injury coupled with non-corresponding reported dates of duty do not support any degree of an acute injury occurring to show an in the LOD injury, nor did the ultimate discharge process undermine any applicable regulatory guidance. The burden of proof is placed on the applicant to submit evidence to support their request. The evidence submitted lacked a definitive nature and timeline of events that would meet required criteria for DES processing. The evidence of the case does not support that his discharge was improper, inequitable or administered with purposeful error or calculated injustice. Therefore, the recommendation is to deny the applicant's requested action.

The complete advisory opinion is at Exhibit L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 29 Mar 24 for comment (Exhibit M). In a response dated 31 May 24, counsel disagrees with the Medical Advisor's assertions and recommendations as there is ample evidence to support his request for a medical disability retirement from a physical perspective and there is clear evidence his due process for referral to DES was ignored.

The advisory opinion alleges the letter from his chiropractor dated 25 Jun 97 is not credible. It is rather common for military medical providers to not fully document the history of a present illness due to time constraints. Given the repeated documentation referencing his back injury and the positive LOD determination, the assertion is unfounded. Additionally, while he was seen by an ANG medical provider on 5 Jun 04 and 7 Aug 04 and documentation stated plans for a P-4 profile and that he was not WWQ, neither the ANG providers, nor his unit, notified him he was being separated because of the medical visits. The Board should disregard the assertion suggesting he was notified of his medical disqualification and subsequent separation. There is no proof the actions asserted by the Medical Advisor occurred and it must be presumed the actions did not occur due to lack of proof in his service records.

The Board should also disregard the assertion he did not inform the ANG about his disabilities prior to enlistment. A review of a DD Form 2807-1 clearly indicates he informed the Army of his recurrent back pain, numbness and tingling. The form also clearly indicates he had a 40 percent disability rating from the DVA for two medical conditions. His medical examination conducted by the Army was used when he enlisted into the ANG.

[redacted]

He was clearly identified as having an unfitting medical condition. Despite the presence of unfitting medical conditions and the requirement to process him through the DES, he was never afforded the opportunity to exercise his due process rights. There is ample evidence to conclude the ANG was aware of his medical conditions at the time of his enlistment and his LOD established the injury was compensable from a retirement/medical separation perspective.

In support of his request, he provides the following: (1) State ANG/DPMAR letter dated 9 Aug 05; (2) DD Form 2807-1 dated 11 Feb 02 and (3) Personal statement dated 17 Apr 24, which states the ANG was fully aware of his recurrent back pain and his 40 percent DVA rating at the time of his enlistment. His statements in his medical records have been consistent and he cannot be held liable because medical personnel failed to put the right year for his injury in his medical records. The onset of his injury in the Army happened in Jun 97.

The applicant's complete response is at Exhibit P.

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 of the AFRBA Psychological Advisor and the AFBCMR Physician Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds there is insufficient evidence to suggest the applicant had a mental health condition that was unfitting during his time in service. The record also does not support any degree of an acute injury occurring in the LOD; nor did the ultimate discharge process undermine any applicable regulatory guidance. The burden of proof is placed on the applicant to submit evidence to support his request. The evidence submitted was assessed as lacking a definitive nature and timeline of events that would meet the required criteria for DES processing. In this respect, the Board does not find any of the applicant's medical or mental health conditions at the time of his discharge unfitting. The mere existence of a medical or mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. Moreover, as noted in the advisory opinions, the military's DES, established to maintain a fit and vital fighting force, can by law, under 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.

With respect to the applicant's request, he be alternatively provided with a 20 year service retirement should the Board find insufficient evidence to grant a medical retirement, the Board does not find it in the interest of justice to credit the applicant for a period of service he did not serve solely for the purpose of entitlement to a retirement benefit he did not earn. The Board also notes the applicant contends he was the victim of racial, ethnic and disability discrimination, abuse of authority and he was denied his due process rights; however, insufficient evidence has been presented to demonstrate this to be the case. It appears the applicant was evaluated and found to not meet retention standards after he was reported to have parked in a handicap parking spot while in uniform. The evidence does not support that his discharge was improper, inequitable or administered with purposeful error or injustice. Therefore, the Board recommends against correcting the applicant's records.

[redacted]

[redacted]

[redacted]

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 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-2021-00877-2 in Executive Session on 17 Apr 24 and 21 May 25.

[redacted] Panel Chair
[redacted], Panel Member
[redacted], Panel Member

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

Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 9 Oct 21.
Exhibit F: Application, DD Form 149, w/atchs, dated 10 Apr 23.
Exhibit G: Documentary evidence, including relevant excerpts from official records.
Exhibit H: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 27 Nov 23.
Exhibit I: Advisory Opinion, AFRBA Psychological Advisor, dated 8 Dec 23.
Exhibit J: Notification of Advisory, SAF/MRBC to Applicant, dated 18 Feb 24.
Exhibit K: Counsel's Response, dated 18 Mar 24.
Exhibit L: Advisory Opinion, AFBCMR Medical Advisor, dated 24 Mar 24.
Exhibit M: Notification of Advisory, SAF/MRBC to Applicant, dated 29 Mar 24.
Exhibit N: Counsel's email, dated 29 Apr 24.
Exhibit O: Notification of Case Closure, SAF/MRBC, dated 30 Apr 24.
Exhibit P: Applicant's response, w/atchs, dated 24 May 24.
Exhibit Q: Letter, SAF/MRBC (Updated Liberal Consideration Guidance, w/Vazirani Memorandum), dated 24 Sep 24.

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.

6/10/2025

[redacted]
Board Operations Manager, AFBCMR
Signed by: USAF