

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-01004

COUNSEL: YES

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His disability discharge be corrected to a medical retirement with 30 percent combined disability rating and he receive financial reparations retroactive to 15 Mar 99, the date of his discharge.

APPLICANT'S CONTENTIONS

The Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) erred when he was discharged with severance pay. He should have been medically retired with 30 percent combined disability rating for his service-connected back injury and radiculopathy of the lower right extremity. First, his back condition was erroneously rated with 10 percent disability under the Veterans Schedule for Rating Disabilities (VASRD) diagnostic code (DC) 5295 (lumbosacral sprain) but should have been rated with 20 percent disability under DC 5293 (intervertebral disc syndrome (IVDS)) based on his service treatment records (STR) and his post-discharge Department of Veterans Affairs (DVA) Compensation & Pension (C&P) exams. Second, his lower right extremity radiculopathy should have been found unfitting with 10 percent disability under DC 8520 (radiculopathy).

Additionally, his application should be considered timely as he applied within three years of receiving the complete DVA file on 26 Dec 18.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 29 Dec 98, according to documentation provided by the applicant, an Informal Physical Evaluation Board (IPEB) found the applicant's chronic lower back pain unfitting with 10 percent compensable disability rating and recommended discharge with severance pay (DWSP).

On 14 Jan 99, the applicant concurred with the IPEB findings and recommended disposition of the IPEB and waived his right to a formal hearing of his case.

According to a message, dated 25 Jan 99, the applicant requested a formal hearing before the Formal PEB (FPEB).

On 10 Feb 99, the FPEB president approved the applicant's request to now waive his earlier election to demand a formal hearing for the purposes of now concurring with the IPEB's recommendations and findings.

On 17 Feb 99, SAFPC directed the applicant be separated from active service for physical disability with severance pay.

On 15 Mar 99, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was honorably discharge for disability with severance pay and credited with 16 years, 2 months and 11 days of active service.

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

APPLICABLE AUTHORITY/GUIDANCE

The Department of Defense (DoD) and the Department of Veterans Affairs (DVA) disability evaluation systems operate under two separate laws. Under Title 10, United States Code, Physical Evaluation Boards must determine if a member's condition renders them unfit for continued military service relating to their office, grade, rank or rating. The fact that a person may have a medical condition does not mean the condition is unfitting for continued military service. To be unfitting, the condition must be such that it alone precludes the member from fulfilling their military duties. If the board renders a finding of unfit, the law provides appropriate compensation due to the premature termination of their career. Further, it must be noted the AF disability boards must rate disabilities based on the member's condition at the time of evaluation; in essence a snapshot of their condition at that time. It is the charge of the DVA to pick up where the AF must, by law, leave off. Under Title 38, the DVA may rate any service-connected condition based upon future employability or reevaluate based on changes in the severity of a condition. This often results in different ratings by the two agencies.

AIR FORCE EVALUATION

AFPC/DPFDD recommends denying the application. A thorough review of the applicant's application, a copy of his PEB case file, current medical literature, and a copy of what appears to be the Code of Federal Regulations, Title 38, Volume 1, Part 4 (7-1-02 Edition) failed to identify sufficient objective evidence to validate the applicant's contention that the IPEB which convened on 29 Dec 98 committed an error or injustice. Rather, the IPEB's actions were supported by the objective medical evidence provided and the governing policies in place at that time.

Regarding the applicant's back condition, the DVA disability rating decision of 20 percent for the applicant's unfitting condition using DC 5293 for IVDS was not rendered until months after the IPEB convened. Rather the objective medical evidence available when the MEB and IPEB convened supports the application of DC 5295. DoDI 1332.39, 14 Nov 96, paragraph 6.1.1, states "The VASRD is primarily used as a guide for evaluating disabilities resulting from all types of diseases and injuries encountered as a result of, or incident to, military service. Because of differences between Military Department and DVA applications of rating policies for specific cases, differences in ratings may result. Unlike the DVA, the Military Departments must first determine whether a service member is fit to reasonably perform the duties of the member's office, grade, rank, or rating. Once a service member is determined to be physically unfit for further military service, VASRD percentage ratings are applied to the unfitting condition(s). Percentages are based on the severity of the condition(s)."

Regarding the applicant's radiculopathy, the presence of radiculopathy is not necessarily unfitting, and the omission of the condition as an MEB referred condition or separate unfitting DC appears to have been typical for PEB adjudications at the time the applicant's case was adjudicated. The applicant was not referred for his radiculopathy, and his pain management clinic encounter note from 30 Jul 98 documented no sensory or motor deficits in either lower extremity, and the applicant had normal deep tendon reflexes. In the absence of objective evidence by the pain specialist to suggest any significant neurological deficit, or electro diagnostic studies showing degeneration of nerve function at that time, the applicant's neurological symptoms suggestive of radiculopathy

may have reasonably been considered to meet retention standards at the time the case was referred by his primary care provider for MEB and adjudicated by the PEB.

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 2 Feb 22 for comment (Exhibit D) but has received no response.

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 AFPC/DPFDD and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds insufficient evidence that neither the MEB nor the IPEB erred in its findings and the applicant was appropriately discharged with severance pay. The Board also notes counsel's reference to several court cases within his argument but does not find them to persuade our decision. Each case before this Board is considered on its own merits. While the Board strives for consistency in the way evidence is evaluated and analyzed, they are not bound to recommend relief in one circumstance simply because the situation being reviewed appears similar to another case. 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 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-2021-01004 in Executive Session on 21 Mar 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 19 Sep 20.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDD, dated 16 Aug 21.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Feb 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

X

Board Operations Manager, AFBCMR