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**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2021-01525

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His records be corrected to reflect the following:

1. His somatic symptom disorder (also known as somatoform disorder) be added to his list of unfitting conditions.
2. His unfitting condition for weakness of anterior tibial nerve currently rated at zero percent by the Air Force Physical Disability Board of Review (PDBR) be changed to 10 percent (*The Board is without authority to correct PDBR decisions*).
3. His disability discharge with severance pay (DWSP) be changed to a disability retirement.

APPLICANT'S CONTENTIONS

He was diagnosed with depression (somatic symptom disorder) due to his back pain and was to be medically discharged in Jan 03. He made mention of this several times to his military units and to the medical staff but was discouraged from pursuing it further because he was told it would affect his type of discharge, security clearance, the type of jobs he could get upon discharge, and other things meant to discourage him from seeking further treatment or adding it to the Physical Evaluation Board (PEB). If it had been added, it would have given him the additional 10 percent, or more, to qualify for a medical retirement. The Department of Veterans Affairs (DVA) initially rated him at 70 percent and then 100 percent for the somatic symptom disorder, secondary to his low back pain.

The DVA rated his anterior tibial nerve condition with 10 percent disability twice through exams in 2003, within one year of his discharge, and again in 2015, while the PEB and PDBR rated the condition with zero percent disability without a physical exam. He feels the DVA rating should carry more weight since they did a physical exam.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a disability discharged Air Force first lieutenant (O-2).

On 10 Dec 02, a Medical Evaluation Board (MEB) convened for the applicant's chronic low back pain and recommended the applicant be returned to duty. The applicant submitted a letter of

**AFBCMR Docket Number BC-2021-01525
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exception to the narrative summary (NARSUM) requesting temporary or permanent medical retirement.

On 22 Jan 03, the Informal PEB (IPEB) found the applicant's chronic low back pain with weakness of anterior tibial nerve unfitting with 10 percent compensable disability rating and recommended DWSP.

On 27 Jan 03, the applicant non-concurred with the IPEB findings and requested a formal hearing before the Formal PEB (FPEB).

On 20 Feb 03, the applicant requested to waive his earlier election to demand a formal hearing and indicated he felt it was in his best interest to accept the findings and recommended disposition. On the same date, the FPEB president approved the applicant's request.

On 21 Feb 03, Secretary of the Air Force Personnel Council (SAFPC) directed the applicant be separated from active service for physical disability with severance pay.

On 7 Mar 03, the applicant was honorably discharged with narrative reason for separation of, "Disability, Severance Pay" and credited with 3 years and 5 days active service this period and 10 months and 5 days prior active service.

On 13 Apr 10, according to documentation provided by the applicant, the PDBR directed the applicant's record be corrected to show his AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, dated 23 Jan 03, be corrected in Section 9(A) to reflect, "1) chronic lower back pain VASRD code 5293, rated at 20 percent and 2) weakness of anterior tibial nerve, VASRD code 8523, rated at zero percent" rather than "chronic low back pain with weakness of anterior tibial nerve, VASRD code 5293-8523, rated at 10 percent."

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

APPLICABLE AUTHORITY/GUIDANCE

DoDI 6040.44, (2 Jul 15) Enclosure 2, para 4.d.(1) As a result of requests for PDBR, the covered individual or a surviving spouse, next of kin, or legal representative may not seek relief from the Board for Correction of Military Records operated by the Secretary of the Military Department concerned. (2) The recommendation of the PDBR, once accepted by the respective Military Department, is final.

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.

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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 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 of the Wilkie memorandum.

On 21 Mar 22, Board staff provided the applicant a copy of the consolidated clarifying guidance (Exhibit G).

AIR FORCE EVALUATION

AFPC/DPFDD recommends denying the applicant's request for addition of somatic symptom disorder to his list of unfitting conditions under the Disability Evaluation System (DES). Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice on the part of the PEB that resulted in the applicant being denied pay and benefits to which he feels he is entitled.

The applicant's original DVA rating decision, dated 17 Dec 03, did not contain a diagnosis or award for somatic symptom disorder. The most recent DVA rating code sheet, dated 27 Mar 20, indicates the DVA first awarded compensation for this condition effective 23 Nov 15 which was over 12 years after separation from service. Under the DVA system (Title 38, U.S.C.), the member may be evaluated over the years and their rating may be increased or decreased based on changes in the member's medical condition at the current time. However, a higher rating by the DVA "*based on new and/or current exams conducted after discharge from service*" does not warrant a change in the total compensable rating awarded at the time of the member's separation.

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

ADDITIONAL AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request to find his condition of somatic symptom disorder/somatoform disorder as unfitting warranting an additional rating to meet criteria for a medical retirement.

A review of all available records finds there was no evidence the applicant had any mental health conditions to include somatic symptom disorder, somatization disorder or its various forms considered to be unfitting for continued military service. He never received any mental health treatment, evaluation or diagnosis during service. Although it is possible his mood had changed resulting from his chronic pain as this is not an unusual occurrence, there was no evidence his mood had ever elevated to a level necessitating him to receive mental health treatment, was never a standalone or primary condition, and was never referred to the MEB or IPEB during service for a medical discharge. He was never placed on a duty limiting conditions profile and was never deemed not worldwide qualified due to his mental health condition. There were also no records from his primary care manager (PCM) or leadership of any observed impairment to his military duties caused by his mental health condition. The applicant did not seek mental health treatment and was not diagnosed with somatic symptom disorder by the DVA until 24 Sep 15, which was 13 years post discharge. Too much time has lapsed since discharge that it appeared more likely than not, his condition was aggravated post service causing him functional impairment and to meet diagnostic criteria for this condition at a later time. Therefore, the Psychological Advisor finds no error or injustice with his discharge from a mental health perspective.

The Board may elect to apply liberal consideration to the applicant's petition based on the contention of a mental health condition. The following are responses based on information presented in the records to the four questions in the policy:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant is requesting to find his mental health condition of somatic symptom disorder as unfitting and be rated by the PEB or PDBR.

2. Did the condition exist or experience occur during military service? There is no evidence his mental health condition of somatic symptom disorder or its various forms existed or was experienced during military service.

3. Does the condition or experience excuse or mitigate the discharge? There is no evidence his mental health condition to include somatic symptom disorder impaired his ability to perform his military duties meeting criteria for a referral to the MEB for a medical discharge or retirement. As such, his mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge? The applicant does not have any unfitting mental health conditions to include somatic symptom disorder that would provide him with additional ratings for a medical retirement and would not outweigh his original discharge.

The complete advisory opinion is at Exhibit E.

APPLICANT’S REVIEW OF ADDITIOINAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Mar 22 for comment (Exhibit F) 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 the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant’s contentions. Specifically, the Board finds insufficient evidence to support the applicant’s request to find his somatic symptom disorder/somatoform disorder unfitting and warranting an additional rating to meet criteria for a medical retirement. The Board applied liberal consideration due to a mental health condition and does not find it to warrant the desired corrections. Furthermore, in accordance with 10 U.S.C. § 1554a, PDBR decisions are considered final, and applicants may not seek relief from the BCFMR for conditions reviewed by the PDBR. Subsequently, for the portion of the applicant's request concerning the rating of his weakness of anterior tibial nerve, the applicant must seek relief in a court with the appropriate jurisdiction. 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-2021-01525 in Executive Session on 21 Mar 22 and 18 Jan 24:

 Panel Chair
Work-Product, 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 18 Feb 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 10 Sep 21.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 4 Feb 22.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 9 Mar 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Mar 22.
- Exhibit G: Letter, SAF/MRBC w/atchs (Liberal Consideration Policy), dated 21 Mar 22.

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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.

2/20/2024

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Board Operations Manager, AFBCMR
Signed by: USAF