

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-02605

XXXXXXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXXX

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

His disability discharge, with severance pay, be upgraded to a medical retirement.

### **APPLICANT'S CONTENTIONS**

His rating should be increased from 20 percent to at least 30 percent. The medications that he is taking for his unfitting condition of Epileptic Seizures contributes to his depression, anxiety and cognitive disorders for which he is currently receiving a 100 percent disability rating from the Department of Veterans Affairs (DVA). The Physical Evaluation Board (PEB) and Physical Disability Board of Review (PDBR) did not take that into account when reviewing his case.

The applicant's complete submission is at Exhibit A.

### **STATEMENT OF FACTS**

The applicant is a former Air Force senior airman (E-4).

On 12 Jun 97, according to DD Form 4, *Enlistment/Reenlistment Document Armed Forces of the United States*, the applicant enlisted in the Air Force Reserve for four years under the Delayed Entry/Enlistment Program (DEP). He was discharged from the DEP and enlisted in the Regular Air Force on 8 Oct 97 for a period of four years.

On 26 Apr 01, according to AF Form 618, *Medical Board Report*, the applicant was diagnosed with "Seizure Activity", and he was referred to the Informal Physical Evaluation Board (IPEB).

On 15 Aug 01, according to AF Form 356, *IPEB Findings and Recommended Disposition of USAF Physical Evaluation PEB*, the applicant was diagnosed with "Seizure Disorder," found unfit for continued service, and recommended discharge under provisions other than Chapter 61, Title 10, USC, determining the condition existed prior to service (EPTS).

On 14 Sep 01, according to AF Form 356, the Formal PEB found the applicant unfit and recommended discharge with severance pay with a maximum compensable percentage of 10 percent, determining the condition did not EPTS.

On 14 Sep 01, according to AF IMT 1180, *Action on PEB Findings and Recommended Disposition*, the applicant agreed with the finding and recommended disposition of the PEB.

On 19 Sep 01, according to a HQ AFPC Memorandum, the Secretary of the Air Force directed the applicant's separation from active service for physical disability.

On 5 Nov 01, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was honorably discharged from the Air Force with a narrative reason for separation "Disability, Severance Pay."

On 6 May 13, according to a DVA Rating Decision, dated 25 Apr 14, provided by the applicant, he was granted service connection for depressive disorder with anxiety disorder and cognitive disorder with an evaluation of 100 percent.

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

## **AIR FORCE EVALUATION**

AFPC/DPFDD recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice during the Disability Evaluation System (DES) processing. There is no indication that he was diagnosed with Depressive Disorder with Anxiety Disorder and Cognitive Disorder or that it was severe enough to be considered unfitting for DES purposes at the time of DES processing. The applicant didn't submit any supporting documentation to show when he was originally diagnosed with the condition; however, the most recent DVA rating decision, dated 21 May 20, shows that his award for this condition is dated 6 May 13, nearly 12.5 years after separation from the Air Force. The Air Force and the DVA disability systems operate under separate laws. Under the Air Force system (Title 10, United States Code [U.S.C.]), the PEB must determine whether an Airman's medical condition renders them unfit for continued military service relating to their office, grade, rank or rating. To be unfitting, the condition must be such that it alone precludes the member from fulfilling their military duties. The PEB then applies the rating best associated with the level of disability at the time of disability processing (a snapshot in time). That rating determines the final disposition (discharge with severance pay, placement on the temporary disability retired list, or permanent retirement) and is not subject to change after the service member has separated. 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.

## **ADDITIONAL AIR FORCE EVALUATION**

The AFRBA Medical Advisor finds insufficient evidence to support the applicant's request for the inclusion of a mental health condition. has reviewed all available military and service treatment records and finds his contention were not corroborated by his records. There was no evidence in his military records that any medication had caused any mental health problem. There was no documented report that the applicant had complained of depressive or anxious symptoms, and he did not complain of cognitive difficulty. In fact, his cognitive function was recorded as intact. Depressive symptoms typically include depressed mood, sadness, hopelessness, helplessness, sleep disturbance, loss of appetite, irritability, loss of energy, impairment in concentration, and thoughts of suicide. Anxiety symptoms typically include feeling anxious, excessive worry, insomnia, panic attacks, and symptoms overlapping depression. There was no evidence that the applicant showed signs of having a depression or anxiety, and none of these symptoms were recorded in the record. To have an unfitting mental health condition, there must be evidence of significant impairment of duty performance, and certain diagnostic criteria must be met. This was not evident in the record. In fact, the applicant requested a return to duty decision. There was support from leadership for his request to be returned to duty. His first sergeant praised his

performance, making no mention of any deterioration in his ability to perform his duties. This is contrary to evidence of a mental health condition. Furthermore, the applicant didn't submit any supporting documentation to show when he was originally diagnosed with a mental health condition. There was also a question as to whether he took the Depakote prescribed to treat his seizure disorder. Depakote is an anti-epileptic medication that has been found to effectively treat mood disorders, specifically, the mixed episodes of bipolar disorder. It works as a mood stabilizing drug, changing dysphoric (mood swings) moods to normal mood state. Thus, if anything, Depakote should have proven beneficial to his mood state. The literature recognizes the relationship between seizure disorders and depression. Persons with seizure disorders seems to have a predisposition for mood disorders, specifically depression. It is possible that the applicant developed depressive symptoms, to include cognitive dulling, and anxiety at some point; however, there is no evidence that the applicant suffered any mental health condition at the time of separation. A condition must be determined unfitting before granting a disability rating. There was no evidence of a mental health diagnosis, and therefore, the Medical Advisor finds no error with the applicant's discharge processing from service.

The complete advisory opinion is at Exhibit D.

### **APPLICANT'S REVIEW OF AIR FORCE EVALUATIONS**

The Board sent a copy of the advisory opinions to counsel on 27 Oct 22 for comment (Exhibit E), and counsel replied on 22 Dec 22. In the response, counsel contended the applicant sustained three major seizures while on active duty. While this was not properly expressed to the Physical Evaluation Board (PEB) given the applicant's desire to continue to serve, it would become abundantly clear that the PEB did not appropriately characterize the seriousness of these seizures. In the time since his discharge, the severity of these seizures would gradually become revealed. Today, the applicant is 100 percent disabled, as rated by the Department of Veterans Affairs and is unemployable. His seizures have directly caused him to suffer more service-connected mental health diagnoses, to include depression, anxiety and cognitive disorders. His present neurologist has stated that his current seizure disorder was not properly diagnosed and reported while the applicant was on active duty.

The applicant's complete response is at Exhibit F.

### **FINDINGS AND CONCLUSION**

1. The application was not timely filed. The applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Department of the Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. While the applicant asserts a date of discovery within the three-year limit, the Board does not find the assertion supported by a preponderance of the evidence.
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 the AFRBA Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There was no evidence of an error or injustice during the DES processing and there was insufficient evidence to support granting the applicant's request for the inclusion of a mental health condition, respectively. The Board notes counsel's contention that the PEB did not appropriately characterize the seriousness of the applicant's seizures. Therefore, the Board recommends against correcting the applicant's records.

## RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; 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-2021-02605 in Executive Session on 3 Oct 23:

, 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 3 Aug 21.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, AFPC DPFDD, dated 29 Mar 22.  
Exhibit D: Advisory Opinion, AFRBA Medical Advisor, dated 13 Sep 22.  
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 27 Oct 22.  
Exhibit F: Counsel's Response, dated 22 Dec 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.

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Board Operations Manager, AFBCMR