



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02646

Work-Product

COUNSEL:

Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. Her disability discharge with severance pay (DWSP) be changed to a permanent disability retirement with a rating of 100 percent, or in the alternative,
2. Refer her to the appropriate medical board for reevaluation of her unfitting medical condition.

APPLICANT'S CONTENTIONS

Her DWSP should have been canceled and her disability case should have been recalled due to an emergency lifesaving medical procedure prior to her separation. The change in her medical condition warranted an increase to her disability rating from 10 percent to 100 percent resulting in a disability retirement instead of DWSP. She also contends that the Formal Physical Evaluation Board (FPEB) failed to fully rate the severity of her symptoms when it assigned the initial 10 percent disability rating.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an honorably discharged Air Force Reserve technical sergeant (E-6).

On 9 Apr 01, AF Form 356, *Findings and Recommended Disposition of USAF Informal Physical Evaluation Board (IPEB)*, provided by the applicant, indicates the IPEB recommended discharge with a compensable percentage of 10 percent, finding her unfit due to her medical condition of Ulcerative Colitis (UC).

On 30 May 01, AF Form 356, *Findings and Recommended Disposition of USAF Formal Physical Evaluation Board (FPEB)*, provided by the applicant, indicates the FPEB found the applicant unfit and recommended DWSP with a maximum compensable percentage of 10 percent.

On 8 Jun 01, medical records, provided by the applicant, indicates she was admitted to a civilian hospital for "bloody diarrhea and abdominal pain."

On 11 Jun 01, medical records, provided by the applicant, indicates she had a surgical procedure, "Flexible Sigmoidoscopy."

On 15 Aug 01, AF Form 100, *Request and Authorization for Separation*, provided by the applicant, indicates the applicant was honorably separated and entitled to DWSP in the grade of technical sergeant.

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POC: SAF.MRBC.Workflow@us.af.mil

On 9 Oct 01, medical records, provided by the applicant, indicates she was admitted to a civilian hospital and was discharged on 19 Oct 01.

On 22 Nov 02, a Department of Veterans Affairs (DVA) Rating Decision memo, provided by the applicant, shows a previous service connection for UC with an evaluation of 10 percent was increased to 100 percent effective 21 Jun 01.

AIR FORCE EVALUATION

AFPC/DPFDD, recommends partially granting the application. The applicant was processed under the Legacy Disability Evaluation System (LDES) under which the AF and DVA performed independent assessments of her medical conditions and could therefore assign different ratings under the Veteran Affairs Schedule for Rating Disabilities (VASRD) based on available medical documentation, assessment and/or member testimony. It's noted the applicant had a 30 percent DVA rating for UC dating back prior 31 Dec 98; however, under the LDES this rating would not have been available to nor utilized by the PEB in its rating decision. On 30 May 01, the FPEB found her unfit for UC with a 10 percent compensable disability rating. The FPEB seemed to have based their decision to award the 10 percent rating on the applicant's testimony that her UC was well controlled with Prednisone. However, the medical reviewer noted that since she was also being followed by a gastroenterologist monthly (rather than every four-six months) this indicates her UC was less than well controlled (i.e., frequent exacerbations). Therefore, this would better align with a 30 percent disability rating in accordance with the VASRD which is the rating she was receiving from the DVA at the time of DES processing. Data in the Military Personnel Data System (MilPDS) indicates the Secretarial memorandum directing the DWSP was signed on 19 Jun 01 (11 days after her first hospital admission). On 9 Aug 01, HQ Air Force Reserve Command (AFRC) published her separation order with a 15 Aug 01 date of separation. The applicant required hospital admission on 8 Jun 01 for an acute severe exacerbation of her UC and had surgery on 7 Jul 01 for UC refractory to medical therapy, prior to her date of separation. Additionally, on 4 Oct 01 she underwent surgery, which was after her date of separation. In accordance with AFI 36-3212, paragraph 2.6. (Attachment 1) "If a major change in the diagnosis or in member's condition is discovered, the referring Medical Treatment Facility (MTF) commander must recall the case for further medical evaluation and a new medical board or addendum, as appropriate. The commander sends a report of circumstances and request for recall to HQ AFPC/DPPD. If a case meets the criteria for recall and the Secretarial memorandum has been signed finalizing the case, the hospital commander needs to contact the Medical Standards Branch, HQ AFPC/DPAMM, for procedures to follow in order to do a new MEB and request medical hold. HQ AFPC/DPAMM is to inform HQ AFPC/DPPD if they approve a medical hold. When a new MEB is received by the IPEB and documentation supports a change to the previous IPEB findings, the case will be sent to Secretary of the Air Force Personnel Council (SAFPC) for finalization." Since the applicant was a Reservist, and her treatment and surgeries were performed in civilian hospitals it would have been her responsibility to immediately notify her unit and the military MTF of the change in her medical condition and surgeries as soon as feasibly possible. The recall request would have also needed to be coordinated through the AFRC Surgeon General's office versus HQ AFPC/DPAMM for approval prior to submission to the PEB. The applicant did not provide any documentation as part of her submission to show that such action was taken. Therefore, the PEB would have been unaware of any changes to her medical condition. Although she provides no evidence that she notified her unit or MTF of the drastic changes to her medical condition and subsequent surgeries prior to separation the PEB would have more than likely approved such a request if it was received. Without complete medical records we are unable to determine if the PEB would have also assigned a 100 percent disability rating for UC or a lower rating not to exceed 40 percent under VASRD Code 7329 for colectomy. Additionally, there is evidence that the FPEB possibly erred in its original decision to award a 10 percent rating for UC based on moderate symptoms with infrequent exacerbations. The medical reviewer opines that

based on the FPEBs statement this condition should have been considered moderately severe with frequent exacerbations and assigned a 30 percent disability rating in accordance with the VASRD.

The complete advisory opinion is at Exhibit B.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the counsel on 15 Sep 22 for comment (Exhibit D), and counsel replied on 12 Oct 22. In the response, counsel contended the medical AO acknowledges the injustices suffered by the applicant with respect to her MEBs and posits that 30 – 40 percent disability rating for her medical conditions would have been issued had she informed the FPEB of her recent change in conditions. She made numerous attempts to supply the FPEB with her updated medical records via coordination with her point of contact, who apparently failed to forward those records to the FPEB. Because her condition would have resulted in placement on the temporary disability retired list (TDRL), the medical documentation supplied can be used to determine her disability percentage, assuming she was placed on the TDRL and reevaluated. Specifically, a DVA rating decision from 22 Nov 01, granted an increase to her UC from 30 percent to 100 percent with an effective date of 21 Jun 01. This effective date coincides with the time period wherein she was still undergoing her FPEB proceedings. Accordingly, she should be placed on the permanent disability retired list at a rate of no less than 100 percent.

Counsel's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

AFPC/JA recommends denying the application as untimely. AFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.5 provides, "ordinarily, applicants must file an application within three years after the error or injustice was discovered, or, with due diligence, should have been discovered." If an applicant files within three years of the date of "discovery" of the claim, the merits of the claim should be addressed. If he/she did not; however, the Board must determine whether the failure should be excused "in the interest of justice." Applicant was medically separated with severance pay from active duty on 15 Aug 01. In her application she notes 15 Aug 01, as the date of injury and as the date the injury was discovered, yet did not file until 27 Jun 21, nearly 20 years later and 17 years too late. No justification for the delay is provided by the applicant. A fair reading of the legislative history and judicial interpretations of 10 U.S.C. 1552(b), *Correction of Military Records*, clearly supports an interpretation that waiver of the time limit is limited to those few situations when necessary to preclude an injustice, not to serve as a mere courtesy or administrative convenience to an applicant. The applicant's failure to pursue her interests at the appropriate time falls far short of the standard. In fact, it is precisely the kind of behavior the Board should not cater to. At some point, the Air Force should, in the interest of justice, be permitted to say, "Enough." In addition to being untimely under the statute of limitations, applicant's application may also be dismissed under the equitable doctrine of laches, which denies relief to one who has unreasonably and inexcusably delayed in asserting a claim. Laches consists of two elements: inexcusable delay and prejudice to the Air Force resulting therefrom. The central theme in all laches cases where courts have found delays to be unreasonable is that the applicants simply failed to take any action before filing a claim or suit. Furthermore, delays as short as three years, eight months have been found to be unreasonable. The applicant waited 20 years to file her claim and there is no evidence she took any action before doing so, despite having knowledge of the surgery she now claims should have resulted in retirement vice separation. It was the member's responsibility at the time to notify her command of medical treatment received at a civilian hospital. The applicant's unreasonable delay has also caused prejudice to the Air Force. There are two basic types of prejudice: "defense

prejudice” (i.e., actions that would prevent the Air Force from defending against the claim, such as loss of records, destruction of documents/evidence, fading memories, or unavailability of witnesses) and “economic prejudice” (i.e., consequences to the government should the applicant prevail, such as back pay, retired pay, the prejudicial effect of reinstatement, etc.). *Cornetta v. U.S.*, 851 F.2d 1372, 1378 (1988). In the applicant’s case, there is “defense prejudice” to the extent that the Air Force no longer has access to the PEB case files and there is no indication the applicant provided the medical records from her treatment and surgeries in civilian hospitals at the time when her case could have been recalled and medical records examined. Without those records, the Air Force’s ability to evaluate the severity of remaining symptoms (if any), and or complications (if present) for disability purposes. Additionally, there is “economic prejudice.” The applicant requests her medical separation be changed to a disability retirement and retroactive compensation. The *Brundage* court held such a situation amounted to prejudice. It stated, “Prejudice to the Government manifestly results when a claimant for back pay unreasonably delays in the assertion of his rights, thereby, obliging the Government to pay two salaries, over a long period of time, when it has received the services of only one person...[E]ven if no one was selected to replace plaintiff...a recovery by plaintiff would require the Government to pay him the salary of a major for a period of over five and a half years, during which time no work was done, and during which time he had ample opportunity to fully assert his her claim,” *Brundage, supra* at 510. In short, the Air Force asserts that applicant’s unreasonable delay, without justification, regarding a matter now dating back 20 years has greatly complicated its ability to provide the requested relief. For the reasons stated above, this application should be denied as untimely and/or pursuant to the equitable doctrine of laches. If the Board considers the untimely request, the FPEB may have erred in awarding a 10 percent disability rating (based on the applicant’s testimony at the time her condition was well controlled) when there was evidence at the FPEB the applicant was being followed by a gastroenterologist on a monthly basis indicating her UC was less than well controlled, better aligning with a 30 percent disability rating in accordance with the VASRD: Moderately severe; with frequent exacerbations – 30 percent.

The complete advisory opinion is at Exhibit C.

APPLICANT’S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the counsel on 15 Sep 22 for comment (Exhibit D), and counsel replied on 12 Oct 22. In the response, counsel contended the assertions are meritless and should not be controlling in this matter. The applicant did not discover the error associated with her medical processing until she consulted with legal counsel less than three years from the date of her current application. It is illogical to assert an individual with no legal background, no knowledge of the existence of the Board for Correction of Military Records or the powers vested in those respective boards, and with no knowledge of the applicable military regulations governing her case would be aware such violations were committed and that actions could be taken to correct those violations. In fact, she was repeatedly told her medical condition was not a “boardable condition” at the beginning phases of the LDES process. Additionally, this honorable Board has routinely waived the statute of limitations in cases where justice requires doing so. With respect to the assertion that the equitable doctrine of laches should be applied, and this application should be dismissed, the following is offered. First, any asserted defense prejudice to the Air Force is solely attributable to the Air Force’s failure to properly safeguard and maintain all her records. Denying relief on the grounds the Air Force is prejudiced due to its own failures to properly maintain the applicants’ military records is grossly improper and seeks to penalize her for the Air Force’s failure to comply with applicable Air Force Instructions and federal law. Additionally, she has provided all relevant medical records stemming from the time in question and has reproduced such records to this Board to fully alleviate any asserted defense prejudice. Additionally, the Air Force will not be economically prejudiced should this Board grant relief. AFPC/JA posits that the Government will be economically prejudiced because it will be required

to retroactively compensate her for the sum, she would have received had she been medically retired in the first place, and points to *Brundage v. U.S.* in support of its position. *Brundage* involved a two time non-select for promotion to major who alleged that administrative error had been committed and covered up by another service member. The matter before this Board involves a service member who was wrongfully separated from service with severance pay when medical retirement was appropriate. Regardless of whether she was separated with severance pay or medically retired, the Air Force would still be required to fill her position because she was found medically unfit for further military service. No economic prejudice is present in this matter and the only issues in contention are what the correct disability rating should be, as both the AFPC/DPFDD and AFPC/JA have acknowledged that she should have been medically retired rather than separated with severance pay.

Counsel's complete response is at Exhibit E.

FINDINGS AND CONCLUSION

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
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 AFPC/JA to deny the application as untimely, the Board concurs with the rationale and recommendation of AFPC/DPFDD and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the FPEB seemed to have based their decision to award the 10 percent rating on the applicant's testimony that her Ulcerative Colitis (UC) was well controlled with prednisone. However, the Board notes the applicant was also being followed by a gastroenterologist monthly (rather than every four-six months), which would indicate her UC was less than well controlled (i.e. frequent exacerbations). Therefore, this would better align with a 30 percent disability rating in accordance with the Veteran Affairs Schedule for Rating Disabilities (VASRD). 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 APPLICANT be corrected to show:

- a. On 30 May 2001, she was found unfit to perform the duties of her office, rank, grade, or rating by reason of physical disability, incurred while she was entitled to receive basic pay; that the diagnosis in her case was Ulcerative Colitis (UC), under Veteran Affairs Schedule for Rating Disabilities (VASRD) code 7323, rated at 30 percent; that the degree of impairment was permanent; that the disability was not due to intentional misconduct or willful neglect; that the disability was not incurred during a period of unauthorized absence; and that the disability was not received as a direct result of armed conflict or caused by an instrumentality of war.
- b. On 15 August 2001, she was released from active duty by reason of physical disability with a 30 percent compensable disability rating, and permanently retired effective 16 August 2001.
- c. Her election of the Survivor Benefit Plan option will be corrected in accordance with her expressed preferences and/or as otherwise provided for by law or the Code of Federal Regulations.

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 the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2021-02646 in Executive Session on 30 Nov 22:

<div>Work-Product</div>	, Panel Chair
<div>Work-Product</div>	, Panel Member
<div>Work-Product</div>	, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 27 Jun 21.
- Exhibit B: Advisory opinion, AFPC/DPFDD, dated 25 Aug 22.
- Exhibit C: Advisory opinion, AFPC/JA, dated 13 Sep 22.
- Exhibit D: Notification of advisories, SAF/MRBC to counsel, dated 15 Sep 22.
- Exhibit E: Counsel's response, dated 12 Oct 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.

9/19/2023

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF