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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02659

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COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His discharge from the Air National Guard (ANG) with transfer to the Retired Reserve List be changed to a permanent retirement for disability.

APPLICANT'S CONTENTIONS

On 29 May 14, he applied for disability with the Department of Veterans Affairs (DVA). He was discharged from the ANG on 29 May 15. He was not afforded the option for a Medical Evaluation Board (MEB) or a Physical Evaluation Board (PEB). His retirement took place before he received his 50 percent disability rating from the DVA, which was effective his date of separation. He appealed his conditions for neck pain, median nerve paralysis (to include radiculopathy and bilateral carpal tunnel syndrome), and back pain at the United States Court of Appeals for Veterans Claims. His conditions are associated with the Persian Gulf War Syndrome. He provides evidence from his military service treatment records and from his DVA medical records.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired ANG staff sergeant (E-5), eligible for retired pay at age 60.

On 14 May 08, the applicant enlisted in the ANG.

On 29 Oct 15, according to NGB Form 22, *Departments of the Army and the Air Force National Guard Bureau Report of Separation and Record of Service*, the applicant was discharged from the ANG and transferred to the Reserve Retired List. He was credited with 20 years, 7 months, and 20 days of total service for retired pay.

The DVA Rating Decision dated 9 Sep 22, reflects the applicant's combined compensable service connected rating is 70 percent, effective 29 May 14.

AIR FORCE EVALUATION

NGB/SGPS recommends denial. The documentation provided is not sufficient to support his claim. Their office would not be able to recommend approval without military and civilian medical documentation related to his illness, injury and potentially disqualifying medical conditions. Medical documentation should include pertinent labs, diagnostic reports, specialty consults and/or encounter notes related to the condition. The applicant should also provide proof of service at the

AFBCMR Docket Number BC-2021-02659

Work-Product

Work-Product

time of his injury/illness/disease incurred or was service aggravated. It is the applicant's burden to provide proof of an error or injustice.

The applicant served on active duty from 19 Aug 85 to 8 Apr 94 and 13 Jun 95 to 9 Aug 96. He enlisted in the ANG on 14 May 08 and was discharged on 29 May 15. He is considered totally and permanently disabled due to service connected disabilities and has a combined service connected evaluation of 100 percent, effective 1 Dec 21.

The complete advisory opinion is at Exhibit C.

The AFRBA Medical Advisor finds insufficient evidence to support the applicant's request for placement on the Permanent Disability Retirement List (PDRL). There was no definitive evidence of a material error, injustice, impropriety or inequity found in the process leading up to the applicant's separation. The Disability Evaluation System (DES) is not a direct option for any individual but rather is brought forth when there exists a potentially unfitting condition and fitness to continue serving remains at bay.

The applicant is requesting he be favorably placed on the PDRL effective the date of his DVA rating impairment. The overarching concern is the near non-existence of medical records with various statements that were not correlated with evidence, except he experienced an injury to his back and neck in 1990. However, there was no documented evidence of an injury occurring at the time. The effective date for the DVA rating (29 May 14) was likely the date he contacted the DVA and notified them of his intent to file a claim (also known as the informal claim for benefits). However, there was no specific evidence or a description of what the applicant claimed as conditions for which he thought could be compensable. It is only assumed it was for his back and neck conditions associated with radiculopathy leading to arthritis and degenerative disc disease.

The sole medical evidence is from a Sep 13 emergency room visit, which noted the diagnosis of myofascial strain and muscle strain; both which have no direct medical correlation which would lead to or alter the sustainment of any form of arthritis and or degenerative disc disease. In light of the paucity of medical diagnostic and or treatment records, there was no objective evidence he was ever placed on a duty limiting condition profile or he was deemed not worldwide qualified for duty. The applicant at the time near his separation did not indicate any condition that would be deemed to interfere with his ability to reasonably perform his military duties in accordance with his rank, grade, office or rating in accordance with DoDI 1332.18, *Disability Evaluation Systems*. The applicant was able to satisfactorily complete his service requirement, earning an honorable discharge, which provides more credence he was able to continue to function at work. There was no evidence of a potentially unfitting condition which would be considered to have incurred while on a duty status.

The applicant makes note of the DVA's approved impairment ratings for his service connected conditions. However, there is an important distinction between the DVA and Department of Defense (DoD) disability systems. The military's Disability Evaluation System (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 future progression of injury or illness. Operating under a different set of laws, 38 U.S.C., with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to service or the length of time since date of discharge. It is also paramount to understand that the DVA's decision of an effective date for the initiation of benefits has all to

do with when the DVA receives a claim or when the DVA is notified of an individual's intent to file a claim, with rare exceptions. It has nothing to do with what is crucial from the military perspective, which is duty status and fitness ability.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 24 Aug 22 for comment (Exhibit E). In a response dated 23 Sep 22, he states the effective date for his 50 percent service connected disability rating is 29 Mar 14 and it was upgraded to 70 percent on 9 Sep 22. Per 10 U.S.C. § 1201, members on active duty for more than 30 days unfit to perform their duties of their office, grade, rank or rating because of physical disability incurred while entitled to basic pay may be retired. The requirement for determination of disability include that the disability is not the result of a member's intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence and either they have at least 20 years of service or a disability at least 30 percent under the Veterans Affairs Schedule for Rating Disabilities (VASRD). Per his DVA rating, he should be granted a medical retirement.

On 1 Aug 19, he was awarded service connection for pes planus, left ankle condition, right ankle condition, tinnitus, irritable bowel syndrome and onychomycosis with an effective date of 29 May 14. On 9 Sep 22, the DVA awarded him retroactive disability compensation for his back pain, lumbar strain L5-S1 with synovial cyst and degenerative arthritis of the cervical spine, C3-4, C4-5. On 9 Sep 22, the DVA granted him a rating of 100 percent.

He also thanks the Board for establishing service connection for his myofascial pain and myofascial strain for his emergency room visit on 5 Sep 13. He provides his medical records that may not have been reviewed. Other conditions listed on his cervical disability benefits questionnaire (DBQ) are degenerative disc disease, foraminal stenosis/central stenosis, radiculopathy, myofascial pain and muscle spasm.

The applicant's complete response is at Exhibit F.

ADDITIONAL AIR FORCE EVALUATION

NGB/SGPS recommends denial. There is no evidence of an error or injustice regarding his retirement. The applicant's military entrance processing station (MEPS) physical in 2008 did not identify any potentially unfitting conditions that would preclude him from entering the ANG and the applicant was able to serve in the ANG until his retirement in 2015. There is no supporting documentation he was potentially unfit to perform the duties of his Air Force Specialty Code (AFSC), office, rank or grade. The applicant submitted documentation of his current medical conditions, but the documentation did not substantiate any of those medical conditions met MEB/PEB processing criteria at the time of his discharge.

The applicant applied to the DVA for disability on 29 May 14 . He did not receive a rating of 50 percent until 1 Aug 19 for his conditions of bilateral pes planus, bilateral chronic ankle sprain and tinnitus. The applicant submitted an appeal to the Board of Veterans Appeals for his neck pain, median nerve paralysis (to include radiculopathy and bilateral carpal tunnel syndrome) and back pain. As he states, these conditions were associated with Persian Gulf War Syndrome. On 6 Jan 21, the Board of Veterans Appeals denied his entitlement to service connection for his back, neck, and cervical radiculopathy medical conditions. The board opined his disabilities of the back, neck and cervical radiculopathy were not documented during service and were not shown to be related

to any aspect of his service. The applicant elevated his denied appeal to the United States Court of Appeals for Veterans. The United States Court of Appeals for Veterans remanded the case for re-adjudication. The applicant currently has a combined service connected DVA rating of 100 percent.

A review of the applicant's submitted documentation along with the available electronic service treatment records was completed and there were no medical conditions identified as rendering him unfit to perform the duties of his AFSC, office, rank or grade at the time of retirement.

Again, the DES, under 10 U.S.C., can only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued 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 any future progression of injury or illness. The DVA, under 38 U.S.C., is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a member's retainability, fitness to serve or the length of time since the date of discharge. The DVA can also conduct periodic re-evaluations for the purpose of adjusting the disability ratings over the lifetime of the veteran.

The complete advisory opinion is at Exhibit G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 11 Jul 24 for comment (Exhibit H) but has received no response.

FINDINGS AND CONCLUSION

1. The application was not 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 recommendations of NGB/SGPS and the AFRBA Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant's MEPS physical in 2008 did not identify any potentially unfitting conditions and the applicant was able to serve in the ANG until his 2015 retirement. The applicant submitted documentation of his current medical conditions but the documentation did not substantiate any of the medical conditions met MEB/PEB processing criteria at the time of his discharge. The applicant is also reminded that the DES is not a direct option for any individual to elect but is brought forth when there is a potentially unfitting condition and one's fitness and ability to continue in service remains in question. Moreover, the applicant's DVA service connected disability ratings remain separate from any in-service military impairments. Therefore, the Board recommends against correcting the applicant's records. The Board also notes 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. The Board does not find it in the interest of justice to waive the three-year filing requirement. Therefore, the Board finds the application untimely and 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-2021-02659 in Executive Session on 26 Jul 23 and 16 Oct 24:

Work-Product	Panel Chair
Work-Product	Panel Member
Work-Product	Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 16 May 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, NGB/SGPS, dated 22 Mar 22.
- Exhibit D: Advisory Opinion, AFRBA Medical Advisor, dated 10 Aug 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 24 Aug 22.
- Exhibit F: Applicant's Response, w/atchs, dated 23 Sep 22.
- Exhibit G: Advisory Opinion, NGB/SGPS, dated 1 Mar 24.
- Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Jul 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.

11/7/2024

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Board Operations Manager, AFBCMR
Signed by: USAF