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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02960

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. Her medical retirement be changed to a regular 20-year active duty retirement with an effective date of 17 Apr 12.
2. She receive all retroactive pay and benefits.

APPLICANT'S CONTENTIONS

In 2016, the applicant stopped receiving concurrent disability benefits. She began making inquiries through the Department of Veterans Affairs (DVA) and the Defense Finance and Accounting Services (DFAS) to no avail. During her time in the service, she was having difficulty from the side effects caused by her motor vehicle accident and the increase in the Celexa dosage medication which affected her work performance. In early 2010, she transferred to a new unit and was authorized to reenlist through a successful appeal to the Secretary of the Air Force. Prior to this move, her old unit initiated a Medical Evaluation Board (MEB). She argued for retention as she was performing well in her new position and was close to completing a 20-year active duty retirement. She was medically retired with ten months shy of a 20-year regular active duty retirement. For approximately five years, she received concurrent medical retirement pay with her DVA disability pay. In 2016, she was assessed with a DVA rating of 100 percent. Despite a DD Form 214, *Certificate of Release or Discharge from Active Duty*, coded as medical retirement and permanent disability and not as Temporary Disabled Retired List (TDRL), she was categorized at the five-year mark as a TDRL service member and her concurrent payments were stopped after the DVA medical assessment in July 2016. She was told at the board that she would be "retired" and would be able to receive benefits from the DVA. Believing this to be the same as a 20-year retirement, when the Board recommended a medical retirement, she did not appeal and did not understand the profound effect it would have on her life years later. Changing her retirement from a medical retirement to a 20-year retirement, allowing her once again to receive concurrent payments, is the appropriate and just resolution in this case. It was the Air Force's medical treatment of her Bipolar disorder and the mismanagement of her medication that caused the downturn in performance and contributed to her medical discharge.

The applicant's complete submission is at Exhibit A.

**AFBCMR Docket Number BC-2021-02960
CUI//SP-MIL/SP-PRVCY**

Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

STATEMENT OF FACTS

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

On 24 May 10, AF IMT 418, *Selective Reenlistment Program Consideration*, indicates the applicant was not recommended for reenlistment based on repeated misconduct and poor fitness. The applicant acknowledged the action and indicated she would appeal the decision. The specific reasons for the action were as follows:

- a. On 20 Mar 08, a Letter of Counseling (LOC) was issued for failure to go.
- b. On 20 Mar 08, a Letter of Reprimand (LOR) was issued for failure to obey.
- c. On 2 Apr 08, a LOR was issued for failure to go.
- d. On 20 Jun 08, a LOR was issued for repeated fitness failures.
- e. On 17 Nov 08, a LOR was issued for repeated fitness failures.
- f. On 14 Jan 09, a LOR was issued for non-compliance with fitness improvement program.
- g. On 31 Mar 09, a LOR was issued for failure to go.
- h. On 23 Apr 09, a LOR was issued for failure to go.
- i. On 8 Jun 09, Nonjudicial Punishment (NJP), Article 15, was administered for failure to go.
- j. On 8 Jul 09, a LOR was issued for disrespect towards a commissioned officer, insubordinate conduct, and failure to obey.
- j. On 17 Feb 10, NJP, Article 15, was administered for disorderly conduct.
- k. On 4 Aug 09, Vacation of Suspended NJP was administered for failure to go and making a false statement.

On 7 Jun 10, the applicant provided a written appeal stating her vehicle accident on 9 Mar 08 and subsequent mental health issues caused her poor performance. Before this, she had no performance issues or disciplinary problems.

On 8 Sep 10, the Secretary of the Air Force granted her appeal to further extend her enlistment.

On 21 Jan 11, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for Bipolar disease. In the Narrative Summary (NARSUM) it is noted the applicant stated she would be fine, regardless of whether a likely bipolar

CUI//SP-MIL/SP-PRVCY

diagnosis ultimately results in an MEB versus continued duty until retirement in Apr 12, as long as her years of service are taken into account.

On 2 Feb 11, the Impartial Review Request Form indicates the applicant requested an impartial review of her MEB and after feedback was provided, she had three days to concur with the findings or submit a rebuttal letter within seven days. On 3 Feb 11, the reviewer concurred with the MEB package and the form indicates the applicant declined to submit a rebuttal which was signed by the applicant.

On 17 Mar 11, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to her medical condition of Bipolar I disorder, most recent episode, Hypomanic with a disability compensation rating of 50 percent with a recommendation of "Permanent Retirement."

On 4 Apr 11, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant agreed with the findings and recommended disposition of the board.

Dated 5 Apr 11, Special Order Work-Product, indicates the applicant was permanently disability retired in the grade of technical sergeant with a compensable percentage for physical disability of 50 percent, effective 28 Jun 11. Her active service for retirement shows she served 19 years, 2 months, and 11 days.

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

AIR FORCE EVALUATION

AFPC/DP2SSR recommends denying the applicant's request for a 20-year active duty retirement. The applicant was medically retired on 28 Jun 11 with 19 years, 2 months, and 11 days of active military service. Legal requirements for a length of service retirement are outlined in 10 USC, Section 09314, *Twenty to thirty years; regular enlisted members*. The applicable version at the time of the applicant's retirement was 10 U.S.C., Section 08914, which states under regulations to be prescribed by the Secretary of the Air Force, an enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired. Since the applicant did not complete the 20 years of active service required by law, she was not eligible to be retired under the provisions of 10 U.S.C., Section 09314 (then Section 08914). Length of service retirements must be effective on the first day of the month to comply with Title 5, U.S.C., section 8301, *Uniform retirement date*, which requires retirements to be effective on the first day of the month following the month in which retirement would otherwise be effective. As such, her request to be retired for length of service on 17 Apr 12 would not be appropriate. At the time of the applicant's medical retirement, the Air Force was not offering early retirement under the Temporary Early Retirement Authority (TERA). On 23 Oct 92, the National Defense Authorization Act (NDAA) for Fiscal Year 1992, Public Law 102-484, allowed Congress to enact TERA which permitted selected military members to retire with 15 or more, but less than

CUI//SP-MIL/SP-PRVCY

20 years of service. Public Law 107-314, NDAA for Fiscal Year 2003, Section 554, extended TERA to 1 Sep 02, at which time the TERA authority expired. Section 504, Public Law 112-81, NDAA for FY 2012, reinstated temporary retirement authorities contained in section 4403, Public Law 102-484, and Section 508, Public Law 114-328, of the NDAA for FY 2017, extended this authority until 31 Dec 25. Had the TERA authority been in place at the time of the applicant's medical retirement, she would not have been eligible since Secretarial guidance historically excluded members under evaluation for disability retirement or separation. It is not uncommon for members to be medically retired prior to qualifying for a length of service retirement. Based on review of the master personnel record and the applicant's request, we see no error or injustice that occurred relating to retirement eligibility, or that would warrant the applicant being given preferential treatment over other members who were medically retired prior to reaching 20 years of service.

The complete advisory opinion is at Exhibit C.

AFPC/DPFDD recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no indication an error or injustice occurred at the time of the disability processing. On the date of the applicant's disability retirement she had 19 years, 2 months, and 11 days of creditable service towards retirement. Concurrent Retirement and Disability Pay (CRDP) eligibility is determined by DFAS and the DVA and is not a determining factor in establishing the Air Force disability retirement date. In accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, paragraph 1.1, the purpose of the Disability Evaluation System (DES) is to maintain a fit and vital force, disability law allows the Secretary of the Air Force to remove from active duty those who can no longer perform the duties of their office, grade, rank or rating and ensure fair compensation to members whose military careers are cut short due to a service incurred or service-aggravated physical disability. Additionally, paragraph 1.6 states the Air Force disability system will not retain, retire, or discharge a member for disability solely to increase Air Force retirement or discharge benefits.

CRDP eligibility is a joint program administered by the DFAS and the DVA which is outside of the Air Force's authority, however, the following DFAS article about CRDP contains information on eligibility criteria. A synopsis is as follows:

CRDP allows military retirees to receive both military retired pay and DVA compensation. This was prohibited until the CRDP program began on 1 Jan 04. You must be eligible for retired pay to qualify for CRDP. If you were placed on a disability retirement, but would be eligible for military retired pay in the absence of the disability, you may be entitled to receive CRDP. Under these rules, you may be entitled to CRDP if...

- a. You are a regular retiree with a DVA disability rating of 50 percent or greater.
- b. You are a reserve retiree with 20 qualifying years of service, who has a DVA disability rating of 50 percent or greater and who has reached retirement age. (In most cases the retirement age for reservists is 60, but certain reserve retirees may be eligible before they turn 60. If you are a member of the Ready Reserve, your retirement age can be reduced

CUI//SP-MIL/SP-PRVCY

below age 60 by three months for each 90 days of active service you have performed during a fiscal year.)

c. You are retired under Temporary Early Retirement Act (TERA) and have a DVA disability rating of 50 percent or greater.

d. You are a disability retiree who earned entitlement to retired pay under any provision of law other than solely by disability, and you have a DVA disability rating of 50 percent or greater. You might become eligible for CRDP at the time you would have become eligible for retired pay.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 2 May 22 for comment (Exhibit E), and the applicant replied on 20 May 22. In her response, the applicant's counsel contends her medical retirement after 19 years was an inequitable outcome, as the most serious part of her mental and physical disability was caused by improper medical treatment by the Air Force. By the time the applicant faced the PEB, she had transitioned to a new medication which eliminated the physical and mental side effects and was fully capable of serving the last ten months of her active duty commitment. It is apparent, the medication prescribed in 2009 and 2010 were the root cause of her personal and duty performance struggles. Had her medication been properly prescribed and proper follow up care been provided, there would have been no performance issues drawing the ire of her command, resulting in the removal from her position.

The applicant's complete response is at Exhibit F.

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 AFPC/DP2SSR and AFPC/DPFDD and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds the evidence presented by the applicant insufficient to grant her a 20-year active duty retirement, noting there is no evidence that an error or injustice occurred at the time of her disability processing. The Board notes the applicant's contention that her improper medical treatment led to her discipline problems resulting in her discharge. The Board found no evidence in the NARSUM or the IPEB notes referencing her poor performance. 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 Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-02960 in Executive Session on 25 May 22, 31 May 22, and 1 Jul 22:


-  *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 23 Jul 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSR, dated 1 Apr 22.
- Exhibit D: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 26 Apr 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 2 May 22.
- Exhibit F: Applicant's Response, dated 20 May 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

2/14/2023

 *Work-Product*

Board Operations Manager, AFBCMR
Signed by: USAF