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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03222

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His medical condition of osteoarthritis of the right knee with residuals of arthroplasty and his mental health condition of Traumatic Brain Injury (TBI) be found in the line of duty (ILOD).

APPLICANT'S CONTENTIONS

On 1 Dec 20, the USAF Physical Evaluation Board (PEB) convened addressing two distinct physical conditions, right knee osteoarthritis and TBI. The Board's decision to annotate no to these conditions as incurred while entitled to receive basic pay is in error. His knee injury occurred on 30 Aug 11, while serving on active duty orders from 1 Jul 01 through 30 Sep 11, and surgery was performed while on medical continuation (MEDCON) orders. His TBI occurred on 8 Aug 97, while serving on active duty orders from 2 Aug 97 through 24 Nov 98. He is struggling with right knee issues and memory loss/diminished cognition relative to his TBI and the PEB rushed and changed their procedures to accommodate COVID-19 protocols. If he was allowed to address the PEB in person, these errors would not have been made.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force Reserve master sergeant (E-7).

On 3 Mar 20, a memorandum to the applicant's commander indicated he was found to have a medical condition which did not meet the medical standards per AFI 48-123, *Medical Examination and Standards*. It further explains the applicant would be evaluated on his qualification for worldwide duty; and if found medically disqualified and he declined a PEB, would be processed for separation.

On 23 Mar 20, the PEB Election Form indicates the applicant elected to have his non-duty related, medical disqualification case referred to the Informal PEB solely for a fitness determination.

On 1 June 20, the applicant's case was submitted for review for his medical condition of Osteoarthritis.

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On 6 Aug 20, the applicant's medical case was reviewed by the PEB Office (HQ ARPC/DPTTS). He was determined disqualified for continued military duty due to his medical condition of Osteoarthritis of the right knee. The applicant elected a fitness review and his case was referred into the Disability Evaluation System (DES) for a fitness determination.


On 10 Aug 20, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of Osteoarthritis of the right knee with residuals of Arthroplasty. It was noted that his medical condition did not incur while entitled to receive basic pay and did not incur ILOD which led to a recommendation of "Unfit."

On 2 Nov 20, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings and recommended disposition of the informal board and requested a formal hearing.

On 1 Dec 20, AF Form 356, *Formal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical conditions of Osteoarthritis of the right knee with residuals of Arthroplasty and residuals of TBI with a recommendation of "Unfit." Again, it was noted these conditions did not incur while entitled to receive basic pay and were not incurred in the line of duty.

On 7 Dec 20, the applicant submitted an appeal to the Formal PEB decision that found his medical conditions not in the line of duty (NILOD). He contended he was given an ILOD determination for his knee injury while he was on active duty orders in 2011. He also contends he was on active duty orders when his TBI occurred in 1997 and was again given an ILOD determination.

On 11 Mar 21, his case was reviewed by the Personnel Board for SAFPC which found his medical conditions of Osteoarthritis of the right knee with residuals of Arthroplasty and residuals of TBI NILOD. The Board noted even though the applicant's conditions were initially found to have incurred ILOD, they found his injuries did not qualify as a Prior Service Condition (PSC) due to intervening events nor were his conditions aggravated by military service. As for the 8-year rule, in order for a condition to qualify under the 8-year rule, it has to become unfitting while the member is on a period of active duty of 30 or more days. In this case, his injuries did not become unfitting while on such a period of active duty.

Effective 1 Apr 21, Reserve Order  indicates the applicant was honorably discharged from the Air Force Reserve.

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

APPLICABLE AUTHORITY

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

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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.

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 Under Secretary of Defense for Personnel and Readiness (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.

On 28 Jun 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends granting the applicant's request to find his unfitting right knee condition as occurring ILOD. The applicant met his burden of proof in providing sufficient evidence to demonstrate the existence of a material error and therefore, his request should be supported. If approved by the Board, the recommendation is to grant a 10 percent impairment rating under the Veterans Affairs Schedule for Rating Disabilities (VASRD) code of 5260 for limited flexion; with a recommendation of discharge with severance pay (DWSP).

The SAFPC board acknowledged that the applicant did sustain an injury to his right knee that required surgical repair and that it did occur while he was on military orders in 2011. In regards to counsel's claim of a PSC, the SAFPC Board noted other intervening events occurred that exacerbated the applicant's right knee condition when he was not in a military status; therefore, he did not meet criteria for PSC. In regards to service aggravation, SAFPC stated the following: "The condition of degenerative arthritis is a chronic disease that is typically signs of wear and tear in the bones." Additionally noted was it being a normal progression of a chronic condition. The board also made note of the applicant playing soccer and as such, undermines any argument that his condition was aggravated by subsequent military service. SAFPC cited that the 8-year rule was not applicable because the applicant was not on orders for more than 30 days at the time his right knee condition was found to be unfit for continued military duty.

The medical advisor is nearly in complete agreement with the findings and explanation from SAFPC except for the issue of a PSC. DoDI 1332.18, *Disability Evaluation System*, Appendix 3 to Enclosure 3, Section 7, paragraph e, states any medical condition incurred or aggravated during one period of active service or authorized training in any of the Military Services that recurs, is aggravated, or otherwise causes the member to be unfit, should be considered incurred ILOD, provided the origin of such impairment condition or its current state is not due to the Service member's misconduct or willful negligence, or progressed to unfitness as the result of intervening events when the Service member was not in a duty status. While on military status, the applicant was acutely injured in 2011 as evidenced by a torn meniscus identified on a magnetic resonance imaging (MRI). Despite having a degree of degenerative change, the acute tear was the original injury. Due to failed conservative treatment, surgery ensued. His recovery was long and delayed, but a return to full duty in late Sep 12 completed the course for this condition. However, subsequent periods of active duty aggravated his right knee pain well before any type of intervening event could possibly occur. An ILOD determination was approved with no follow-on action. This medical advisor opines that there exist sufficient evidence to conclude that the applicant's right knee condition met criteria for a PSC and that it did occur ILOD.

The complete advisory opinion is at Exhibit C.

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request to overturn SAFPC/AFPB's previous decision pertaining to his TBI. The applicant's TBI in 1997 was incurred ILOD but due to an intervening event of a subsequent non-ILOD TBI in 2006 and no evidence of service aggravation, his TBI in 1997 was not found to be ILOD under the PSC rules. Therefore, his unfitting condition of TBI did not occur ILOD.

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His TBI sustained in 1997 was incurred ILOD as there was ample evidence to include a positive LOD determination for this incident in his records. However, the applicant did not acknowledge or discuss his subsequent TBI he had experienced in 2006. This subsequent TBI event is significant to the applicant's case that needs to be addressed and considered. Because he had a preceding TBI in 2006, almost 10 years after his ILOD TBI in 1997, his TBI in 1997 would need to qualify as a PSC. As discussed in the SAFPC's memorandum, in order for his 1997 TBI to qualify as a PSC, this TBI needs to later become unfitting "as long as there are no intervening events that could accelerate the deterioration of the disease beyond natural progression." The applicant had an intervening event identified as his 2006 TBI that was not incurred ILOD and did not aggravate his prior service condition and as such, his TBI in 1997 previously determined as ILOD, was not considered to be ILOD under the PSC rule. His non-ILOD TBI in 2006 could have accelerated the progression of his TBI sustained in 1997 in addition to other stressors or extraneous events causing him to experience mild cognitive impairments years later.

The applicant was reported to have increased memory problems and other cognitive difficulties in the past several years necessitating his referral to the MEB for his physical condition and TBI. Several months prior to his referral to the MEB, he received a neuropsychological evaluation by the Department of Veterans Affairs (DVA) in Sep 19. He had reported at the time he believed he returned fully to baseline functioning about a month after his TBI in 1997, indicating he was able to recover from this injury. His medical records would support his notion because there were no records reporting he needed additional or continuous treatment for the residual effects from this TBI event. The results of his neuropsychological tests also found his memory problems and cognitive difficulties may be related to his current life's stressors, identified as knee surgeries, reduced physical activities, and medical retirement from his civilian employment, and possible Post-Traumatic Stress Disorder (PTSD). The evaluation report stated his history of head injuries (unclear severity, but likely mild based on review of medical records and Veteran's clinical history) were about 27, 22, and 13 years ago, and any TBI symptoms would be expected to be stable at this point. That being said, research on the long-term effects of repeated head injuries tends to be less well-established. Still, more likely contributing to his current presentation is ongoing significant stressors and mood symptoms, which can lead to noticeable cognitive changes. In particular, he is reporting an increase in possible PTSD symptoms since he stopped working, which generally fits the timeline of reported cognitive difficulties. It appeared from this report the applicant's non-military duties and stressors more likely than not caused the exacerbated and aggravation of his cognitive difficulties and affected his present cognitive functioning.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends his condition of TBI sustained on 8 Aug 97 should be found ILOD.

2. Did the condition exist or experience occur during military service?
There is evidence the applicant sought immediate medical care following his TBI, was hospitalized, and received surgery for fractures to his head/skull from the period of 8-9 Aug 97. The applicant received a positive LOD determination for this incident on 18 Aug 97.

3. Does the condition or experience excuse or mitigate the discharge?

Although the applicant received an initial positive LOD determination for his TBI occurring in 1997, his records found he had intervening event identified as another TBI in 2006 that was not found ILOD. This intervening event would render his TBI in 1997 as not ILOD under the PSC rules, and there was no evidence his military duties aggravated his condition. Therefore, his condition or experience does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition or experience does not excuse or mitigate his discharge, it also does not outweigh his original discharge.

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 28 Jun 22 for comment (Exhibit E), 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 the victim of an error or injustice. The Board concurs with the rationale and recommendation of the AFBCMR Medical Advisor and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant has provided medical evidence to conclude that his right knee condition met criteria for a prior service condition and that it did occur ILOD which is sufficient to justify granting the applicant's request. However, for the remainder of the applicant's request, the Board concurs with the rationale of the AFBCMR Psychological Advisor and finds 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 to find his TBI ILOD. The applicant's TBI is not considered a prior service condition; he had an intervening event identified in 2006 that was not incurred ILOD and no evidence was presented to indicate his TBI was service-aggravated. 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 the following:

- a. On 11 March 2021, he was found unfit to perform the duties of his office, rank, grade, or rating by reason of physical disability, incurred while he was entitled to receive basic

pay; that the diagnosis in his case was Osteoarthritis of the right knee with residuals of Arthroplasty, under Veterans Affairs Schedule for Rating Disabilities (VASRD) code 5260, rated at 10 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 1 April 2021, he was discharged due to physical disability – entitled to severance payment, with a 10 percent compensable disability rating.

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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-03222 in Executive Session on 27 Jul 22 and 29 Jul 22:

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

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 23 Sep 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFBCMR Medical Advisor, dated 10 May 22.
- Exhibit D: Advisory opinion, AFRBA Psychological Advisor, dated 21 May 22
- Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 28 Jun 22.
- Exhibit F: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 28 Jun 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.

3/27/2023

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF