



**CUI//SP-MIL/SP-PRVCY**

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

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

*Work-Product*

**DOCKET NUMBER: BC-2021-03235**

**COUNSEL:**

*Work-Product*

**HEARING REQUESTED: YES**

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**APPLICANT'S REQUEST**

She be medically evaluated under a Physical Evaluation Board (PEB); or in the alternative, she be medically retired effective 30 Jun 97.

**APPLICANT'S CONTENTIONS**

She did not go through the proper medical evaluation process so she could be properly compensated for her unfit medical condition. Her asthma was undoubtedly caused by her military service and was permanently aggravated rendering her unfit to perform her required duties. Multiple errors and/or violations of Air Force and DoD policies occurred to include the failure to place her on a medical hold, which would have allowed for a full and proper medical determination prior to her separation, and failure to refer her case to the PEB because she was unlikely to be returned to duty twelve months following the onset of her condition. Per DOD Directive 6130, *Medical Standards for Military Service*, Section 5.10, asthma may be a disqualifying condition rendering a service member incapable of performing their duties and resulting in an unfit for duty determination. That would have been the anticipated and likely outcome had the Air Force properly convened a PEB or at the very least, it would have warranted placement on the Temporary Disability Retired List (TDRL) until her condition stabilized. With the proper referral to the PEB, she would have been evaluated by the Department of Veterans Affairs (DVA) for all referred and claimed conditions. She was not seen by a DVA employee until 2008 when she became so seriously ill due to the deteriorated condition of her lungs. She did not know her appeal rights until recently, and that is the cause of delay.

In support of her claim, the applicant, through counsel, submitted a brief outlining her case and a letter from her civilian asthma doctor who cared for her from 1999 until 2010 stating over that period of time she has required increased medications to control her asthma and her condition is relatively well controlled. Since 2008, she has required intermittent oral corticosteroids three or more times a year to treat exacerbations of her asthma. Additionally, she submitted copies of medical documents from her military service and her DVA disability rating to support her claim.

The applicant's complete submission is at Exhibit A.

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Controlled by: SAF/MRB  
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## **STATEMENT OF FACTS**

The applicant is a former Air Force lieutenant colonel (O-5).

On 6 Feb 96, AF Form 618, *Medical Board Report*, provided by the applicant indicates she was referred to the Physical Evaluation Board (PEB) for asthma.

On 11 Apr 96, AF Form 422, *Physical Profile Serial Report*, provided by the applicant, indicates she was found fit and returned to duty with an Assignment Limitation Code (ALC) restricting her worldwide duty status and requiring a review in lieu of (RILO) a Medical Evaluation Board (MEB) during her birth month in 1997.

On 13 Dec 96, AF Form 780, *Officer Separation Actions*, indicates the applicant tendered her resignation due to the completion of her active duty service commitment with a requested effective date of 30 Jun 97.

On 30 Jun 97, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged in the grade of lieutenant colonel (O-5) after serving seven years, six months, and five days of active duty. She was discharged, with a narrative reason for separation of "Completion of Required Active Service."

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

## **AIR FORCE EVALUATION**

The AFBCMR Medical Advisor recommends denying the applicant's request for placement into the Disability Evaluation System (DES) in order to receive a review by a PEB and backdated disability retirement and pay from the date of her release from military service. Directing attention to determinants of unfitness, as outlined in DoDI 1332.38, *Physical Disability Evaluation* [published 1996], paragraph E3.P3.2.1, "A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties), to include duties during a remaining period of Reserve obligation." No evidence is presented to indicate the applicant's medical condition prevented, interfered with, or caused her to be unable to reasonably perform the duties of her office, grade, rank, or rating. The applicant's Officer Performance Reports (OPR) provided a glimpse into her performance and value to the Air Force. Hence, the Board's attention is directed to paragraph E3.P3.3.1, *Referral Following Illness or Injury*, "When referral for physical disability evaluation immediately follows acute, grave illness or injury, the medical evaluation may stand alone, particularly if medical evidence establishes that continued service would be deleterious to the Service member's health or is not in the best interests of the respective Service." To the contrary, in the applicant's case, paragraph E3.P3.3.2, *Referral For Chronic Impairment*, reads, "When a Service member is referred for physical disability evaluation under circumstances other than as described in subsection E3.P3.3.1, above, evaluation of the member's performance of duty by supervisors as indicated, for example, by letters, efficiency

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reports, credential reports, status of physician medical privileges, or personal testimony, which may provide better evidence than a clinical estimate by a physician of the Service member's ability to perform his or her duties. Particularly in cases of chronic illness, these documents may be expected to reflect accurately a member's capacity to perform."

Although the applicant's profile restrictions rendered her non-worldwide qualified, given her occupation, her then current assignment to a medical center, and the level of control of her medical condition, the Medical Advisor opines had her case been reviewed by the PEB, there is a high likelihood she would have been returned to duty, fit for continued care and observation; as was recommended by the pulmonologist who completed her MEB narrative summary. Moreover, Department of Defense policy at the time took into consideration circumstances that allowed a selective exception for retention, when not worldwide qualified, under paragraph E3.P3.4.1.3, *Deployability*, which reads, "Inability to perform the duties of his or her office, grade, rank, or rating in every geographic location and under every conceivable circumstance will not be the sole basis for a finding of unfitness, but would require a subsequent clinical reevaluation, upon which the decision for retention would again be made." This appears to have occurred in the applicant's case, directing attention to her AF Form 422, dated 11 Apr 96, which depicts the date of release from restrictions "to be determined by HQ AFPC/DPMM after next review." This is an indicator the Medical Retention Standards Division, office symbol DPMM at the time, made the decision to return the applicant to duty with an ALC, in lieu of referral to the PEB; to be followed by a reassessment, generally conducted annually, referred to as a periodic RILO MEB; or sooner if the condition changes for the worse, becomes unstable, or becomes refractory to treatment. Such an action was within the discretionary authority of the Medical Retention Standards Division or higher Secretarial Authority.

The Medical Advisor took note the applicant's asthma may have worsened or required more intense treatment since her separation, most recently rated at 60 percent; leading one to consider counsel's idea that warranted placement on the TDRL. However, the Military Department would have been limited to assigning the disability rating, if found unfit, based upon the evidence present at or near the time of final military disposition. To the contrary, operating under Title 38, Code for Federal Regulations, the DVA, is empowered to adjust disability ratings as the level of impairment for a given medical condition may vary [improve or worsen] over the lifetime of the veterans. The DVA is also empowered to offer compensation for any medical condition determined service-incurred, without regard to it proven or demonstrated impact upon a former service member's fitness to serve, retainability, or reason for discharge.

The complete advisory opinion is at Exhibit C.

**APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 17 Oct 22 for comment (Exhibit D), and the applicant replied on 8 Nov 22. In response, the applicant's counsel takes issue with certain aspects of the AFBCMR Medical Advisor's opinion and outlines these issues in the full response. The applicant's counsel concludes the cavalier handling of the applicant's case may have been due to the informal relationships between Air Force medical personnel which resulted

in a lack of proper documentation and follow through. But that is speculation based on the applicant's experience where she noted often, if one doctor required care, they would simply go see one of their medical colleagues with the proper skill set, get treated, and get back to work with none of the normally required medical documentation ever being completed. Indeed, she experienced this personally many times on both the providing and receiving end. But based on this rather random and haphazard application of the rules and examinations, the Air Force should forfeit the presumption of regularity it would normally be entitled to and the applicant should receive the benefit of the doubt. The Medical Advisor's Advisory Opinion inadvertently makes very clear his opinion is based on repetitive conjecture and speculation regarding how events may have played out. Yet he could not possibly understand the struggle the applicant endured in attempting to maintain the physical stamina to perform her duties while she had become dependent on inhalers and steroids to do so. Her rapidly deteriorating pulmonary status had already begun to require multiple inhalers before she was separated, after which her downward pulmonary trajectory accelerated. Finally, the Medical Advisor's opinion completely ignores the cause of her condition which was so clearly her deployment to Egypt. After exposure to multiple pulmonary irritants over a prolonged period of time, she developed steadily worsening asthma. The opinion uses her OPR which indicated outstanding performance against her as if to punish her for pushing through her pain and performing her duties rather than giving up and saying she was not up to it. Furthermore, the opinion fails to consider certain citation of DoD Directive 1332.18, *Disability Evaluation System*, directing all service members referred for physical disability evaluation shall be afforded comprehensive counseling and this was surely not done. Nor does it address the requirement in Air Force regulations authorizing a maximum of six months from MEB referral to holding a PEB, yet the PEB was never conducted, and she was discharged from the Air Force a full sixteen months after the referral of the MEB to a PEB. Also, when an MEB makes a referral to a PEB as occurred here, the MEB has already made the determination the service member has a condition that is incompatible with continued military service. Therefore, not conducting a PEB is prima facie evidence the presumption of regularity in this case should no longer be afforded to the Air Force.

The applicant's complete response is at Exhibit E.

## **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 recommendation of the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board finds no error with the processing of her disability evaluation case. She was referred to the MEB for her potentially unfitting condition of asthma; however, was found fit for duty as indicated on her profile dated 11 Apr 96 which assigned her an ALC restricting her from worldwide duty. The mere existence of a medical diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The applicant's military duties were not severely degraded due to her medical condition, although they did impact her

deployability. A Service member shall be considered unfit when the evidence establishes the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. Furthermore, 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 military's DES established to maintain a fit and vital fighting force, can by law, under Title 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 or near the time of separation and not based on post-service progression of disease or injury. 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)*. 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.



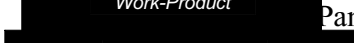
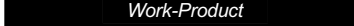
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

**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 the 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-2021-03235 in Executive Session on 25 Jan 23 and 3 Jan 24:

-  *Work-Product*, Panel Chair
-  *Work-Product*, Panel Member
-  *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 1 Sep 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFBCMR Medical Advisor, dated 13 Oct 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Oct 22.
- Exhibit E: Applicant's Response, dated 8 Nov 22.

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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.

1/16/2024

*Work-Product*

Board Operations Manager, AFBCMR

Signed by: *Work-Product*