



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03240

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He requests the following based on an allegation of reprisal pursuant to DODD 7050.06, *Military Whistleblower Protection*, and 10 U.S.C. § 1034.

1. He be retroactively promoted to the grade of master sergeant (E-7) and his retirement be in the grade of E-7.
2. He receive combat related injury designation.
3. He be awarded the Purple Heart (WILL NOT BE CONSIDERED BY THE BOARD AT THIS TIME).
4. He be granted a combat related medical disability retirement, or in the alternative be processed through the Legacy Disability Evaluation System (LDES).

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends he was wronged. He deployed to Afghanistan eight times in 18 years, to include four combat missions. While in Afghanistan he worked with unmanned aerial vehicle (UAV) systems where his base was a constant target for insurgent attacks. He was injured by hostile enemy attacks and should be awarded the Purple Heart that was denied. His military retirement should have reflected in the combat zone and combat related. The Board previously corrected his records for his rank; however, he missed promotion to the grade of E-7.

His records demonstrated he exceeded standards; however, during the latter part of his career, medical personnel could not keep track of his left ear injury and separate right ear injury. There were also issues with tracking the correct number of years of his service. During this time, he had a stripe removed and was told he would have to re-test for the grade of technical sergeant (E-6). He received an enlisted performance report (EPR) for the period of 19 Jun 10 to 18 Jun 11 reflecting he did not meet standards. His first sergeant and commander were not in compliance of AFI 36-2502, *Enlisted Airman Promotion and Demotion Programs*, and his grade of E-6 was erroneously removed. The Board removed his EPR and his grade of E-6 was restored.

He deployed to Afghanistan from Oct 11 to 31 Jan 12 and was injured when the entry control point (ECP) at Kandahar was attacked by a vehicle borne improvised explosive device (VBIED) on 9 Jan 12. Witness statements are provided attesting the explosion was at the back gate next to the compound and the blast rocked the hangar. The blast was close to the ECP perimeter, about 150 to 200 yards from the applicant. He was injured in the blast but was not awarded the Purple Heart.

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He was seen by medical personnel at the camp for nausea and vomiting. He did not realize his left ear had been injured by the VBIED attack. A few days later, the base was hit by another attack and his right ear was injured and perforated while he was cleaning his ear during the rocket attack. When he returned home, he could no longer walk for more than five minutes without vomiting. The emergency room could not determine the cause of his symptoms and he was referred to the Werner Institute for Balance and Dizziness and audiology. The Werner Institute determined his vestibular dysfunctions were from a blast injury to his left ear. A few days after the evaluation, his primary care manager (PCM) recommended denial of the Purple Heart and initiated a medical evaluation board (MEB) because he thought he was lying. In the May 12 post-deployment form, he was directed to say "No" to exposure to IED explosions.

He suffered perilymphatic fistula, which is the bone in the inner ear leaking fluid due to a hole from the blast trauma. He went through 13 months of physical therapy. He could no longer perform daily duties such as bending over and operating heavy equipment. His PCM believed he was lying and he lost nine potential promotion points toward his E-7 testing. Instead, he received one end of tour decoration for 10 years, totaling three points.

A 28 Jan 15 Department of Veterans Affairs (DVA) evaluation was full of errors. It states he accidentally self-inflicted the injury. The narrative continued to state he admitted to injuring his eardrum while trying to clean it without evidence to back their claim.

The MEB report dated 26 Jun 15 stated he had 17 years of service; however, the physical evaluation board (PEB) that convened on 15 Jul 15 erroneously stated he had 14 years of service. The informal physical evaluation board (IPEB) determined his disability was 10 percent with 14 years of service and not combat related. However, he has 18 and a half years of service. The PEB that convened on 24 Jul 15 had his correct years of service and a 10 percent rating for Vestibular Neuronitis. When the applicant's orders to attend his formal PEB (FPEB) was canceled, he reached out to the DVA for an emergency reconciliation. The DVA on 18 Sep 15 increased his rating to 30 percent.

It is clear he injured his left ear, which caused his Vestibular Neuronitis and his perilymphatic fistula, from the VBIED blast in Afghanistan. In addition, the MEB missed the applicant's sleep apnea diagnosis. He has been prescribed a continuous positive airway pressure (CPAP) machine since 2014 for his obstructive sleep apnea (OSA). He was also ill-advised by his military counsel to reconcile with the DVA, which gave him only 30 percent. He was retired with a 30 percent disability; however, he does not receive any military pay for his honorable discharge due to his PCM determining his injury was not combat related.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 18 Jun 12, the applicant requested the Board remove his fitness assessment (FA) failures dated 25 Jan 11 and 25 Apr 11 and his referral EPR for the period ending 18 Jun 11 from his records. He also requested his promotion sequence number (PSN) for promotion to the grade of E-6, with date of rank (DOR) and effective date of 1 Aug 11 be restored. On 30 May 13, the Board granted the applicant's request finding sufficient evidence the FAs were not administered properly.

The applicant's Chronological Record of Medical Care dated 28 Nov 12 includes initial evaluation by the Werner Institute for Balance and Dizziness. It states he perforated his left ear drum membrane while in Afghanistan. The findings from his sensory organization test (SOT) and sensory integration test (SIT) supported a vestibular dysfunction pattern. The findings from his subjective history included a blast injury.

On 26 Jun 15, a MEB convened and referred the applicant to the IPEB for his condition of chronic Vestibular Neuronitis. The MEB narrative summary (NARSUM) states it appeared his symptoms started after an accidental but self-inflicted tympanic membrane perforation he suffered while attempting to clean his ear with a curette in Feb 12 while at home in Las Vegas, NV. The applicant claimed his symptoms were from a reported blast injury he suffered while deployed to Afghanistan in Jan 12 (which his deployed commanders would not corroborate). The only medical records available during his deployment were for acute nausea and vomiting that resolved and there was no mention of suffering a blast injury. He also denied any blast injuries on his 23 Jan 12 post deployment health assessment (PDHA). He was also seen by his PCM, ear, nose and throat (ENT) physician and audiology multiple times between Mar to Oct 12 with no mention of suffering any blast injury. There is also no mention of suffering any blast injury during his 8 May 12 PDHA but once again he admitted to rupturing his eardrum while trying to clean it.

The commander's input to the MEB dated 8 Jul 15, reflects the applicant's commander found the optimal outcome would be to return the applicant to duty without limitations, to include reinstating his ability to deploy. However, if this could not be done, he recommended medical retirement or separation with appropriate compensation.

On 15 Jul 15, the IPEB recommended the applicant unfit for his condition of Vestibular Neuritis and was awaiting IDES DVA ratings. His years of service reflect as 14 years.

In an email dated 8 Dec 15, the AFPC Disability Office informed the applicant's military treatment facility and AFPC offices, the applicant's service for basic pay and active service for retirement listed on the IPEB findings was corrected.

The DVA Rating Decision dated 22 Jul 15 reflects the proposed entitlement to service connection for his Vestibular Neuronitis as directly related to military service as 10 percent. The applicant was also granted 50 percent service connection for his OSA. His total combined rating for his multiple service connected disabilities is 60 percent.

On 24 Jul 15, the IPEB recommended the applicant be discharged with severance pay (DWSP) with a 10 percent compensable rating for his unfitting condition of Vestibular Neuronitis. His service reflects as 17 years.

On 3 Aug 15, the applicant disagreed with the disposition of the IPEB and requested a formal hearing of his case.

On 3 Sep 15, the applicant requested a one-time only rating reconsideration for his proposed rating of 10 percent for Vestibular Neuronitis. He asked for an increase in his rating to at least 30 percent due to daily dizziness and staggering. Since he could not release pressure in his inner ear, due to an imbalance, he suffered severe pain or vertigo attacks with changes in altitude and or atmospheric pressure.

On 9 Sep 15, the applicant indicated he previously requested a hearing at the FPEB. He requested to waive his earlier election having received an explanation from counsel of the IPEB's decision.

The applicant indicated he understood if his waiver was approved, he had no right to demand a FPEB hearing.

On 23 Oct 15, the DVA proposed a rating of 30 percent for his Vestibular Neuronitis and total combined rating for service connected disabilities of 70 percent.

AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, dated 17 Nov 15 reflects the IPEB recommended the applicant be permanently retired for disability with a compensable rating of 30 percent for his unfitting condition of Vestibular Neuronitis. "No" is marked in the *Additional Findings*, Block 10, Item E, *Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.* The IPEB remarks state the applicant reported his symptoms were due to dysfunction following a VBIED on his base during deployment to Kandahar. He reported being evaluated for nausea and vomiting several days after the blast; however, medical records do not mention a possible blast injury. The first mention of a possible blast injury was a civilian provider who concluded he may have a perilymphatic fistula in his left inner ear due to the blast injury. Subsequent evaluation and a second opinion noted he did not have an active perilymphatic fistula and he declined surgical exploration for confirmation. Further, no blast exposure was noted on his post-deployment questionnaire. An addendum to the NARSUM dated 10 Jun 15 indicates all other conditions referred to in the DVA compensation and pension (C&P) evaluation were not found to be boardable or were currently unfitting. The Board considered all other medical conditions (Category II and III) rated by the DVA related to the applicant's military service as required under the IDES and found the conditions were currently not unfitting for duty. His years of service reflect 18 years.

On 30 Nov 15, the Secretary of the Air Force Personnel Council (SAFPC) directed the applicant be permanently retired under 10 U.S.C. § 1201.

On 28 Jan 16, the applicant was honorably discharged for permanent disability retirement, effective 29 Jan 16, in the grade of E-6. He was credited with 18 years, 3 months and 21 days of active duty service.

The applicant was retired in the grade of E-6, effective 29 Jan 16 for permanent disability per Special Order **Work-Product** dated 14 Dec 15. The applicant's retirement order reflects "No" for disability received in line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in line of duty during a period of war. The order also shows "No" for Disability was the result of a combat related injury. His retirement order reflects his active service for retirement as 18 years, 3 months and 21 days and his highest grade held (HGH) is E-6.

On 23 May 22, the AFBCMR staff informed the applicant his request for award of the Purple Heart was returned without action in accordance with AFI 36-2603, *Air Force Board for Correction of Military Records*, since the applicant had not identified he exhausted the available avenue of relief for award of the Purple Heart. The applicant was provided the Purple Heart Bulletin for proper submission of his request.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory opinions at Exhibits E and F.

APPLICABLE AUTHORITY/GUIDANCE

Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System*, Appendix 5 to Enclosure 3, "Combat Related" covers injuries and diseases attributable to the special dangers

associated with armed conflict or the preparation or training for armed conflict. A disability is considered combat-related if it makes the member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances; as a direct result of armed conflict; while engaged in hazardous service; under conditions simulating war; or caused by an instrumentality of war. Armed conflict is defined as a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which service members are engaged with a hostile or belligerent nation, faction, force, or terrorist.

Per 10 U.S.C. § 1034 and AFI 90-301, *Inspector General Complaints Resolution*, Reprisal against military members for making protected disclosures is prohibited. AFI 90-301, paragraph 5.2.1.1., No Person may take (or threaten to take) an unfavorable personnel action; or withhold (or threaten to withhold) a favorable personnel action as reprisal against a member of the armed forces for making or preparing to make or being perceived as making or preparing to make a protected communication.

AIR FORCE EVALUATION

AFPC/DPFDD recommends denial for his record to be corrected to show he received a combat related injury designation and he be granted a combat related medical disability retirement or he be placed in the DES for his service-connected condition of Vestibular Neuronitis. There is no indication an error or injustice occurred at the time the PEB processed his disability case. There is no corroborating medical evidence the applicant's Vestibular Neuronitis was directly caused by the Jan 12 VBIED blast. Medical opinion shows that although the Werner Institute specialist suggested the blast may have caused a perilymphatic fistula in his left inner ear, a second opinion performed by an impartial off-base otologist confirmed he did not have an active perilymphatic fistula. Medical records suggest the most probable cause for the condition was due to an accidental self-inflicted injury while cleaning his ear following his return from deployment.

Under 10 U.S.C., the PEB must determine if a member's condition renders them unfit for continued military service relating to their office, grade, rank or rating. Additionally, DoDI 1332.18, appendix 5 to Enclosure 3, the PEB renders a final decision on whether an injury or disease that makes the service member unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict or was caused by an instrumentality of war during war. A disability is considered combat related if it makes the service member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances:

1. As a Direct Result of Armed Conflict. Injury or disability was incurred in combat with an enemy of the United States. To qualify under this, rule a Service member must be engaged with members of opposing armed forces and forces are in close enough proximity to potentially inflict physical harm on one another. Furthermore, to be "engaged with" indicates each party has the potential to cause physical harm to the other; it is reciprocal.
2. While Engaged in Hazardous Service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.
3. Under Conditions Simulating War. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice;

bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

4. Caused by an Instrumentality of War. Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

On 26 Jun 15, a MEB found the applicant unfitting for Vestibular Neuronitis. The NARSUM indicated his symptoms started after an accidental but self-inflicted tympanic membrane perforation suffered while attempting to clear his ear with a curette in Feb 12 while at home in Las Vegas, NV. He was initially seen at the base family health clinic with complaints of dizziness, nausea and vomiting. The NARSUM further details he was denied a Purple Heart for a blast injury in Afghanistan in 2012 when his deployed commanders would not corroborate the applicant's contentions when they were contacted by his commander. The deployed commander did not recollect any of his personnel being directly injured or requiring medical attention on the day of the incident. The only medical records available during his deployment were for acute nausea and vomiting that resolved, there was no mention of him suffering a blast injury. The applicant also denied any blast injuries in his 23 Jan 12 PDHA. He was also seen by his PCM, ENT physician and audiology multiple times between Mar to Oct 12 with no mention of him suffering a blast injury. There is also no mention on his 8 May 12 PDHA of a blast injury; however, he admitted to rupturing his eardrum while trying to clean it. The NARSUM further indicates the first mention of a blast injury was in the medical note by an off-base provider from the Werner Institute for Balance and Dizziness that concluded he may have a perilymphatic fistula in his left inner ear caused by an explosion in Afghanistan on his last deployment which could not be corroborated by his medical records. Following this encounter, he was seen by his on base ENT specialist who did not feel he had a fistula. A surgery to identify the fistula was offered but the applicant declined. The applicant was then sent to an off base otologist for a second opinion who stated he did not have an active perilymphatic fistula.

On 24 Jul 15, the IPEB found the applicant unfit for Vestibular Neuronitis with a 10 percent compensable disability rating, as assigned by the DVA under the IDIS, and recommended DWSP. The IPEB also did not find the condition was either combat related or incurred in a combat zone. On 3 Aug 15, the applicant disagreed with the IPEB's findings and appealed to the FPEB. However, on 9 Sep 15, he waived his FPEB hearing, in which he could have petitioned the FPEB to find his condition to be found combat related. On 18 Sep 15, he requested a one-time DVA Rating Reconsideration for an increase to his disability rating. On 17 Nov 15, an updated AF Form 356, was prepared by the IPEB upgrading the applicant's disability to 30 percent with a recommendation he be retired for permanent disability. He was subsequently permanently retired effective 29 Jan 16.

The complete advisory opinion is at Exhibit E.

AFPC/DPMSP recommends denial for promotion and retirement in the grade of E-7. There is no evidence in the applicant's promotion history to show he was promoted to the grade of E-7.

In accordance with the AFBCMR in BC-2012-02649, his FAs dated 25 Jan 11 and 25 Apr 11 and EPR ending 18 Jun 11 were removed and his grade of E-6 with DOR 1 Aug 11 was restored. The applicant tested for E-7 during Promotion Cycles 14E7 and 15E7 and was not selected for promotion. The applicant did not have a line number pending for promotion to the grade of E-7.

The applicant's retirement order, Special Order **Work-Product**, shows the applicant was permanently disability retired in the grade of E-6 and his HGH on active duty is verified as E-6.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 16 Apr 24 for comment (Exhibit G). In an undated response, he states he suffered a major blast trauma from a VBIED on 19 Jan 12. The VBIED attack killed seven Afghans, two who were children. He was located only yards away from the detonation and he was exposed to the high explosive supersonic pressure wave or blast. The blast wave ruptured the tympanic membrane and broke his temporal bone in his left ear. This primary blast injury caused a traumatic brain injury (TBI) with neurocognitive disorder, neurological sleep apnea or central sleep apnea and vestibular neuritis, which are all service connected.

In Feb 12, he was seen by an ENT and diagnosed with vestibular neuritis. He was referred to the Werner Institute and after testing, he was diagnosed with vestibular fistula in his left ear due to the VBIED primary blast that occurred on 19 Jan 12. He was also seen by the on-base ENT for the constant pressure in his head due to the trauma from the VBIED. This pressure caused severe nose bleeds with altitude changes or changes in atmospheric pressure. He was referred to an off-base ENT, who diagnosed him with barotrauma with secondary vestibular dysfunction to the primary blast from the VBIED and he did not recommend surgery.

After his records were corrected in BC-2012-02649, he was met with constant reprisal and was denied decorations. The same people who falsified his military documents decided to write him an Air Force Commendation Medal (AFCM) that covered 10 years, instead of three separate decorations. He was also told he would receive the Purple Heart that was submitted but his final package was denied at his home station. His PCM stated he was lying and he injured his ear cleaning it. His integrity has never been in question. His Whistle Blower rights as well as protection from reprisal were violated.

The applicant's complete response, with attachments, is at Exhibit H.

FINDINGS AND CONCLUSION

1. The application was not timely filed.
2. The applicant did not exhaust all available non-judicial relief for award of the Purple Heart 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/DPFDD and AFPC/DPMSP and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no corroborating medical evidence the applicant's Vestibular Neuritis was directly caused by the Jan 12 VBIED blast. In this respect, the Board notes the applicant's deployed commanders declined to validate the applicant's claims. Moreover, the applicant's

medical records suggest the most probable cause for the condition was due to an accidental self-inflicted injury while cleaning his ear following his return from deployment. The applicant also contends the PEB failed to consider his unfitting condition of OSA. However, there is no evidence the applicant was unable to perform the duties of his office, grade, rank or rating due to his OSA and there is no evidence the applicant's OSA reached to an unfitting level for evaluation by the DES. In this respect, the applicant is reminded his DVA service connection rating remains separate from his in-service impairment ratings. With respect to the applicant's request for promotion and retirement in the grade of E-7. The applicant has provided no evidence to sustain he was promoted to the grade of E-7. Based on the evidence, it appears the applicant was properly considered for promotion to the grade of E-7 after the Board restored his grade of E-6, removed his FA failures dated 25 Jan 11 and 25 Apr 11 and removed his referral EPR for the period ending 18 Jun 11; however, he was not selected for promotion to the grade of E-7. While the applicant contends the denial of awards and promotion opportunity was due to reprisal in violation of 10 U.S.C. § 1034, the applicant has provided no evidence to substantiate his allegations he was the victim of reprisal in violation of 10 U.S.C. § 1034. With respect to the request for award of the Purple Heart, the Board notes the applicant has not provided evidence to show he has exhausted the administrative remedy for award of the Purple Heart. Accordingly, the Board finds the request for award of the Purple Heart is not ripe for adjudication by the Board at this time. 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)*. 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 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-2021-03240 in Executive Session on 18 Jun 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 31 Aug 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: ROP and Directive (BC-2012-02649) dated 25 Jun 13.
- Exhibit D: Letter to Applicant, SAF/MRBC, w/atchs, dated 23 May 22.
- Exhibit E: Advisory Opinion, AFPC/DPPFD, dated 5 Apr 24.
- Exhibit F: Advisory Opinion, AFPC/DPMSP, dated 15 Apr 24.

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Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 16 Apr 24.
Exhibit H: Applicant's Response, w/atchs, undated.

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.

7/22/2024

X

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Board Operations Manager, AFBCMR
Signed by: USAF