

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00101

XXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her disability rating of 30 [sic] percent be changed to 80 percent (Amended request, originally asked for 90 percent increase, see Exhibit E).

APPLICANT'S CONTENTIONS

She was assigned a 30 percent disability rating for her Multiple Sclerosis (MS) by the Department of Veterans Affairs (DVA). She appealed that decision and asked for a one-time only rating reconsideration stating she had other residual medical conditions associated with MS. The DVA reconsidered each of her residual conditions and assigned ratings for these conditions. She appealed this decision again through the DVA and on 19 Jan 19, was assigned a 70 percent disability rating for MS. Due to the errors made by the DVA and the Air Force receiving incomplete information or misunderstood the DVA disability rating findings, she was medically retired with a 30 [sic] percent disability rating instead of the 90 percent which is currently reflected in the 70 percent rating assigned to her medical condition of MS and the residual conditions associated with this disease.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a medically retired Air Force Reserve colonel (O-6).

On 25 Jul 16, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for MS.

On 25 Jan 17, the DVA proposed a disability rating for her Category I unfitting medical condition of MS at 30 percent. The DVA also provided disability ratings for several other service-connected disabilities with a combined rating of 70 percent.

On 27 Jan 17, 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 MS with a disability compensation rating of 30 percent with a recommendation of "Permanent Retirement." The Board considered all other medical conditions (Category II and III) rated by

the DVA and found these conditions were not currently unfitting for duty either separately or collectively.

On 10 Feb 17, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings and recommended disposition of the Board and requested a formal hearing.

On 7 Jun 17, AF Form 356, *Formal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to her medical condition of MS with a disability compensation rating of 30 percent with a recommendation of "Permanent Retirement." The applicant contended her case should be returned without action as she had not reached maximal medical improvement. The Board acknowledged the commander's statement that she is able to perform her daily in-garrison duties and her recent "Excellent" Air Force fitness assessment score; however, her condition is subject to sudden and unpredictable exacerbations, representing an obvious medical risk to her health/safety. Additionally, her condition imposes unreasonable requirements on the military to maintain or protect her and requires frequent follow-up with a medical specialist which is not manageable in austere locations. The board also found no reason to support the contention that she had not reached maximal medical benefit. Although unfitting, her MS was currently relatively stable.

On 12 Jun 17, AF Form 1180 indicates the applicant disagreed with the findings and recommended disposition of the formal board and requested her case be referred to the Secretary of the Air Force Personnel Council (SAFPC) for review and final decision. She also requested a one-time reconsideration of the disability rating for the condition found by the PEB.

On 26 Feb 18, her case was reviewed by the Personnel Board for SAFPC which found after considering all applicable statutes, instructions, and authorities, concluded the most appropriate decision in the case was to direct that she be permanently retired with a disability rating of 30 percent. The board noted when determining the applicant's disability rating award, the board is required by law to rate a disability using criteria outlined in the Veterans Affairs Schedule for Rating Disabilities (VASRD). The board typically applies the disability ratings proposed by the DVA under the Integrated Disability Evaluation System (IDES), as these ratings should be in compliance with the VASRD. The board therefore assigned a rating of 30 percent for the unfitting MS condition, under VASRD Code 8018.

On 9 Mar 18, the applicant submitted a written request to the DVA for a one-time only rating reconsideration stating her medical condition of MS should be increased to 80 percent based on residual conditions she is experiencing due to this disease.

On 27 Mar 18, the DVA proposed a disability rating for her medical conditions of neurocognitive disorder due to MS at 30 percent and obstructive bladder and urinary incontinence due to MS at 20 percent. It was noted the purpose of the letter was to provide information regarding the changes as a result of the one-time request as no other changes have been made to the remaining claimed and inferred conditions.

On 10 Apr 18, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to her medical conditions of neurocognitive disorder due to MS at 30 percent and obstructive bladder and urinary incontinence due to MS rated at 20 percent; with an overall combined rating of 40 percent and a recommendation of “Permanent Retirement.”

Dated 8 May 18, Special Order XXXXXX, indicates the applicant was permanently disability retired in the grade of lieutenant colonel (O-5) with a compensable percentage for physical disability of 40 percent, effective 29 Aug 18.

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

AIR FORCE EVALUATION

AFPC/DPFDD recommends partially granting the applicant’s request for an increase in her disability rating. Based on the documentation contained in the PEB case file and analysis of the facts they recommend that applicant’s DES unfitting condition of Neurocognitive Disorder due to MS rated at 30 percent be changed to Unspecified Neurocognitive Disorder with Major Depressive Disorder, Recurrent and Hypersomnolence due to MS and assigned a 70 percent disability rating. Her overall DES disability rating should therefore be changed from 40 percent to 80 percent based on the VASRD. The applicant demonstrated due diligence and had the DVA properly assessed these residual effects during the DES processing, the PEB would have assigned these ratings at that time.

The Air Force and the DVA disability systems operate under separate laws. Under the Air Force system (Title 10 U.S.C.), the PEB must determine whether an airman’s medical condition renders them unfit for continued military service relating to their office, grade, rank or rating. To be unfitting, the condition must be such that it alone precludes the member from fulfilling their military duties. The PEB then applies the rating best associated with the level of disability at the time of disability processing (*a snapshot in time*). That rating determines the final disposition (discharge with severance pay, placement on the temporary disability retired list, or permanent retirement) and is not subject to change after the service member has separated. Under the DVA system (Title 38, U.S.C), the member may be evaluated over the years and their rating may be increased or decreased based on changes in the member’s medical condition at the current time. However, 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.

On 9 Mar 18, the applicant requested a one-time DVA rating reconsideration. In this request she contended that the DVA rating for MS failed to rate the residuals for this condition. She contended that the DVA should have rated the residuals for Neurocognitive Disorder at 30 percent; Peripheral Vestibular Disorder at 30 percent; Bladder Injury at 40 percent; Neuralgia at 10 percent; and Chronic Fatigue Syndrome at 10 percent. On 26 Mar 18 the DVA partially approved this request and assigned disability ratings for Neurocognitive Disorder due to MS at 30 percent and Overactive Bladder and Urinary Incontinence due to MS at 20 percent.

Accordingly, on 10 Apr 18 the PEB issued an updated AF Form 356 utilizing the updated DVA ratings and directed permanent retirement with a combined compensable disability rating of 40 percent. She was subsequently retired effective 29 Aug 18. Records indicate that on 19 Jan 19 the DVA issued an updated rating decision which upgraded the Neurocognitive Disorder due to MS at 30 percent to Unspecified Neurocognitive Disorder with Major Depressive Disorder, Recurrent and Hypersomnolence due to MS and assigned a 70 percent disability rating. The rating decision also contained the following statement “This includes your claim for chronic fatigue syndrome. This also addresses your previous denials for sleep disturbances, depression and insomnia.” They continued the previous rating for Overactive Bladder and Urinary Incontinence due to MS at 20 percent. This rating update seems to more appropriately address the residual effects of her MS that she had requested in her original DVA Rating Reconsideration request during DES processing.

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 22 Feb 22 for comment (Exhibit D), and the applicant replied on 3 Mar 22. In her response, the applicant contends she should be receiving 80 percent of her retirement pay as tax-free stating it is unfair to penalize her for the DVA’s slow disability rating appeal process.

The applicant’s complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

On 21 Jul 22, an email was sent to AFPC/DPFDD advising them of the applicant’s updated request. They replied on 26 Jul 22 changing their recommendation to grant. This information was emailed to the applicant for comment to which she has not responded.

For more information, see Exhibits F and G.

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 AFPC/DPFDD and finds a preponderance of the evidence substantiates the applicant’s contentions. The applicant had multiple appeals to the DVA which ultimately resulted in a rating update that more appropriately addressed the residual effects of her MS. 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 10 April 2018, she was found unfit to perform the duties of her office, rank, grade, or rating by reason of physical disability, incurred while she was entitled to receive basic pay; the diagnosis in her case was Neurocognitive Disorder with Major Depressive Disorder, Recurrent and Hypersomnolence due to Multiple Sclerosis (MS), Veteran Affairs Schedule for Ratings Disabilities code 8018-9326, rated at 70 percent; when combined with her initial disability rating of 20 percent due to overactive bladder and urinary incontinence due to MS, results in a combined [not added] disability rating of 80 percent. It is noted the degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during a period of unauthorized absence; and the disability was not as a direct result of armed conflict or caused by an instrumentality of war and was not combat-related.
- b. On 28 August 2018, she was discharged from active duty and on 29 August 2018, she was permanently retired with a compensable percentage for physical disability of 80 percent.
- c. Her election of the Survivor Benefit Plan option will be corrected in accordance with his expressed preferences and/or as otherwise provided for by law or the Code of Federal Regulations.

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-2022-00101 in Executive Session on 27 Jul 22 and 27 Aug 22:

- , Panel Chair
- , Panel Member
- , Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 20 Nov 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFPC/DPFDD, atchs, dated 15 Feb 22.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 22 Feb 22.
- Exhibit E: Applicant's response, dated 3 Mar 22.
- Exhibit F: Email response from AFPC/DPFDD, dated 26 Jul 22.
- Exhibit G: Notification of advisory, SAF/MRBC to applicant, dated 26 Jul 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.

X

Board Operations Manager, AFBCMR