



CUI//SP-MIL/SP-PRVCY
UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00860

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her discharge with severance pay (DWSP) be changed to a medical retirement.

APPLICANT'S CONTENTIONS

Due to a congressional mandate, her medical separation is eligible to be reviewed if her rating was less than 30 percent and if she was separated between 11 Sep 01 through 31 Dec 09. She should be reconsidered for a permanent retirement at a compensable rating of 60 percent, 30 percent for migraines and 40 percent for Intervertebral Disc Syndrome.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force senior airman (E-4).

On 10 Feb 05, AF Form 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for recurrent migraine headaches.

On 14 Apr 05, 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 migraine headaches with a disability compensation rating of 10 percent with a recommendation of "DWSP."

On 21 Apr 05, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings of the board and requested a formal hearing.

On 27 May 05, 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 migraine headaches, rated at 10 percent and L4-L5 disc herniation, rated at 10 percent with a combined disability compensation rating of 20 percent with a recommendation of "DWSP."

AFBCMR Docket Number BC-2022-00860
CUI//SP-MIL/SP-PRVCY

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CUI//SP-MIL/SP-PRVCY

On 27 May 05, AF Form 1180, indicates the applicant agreed with the findings and recommended disposition of the board.

On 15 Jul 05, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged in the grade of senior airman (E-4) after serving three years, four months, and four days of active duty. She was discharged, with a narrative reason for separation of "Disability, Severance Pay."

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 denying the application finding no evidence of an error or injustice during Disability Evaluation System (DES) processing. Upgrade of a disability rating by the DVA after separation does not warrant change to the original DES ratings after the fact.

On 10 Feb 05 a Medical Evaluation Board (MEB) found the applicant potentially unfit for recurrent migraine headaches. The Medical Narrative Summary (NARSUM) indicated that she had been disqualified as a loadmaster due to her migraines. The NARSUM also listed chronic low back pain (LBP) in her past medical history but otherwise made no mention of this condition. During the MEB process the applicant submitted a Letter of Exception to document that she also suffered from LBP. There is no evidence that she rebutted the MEB's initial unfitting recommendation or requested that LBP be added to her list of potentially unfitting conditions for PEB consideration. On 14 Apr 05, the IPEB found her unfit for migraines with a 10 percent disability rating and recommended DWSP. On 21 Apr 05, the applicant disagreed with the IPEB findings and appealed to the Formal PEB. The FPEB indicates that she contended she should be permanently retired with a compensable rating of 60 percent; 30 percent for migraines and 40 for Invertebral Disk Syndrome. The record also shows that in preparation for the FPEB hearing, an updated NARSUM was prepared to provide information concerning the LBP condition. The FPEB continued the migraine headaches at 10 percent and added L4-L5 Disk Herniation for the LBP condition at 10 percent with an overall 20 percent compensable disability rating and continued the DWSP. The FPEB noted there was no evidence in the medical record that the member had experienced prostrating migraines (requiring emergency room (ER) visits) since 10 Jan 05. The Board also noted that she was not on control medications but only takes when necessary. The Board also noted that a magnetic resonance imaging (MRI) revealed she had a L4-L5 disk herniation for which surgery was planned if conservative therapies did not resolve the condition. Therefore, the board opined that both conditions were best rated at 10 percent respectively for a combined rating of 20 percent. Furthermore, the record also indicates the applicant agreed with the FPEB's findings and did not appeal to the Secretary of the Air Force Personnel Counsel for a higher disability rating as previously requested.

She was processed under the legacy DES in which the Air Force and DVA made separate independent assessments of a member's medical conditions and could therefore award different ratings for the same conditions based on available documentation and examinations. The DVA's

CUI//SP-MIL/SP-PRVCY

initial rating decision is dated 23 Mar 07. During this initial rating decision they assigned a 20 percent disability rating for her LBP. However, they denied her claim for service-connection for migraines. The rating decision shows that the DVA initially awarded the 20 percent disability rating for LBP based on surgical repair, with fusion of the L4-L5 site which had not been performed when the FPEB awarded the 10 percent DoD rating. It also based this rating on the applicant's range of motion at the time of examination. They also noted that there was a likelihood of improvement, so the assigned evaluation was not considered permanent and was subject to a future review examination. On 19 Mar 09, the DVA issued another rating decision increasing the rating for LBP from 20 percent to 40 percent based on an appeal submitted in Mar 08 (almost a year after their initial award and almost three years after separation from the Air Force). This rating increase was due in part to an updated DVA examination on 13 Aug 08 (over three years after separation) in which the member reported constant LBP and decreased range of motion was observed. This rating decision also service-connected her migraine condition but assigned a 0 percent disability rating. It's noted in the applicant's DVA records that she has submitted several supplemental claims throughout the years but the DVA has continued the 0 percent disability rating for migraines. The most recent DVA rating decision dated 23 Mar 22 shows that although this condition has been service-connected since the Mar 09 decision, it is still rated at 0 percent. If the member would have processed under the current Integrated DES, in which the PEB applies the disability ratings provided by the DVA, she would have received 0 percent versus the 10 percent awarded by the FPEB for migraines and would have likely only received the a 10 percent rating for the LBP condition since the DVA exams would have been conducted prior to her surgery. Therefore there would be no change to her final DES disposition and would have still resulted in DWSP at a lower 10 percent.

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.

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 5 Jul 22 for comment (Exhibit D), but has received no response.

FINDINGS AND CONCLUSION

AFBCMR Docket Number BC-2022-00860

CUI//SP-MIL/SP-PRVCY

CUI//SP-MIL/SP-PRVCY

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 AFPC/DPFDD and finds a preponderance of the evidence does not substantiate the applicant’s contentions. Specifically, the Board did not find any error or injustice in the processing of her disability case. The Board took note of the applicant’s disability ratings from the DVA but did not find this evidence compelling to warrant relief. 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 the “snapshot” time of separation and not based on post-service progression of disease or injury to which the DVA can offer compensation. Furthermore, the Board 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. The applicant retains the right to request reconsideration of this decision. If the applicant can provide medical documentation regarding her spine surgery and any medical examinations that include lumbar range of motion (ROM) prior to separation and evidence that the frequent migraines were prostrating, the Board would reconsider her request.

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-2022-00860 in Executive Session on 26 Oct 22:

 Panel Chair
 Panel Member

 Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 12 Mar 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.

AFBCMR Docket Number BC-2022-00860

CUI//SP-MIL/SP-PRVCY

CUI//SP-MIL/SP-PRVCY

Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 1 Jul 22.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 5 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.

2/14/2023

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Board Operations Manager, AFBCMR
Signed by: USAF