



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01381

Work-Product

COUNSEL:

Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His medical disability retirement for his post-traumatic stress disorder (PTSD), effective 13 Sep 04 be rescinded.
2. He be granted a 20-year service retirement as of 2 Jan 05.
3. In the alternative, his compensation for his disability be increased to 75 percent.
4. His condition be designated as combat related for the purpose of combat related compensation (ADMINISTRATIVELY CORRECTED).

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends he was improperly forced into a medical evaluation board (MEB) because his condition prevented him from a permanent change of station (PCS) before reaching his 20-year retirement. He was placed on the temporary disability retired list (TDRL) three months before reaching 20 years of service and against his commander's wishes.

His MEB was completed in seven months, and he was kicked out just before completing 20 years for retirement. He received a 30 percent disability rating; however, due to a class action lawsuit, his rating was increased to 50 percent. However, his Department of Veterans Affairs (DVA) rating was 70 percent for his PTSD. As a result of the errors, he was improperly separated without allowing him the time for his symptoms to stabilize and it was done while knowing he was only a few months shy of his 20-year retirement.

In 2004, he was facing a PCS assignment to [Work-Pr...] while he was going through a stressful divorce proceeding. Despite having a non-deployable profile, he was told his PCS would include a deployment. He was profiled for partner relational problems and on 19 Feb 04, his PTSD and depression were profiled through 18 Aug 04. His profile required MEB and physical evaluation board (PEB) processing.

His command supported him declining his PCS assignment and allowing him to finish his 20-year career; however, the medical group (MDG) forced the MEB. The applicant was unduly influenced to agree to the MEB despite the lack of a continuous profile, his upcoming retirement and his command's support for him to receive his full 20-year retirement. The MEB dated 13 Apr 04 noted he would be retiring less than a year on 19 Jan 05 but recommended referral to an informal PEB (IPEB).

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Based on the presumption of fitness, issuing a non-deployment profile would not have automatically triggered the MEB and he would have been able to shift into a dwell status pending retirement. His case was handled improperly per DoDI 1332.18, *Disability Evaluation System (DES)* and AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*. His condition was not stabilized prior to being referred to the DES.

He also received a Purple Heart (PH) for wounds incurred on 25 Jun 96 . His command knew he could fulfill the remainder of his service as a value added asset to their in garrison role. The MEB also clearly erred when it stated he did not suffer his disability from a combat zone/combat related as he received the PH for wounds received at the Khobar Tower bombings. He should be awarded constructive credit necessary to reach his 20-year retirement and he be afforded his full military pension.

STATEMENT OF FACTS

The applicant is a retired Air Force technical sergeant (E-6). He was retired for physical disability.

On 21 Aug 96, the applicant was awarded the PH for wounds incurred on 25 Jun 96, as a result of action by a hostile foreign force.

On 13 Apr 04, a MEB convened and referred the applicant to the IPEB for his conditions of PTSD, Depressive Disorder Not Otherwise Specified (NOS), Malaria, Shigellosis and Recurrent Sinusitis and Occupational Problems, Problems with Primary Support Group.

On 6 May 04, the applicant's commander recommended the applicant be retained in the Air Force to reach his 20-year retirement eligibility date.

The AF Form 356, *IPEB Findings and Recommended Disposition of USAF Physical Evaluation Board (PEB)*, dated 4 Jan 06 reflects the applicant's PTSD associated with Depressive Disorder NOS, Social and Industrial Adaptability Impairment, Mild to Moderate was unfitting. The IPEB recommended the applicant be placed on the TDRL with a disability rating of 30 percent.

On 22 Jun 04, AF Form 1180, *Action on PEB Findings and Recommended Disposition*, the applicant agreed with the findings and recommended disposition of the IPEB and waived his right to a formal hearing.

On 29 Jun 04, the Secretary of the Air Force Personnel Council (SAFPC) directed the applicant be placed on the TDRL.

On 14 Sep 04, [REDACTED] *Work-Product* dated 4 Aug 04, the applicant was placed on the TDRL in the grade of E-6 with a compensable percentage for physical disability of 30 percent. He was credited with 19 years, 8 months, and 11 days of active service for retirement.

The AF Form 356 dated 4 Jan 06 indicates during a TDRL Reevaluation, the IPEB diagnosed the applicant with an unfitting condition of PTSD associated with Depressive Disorder, NOS, Social and Industrial Adaptability Impairment, Mild to Moderate. The IPEB stated his condition had improved since he was placed on the TDRL, and his condition appeared to have stabilized. The IPEB noted he was employed and had required psychiatric intervention. The IPEB found him unfit and recommended he be permanently retired with a rating of 30 percent in accordance with the Veterans Affairs Schedule for Rating Disabilities (VASRD) guidelines.

On 9 Jan 06, the applicant concurred with the recommended findings of the IPEB.

On 19 Jan 06, the Secretary of the Air Force Personnel Council (SAFPC) directed the applicant be removed from the TDRL and permanently retired.

On 6 Feb 06, [Work-Product] dated 19 Jan 06, the applicant was removed from the TDRL and retired in the grade of E-6 with a compensable percentage of 30 percent for physical disability, effective 8 Feb 06. He was credited with 19 years, 8 months, and 11 days of active service for retirement.

On 8 Dec 11, [Work-Product] amended [Work-Product] to read his compensable percentage for disability of 50 percent, effective 14 Sep 04.

Per [Work-Product] dated 22 Jun 22, the applicant's retirement order, [Work-Product] [Work-Product] dated 19 Jan 06, was amended to reflect "Yes" to show the applicant's disability was received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war; and his disability was the direct result of a combat related injury as defined in 26 U.S.C. § 104.

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

AIR FORCE EVALUATION

AFPC/DP3SA recommends denial for a length of service retirement. Per 10 U.S.C. § 8914, the applicant did not meet the parameters for a length of service retirement (20 to 30 years for regular enlisted members). There is also no legal basis for the applicant to be granted an early retirement. The applicant does not qualify for an early retirement under the Temporary Early Retirement Act (TERA) since the authority expired prior to the applicant's separation in Sep 04.

The applicant was placed on the TDRL on 14 Sep 04. On 8 Feb 06, he was removed from the TDRL and permanently retired in the grade of E-6, with 19 years, 8 months and 11 days of active military service.

The complete advisory opinion is at Exhibit C.

AFPC/DPFDC recommends denial for a length of service retirement, an early retirement or that his disability rating be changed to 75 percent. There is no evidence of an error or injustice that occurred during the disability processing removing the applicant from TDRL to retirement. AFPC/DPFDC administratively amended the applicant's order, ACD [Work-Product], awarding the applicant combat zone and combat related decision per [Work-Product].

The applicant's counsel contends there was an injustice because the applicant was retired just short of his 20-year total active federal military service (TAFMS) point. The mission of the IPEB in 2006 was to determine if the applicant was fit or unfit. The applicant's circumstances were not unique, and members were routinely separated or retired with 18 to 19 years of service at the time. Further, the Limited Assignment Status (LAS) was not used then as it is today to retain personnel in critical Air Force Specialty Code (AFSC) positions. The LAS was not used at that time to get personnel to the 20-year point as it is used today. Further, the applicant would not have been an LAS candidate based on his AFSC.

The applicant was processed through the PEB in accordance with the guidelines in place at the time. There is nothing to indicate the PEB made a bad decision by finding him unfit. On 14 Sep

04, he was placed on the TDRL with a rating of 30 percent, which clearly indicates he was not fit to remain on active duty. Due to the class action lawsuit, his rating was increased to 50 percent.

The applicant may be eligible for Combat Related Special Compensation (CRSC), a Congressionally mandated program which pays a monthly, federal income tax exempt entitlement to military retirees who are receiving DVA benefits and have been determined by their respective service to have combat related disabilities. The applicant may obtain more information and apply for CRSC through the links provided in the advisory.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 12 Jul 22 for comment (Exhibit E), and counsel replied on 10 Aug 22. Counsel does not dispute the applicant had less than 20 years required for a length of service retirement; however, counsel contends the advisory limited its analysis to whether the action was erroneous. It never addresses whether the result was an injustice.

Counsel also contends the AFPC/DPFDC advisory to deny relief shows why relief should be granted. The Air Force later recognized the injustice of their policies and fixed the issue by applying LAS liberally to ensure members would not be denied their retirement as a result of becoming medically unfit in their final year of service. The applicant's commander recommended he be permitted to remain in service until he reached eligibility for a 20 year retirement. While LAS was being conservatively applied, there was no explanation as to why the applicant's case was rushed through the DES. His MEB was rushed because his provider convinced him it was the only option to avoid being shipped overseas. His provider exceeded his authority and overstepped the bounds of appropriate medical treatment. The advisory opinion asks the Board to accept the MEB, although he was still suffering from severe mental health issues at the time.

His condition was deemed unstable resulting in his placement on the TDRL. Now all personnel who are found unfit for behavioral disorders due to traumatic stress are required to be placed on the TDRL with at least a 50 percent rating. Even if the medical staff did everything correctly, there is still an injustice as he was prevented from completing 20 years and was given no option to remedy this. His physical evaluation board liaison officer (PEBLO) or MEB counsel should have advised him that by concurring with the IPEB, he was waiving any chance for retirement. He should have been instructed to non-concur, submit a rebuttal and demand a formal board (FPEB). This would not have been frivolous as his condition was unstable. Further, his condition should have been found 70 to 75 percent disabling but was listed as only 30 percent disabling. The time it would have taken him to make his election and then complete the steps would have pushed him past the 20-year mark.

Both of the advisory opinions focus on whether the actions of the Air Force were lawful at the time they occurred but neither looks to whether the actions were appropriate or just. The Air Force used his skills and experiences for 19 years, 8 months and 11 days and rewarded him with a fraction of what he should have received and justifies the action with sentiment that was how it was done in 2004. This does not make it right, just and is certainly not equitable.

Counsel's complete response is at Exhibit F.

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 recommendations of AFPC/DP3SA and AFPC/DPFDC and finds a preponderance of the evidence does not substantiate the applicant's contentions. Based on the legal requirements established in 10 U.S.C. § 8914, the applicant did not meet the requirement for a length of service retirement. Counsel contends the applicant's MEB was rushed and he was unjustly denied the opportunity to continue serving until reaching 20 years. However, there is no evidence an error or injustice occurred during the process placing the applicant on the TDRL, removing the applicant from the TDRL and retirement with a 30 percent disability rating. Accordingly, the Board does not find it in the interest of justice to credit the applicant for a period of service he did not serve so he may be eligible for a length of service retirement. Counsel requests in the alternative his disability rating be increased to 75 percent; however, counsel is reminded the applicant's DVA service connected rating and his military impairment rating remain separate. In view of the above, the Board recommends against correcting the record. 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)*. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2022-01381 in Executive Session on 22 Feb 23 and 16 Oct 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 26 Apr 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP3SA, dated 16 Jun 22.
- Exhibit D: Advisory Opinion, AFPC/DPFDC, w/atchs, dated 22 Jun 22
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Jul 22.

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Exhibit F: Applicant's Response, dated 10 Aug 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.

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Board Operations Manager, AFBCMR
Signed by: USAF

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