



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-2022-01533

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. He be given a medical retirement and compensation backdated to 1 Dec 10.
2. His initial line of duty determination (LODD) of existed prior to service (EPTS), not in the line of duty (NILOD) be corrected to in the line of duty (ILOD), service aggravated.
3. His Department of Veterans Affairs (DVA) disability rating be backdated to 1 Dec 10 and be rated at 100 percent (**No decision needed, outside the Board's purview**).
4. His Office of Personnel Management (OPM) medical retirement be adjusted to 40 percent (**No decision needed, outside the Board's purview**); or in the alternative, he be promoted to chief master sergeant by the Air Force to compensate for the loss of pay.

APPLICANT'S CONTENTIONS

The decision by the Secretary of the Air Force Medical Review Board (SAF/MRBP) concurring with the Physical Evaluation Board (PEB) findings is inconsistent with the medical evidence. Medical evidence shows he damaged his spine to an unfit level during his active duty tour in *Work-Product* from 2009 to 2010. He should have been discharged in 2010 due to this injury under the eight-year rule with 100 percent DVA disability rating versus 70 percent. Instead, he was denied medical care until his spine could no longer be improved and was medically discharged in 2019. He paid out-of-pocket for his medical care until 2017 when he was awarded disability pay by the DVA. Under the eight-year rule, his condition was service aggravated. His initial LODD of EPTS should have been found to have been service aggravated. He has filed several complaints to include congressional complaints, to get this corrected.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force Reserve senior master sergeant (E-8) awaiting retired pay at age 60.

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Controlled by: SAF/MRB
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On 27 Apr 17, ARPC/DPTTS determined the applicant was medically disqualified for continued military duty, being diagnosed with other intervertebral disc degeneration, thoracic region myalgia. A review of the records revealed no LODD was made or was being processed with a positive determination.

On 5 May 17, the applicant acknowledged his non-duty related, medical disqualification case would be forwarded to the PEB for a fitness determination only and not to determine his entitlement to disability processing.

On 7 Dec 18, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of other intervertebral disc degeneration and chronic myalgia with a recommendation of "Unfit." His conditions were found to not have incurred while entitled to receive basic pay and not in the line of duty or proximate result of performing duty.

On 3 Jan 19, the applicant elected to have his case referred to the Formal PEB solely for a fitness determination.

On 6 Feb 19, AF Form 356, *Formal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of other intervertebral disc degeneration and chronic myalgia with a recommendation of "Unfit." His conditions were found to not have incurred while entitled to receive basic pay and not in the line of duty or proximate result of performing duty. The applicant contended his injuries were prior service impairments which were permanently aggravated by his military service and requested his injuries be found ILOD and his case be returned to his unit for proper ILOD and Integrated Disability Evaluation System (IDES) processing. However, the Board found no compelling evidence to return the case for a new LODD.

On 8 Feb 19, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings of the board and requested his case be referred to SAFPC. His Office of Airmen's Counsel (OAC) contended his cervical and lumbar disc disease should have been found ILOD because his injuries were service aggravated while he was on active duty orders.

On 23 May 19, on behalf of the Secretary of the Air Force (SAF), the Air Force Personnel Board (AFPB) concurred with the determination of the prior PEBs and found the applicant unfit for continued military service and determined his cervical/lumbar conditions were found NILOD nor were they aggravated by military service. The board determined his condition was NILOD due to service aggravation because the condition must be permanently worsened beyond the natural progression due to military duty and found no reported permanent injury to his back from military service. The Board noted there was a paucity of medical documentation concerning any cervical spine complaints after his surgery in 2007, which took place when he was not in a military status. Furthermore, the board determined his condition was not found to be ILOD due to a prior service condition (PSC). PSC requirements are that an illness, injury or disease incurred or aggravated during one period of active service in any of the Armed Forces that recurs, is aggravated or

otherwise causes the member to become unfit, should be considered ILOD, unless there is evidence of an intervening event. He had multiple surgeries, while not in a duty status, which are considered intervening events. Finally, the board determined he did not meet the requirements for the eight-year rule since he was not on orders greater than 30 days when his back and neck condition became unfitting in 2015. His Point Credit Accounting and Reporting System (PCARS) showed he had not been on active duty orders greater than 30 days since 2011.

Dated 4 Sep 19, Reserve Order Work-Product indicates the applicant was relieved from assignment with the Air Force Reserve and placed on the Reserve Retired List, effective 23 Sep 19.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits E and H.

APPLICABLE AUTHORITY/GUIDANCE

Title 10 U.S.C. Section 1207a, *Members with over eight years of active service: eligibility for disability retirement for pre-existing conditions.*

Paragraph (a) In the case of a member described in subsection (b) who would be covered by section 1201, 1202, or 1203 of this title but for the fact that the member's disability is determined to have been incurred before the member became entitled to basic pay in the member's current period of active duty, the disability shall be deemed to have been incurred while the member was entitled to basic pay and shall be so considered for purposes of determining whether the disability was incurred in the line of duty.

Paragraph (b) A member described in subsection (a) is a member with at least eight years of active service.

AIR FORCE EVALUATION

AFRC/SGP recommends denying the application finding no evidence of an error or injustice. The applicant's cervical and lumbar conditions were deemed NILOD after appropriate LOD consideration and appeal in 2010. He was found unfit for continued military service due primarily to the cervical and lumbar conditions, leading to a non-duty Disability Evaluation System (DES) case processing. On 23 May 19, SAF/MRBP summarized the medico-legal facts of the case which led to the determination the applicant was unfit for continued military service and reiterated his cervical and lumbar conditions were not considered NILOD. Upon review of all the attachments the applicant submitted with his application, there is no error or injustice noted in the SAF/MRBP analysis or conclusion rendering the decision made, still valid.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 10 Nov 22 for comment (Exhibit F), and the applicant replied on 7 Dec 22. In his response, the applicant contends the AFRC/SG doctor did not look at the medical evidence he submitted to support his claim of a service-aggravated spinal injury due to the eight-year rule. Per Title 37 U.S.C. Section 204, AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, and AFRCI 36-3004, *Incapacitation Pay and Management of Reservist Continued on Active Duty Orders*, he should have been kept on extended active-duty orders in 2010 until his condition could no longer be improved. By law, he did not receive the medical care he was entitled to. To support his claim, the applicant submitted a statement of events outlining the progression of his injury, a photograph of his scars, email correspondence relating to his case, memorandums for record attesting to his injury, and various medical documentation.

The applicant's complete response is at Exhibit G.

ADDITIONAL AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends denying the applicant's request for a medical retirement and a LODD of service aggravation for his cervical and lumbar conditions. The Medical Advisor remains in concurrence with the latest findings from the SAF Personnel Board. The applicant's low back pain, although frequently treated, did not interfere with the performance of his Reserve military duties for years past his deployment. The known natural progression of the degenerative condition coupled with separate encounters of worsening symptoms would not liken to "permanent worsening" as necessary for service aggravation. The burden of proof is placed on the applicant to submit evidence to support his contentions/request. The additional evidence he did submit was assessed to not support his request for a favorable LODD or of service aggravation and was insufficient to demonstrate the existence of an error or injustice.

Degenerative disc disease (DDD) represents a wide category of back pain resulting from or associated with the degeneration of intervertebral discs. It involves a process where the intervertebral discs lose height and hydration. When this occurs, the discs are unable to fulfill their primary functions of cushioning and providing mobility between the bony vertebrae. Back pain associated with DDD is frequently caused by simple wear and tear as part of the general ageing process during which the intervertebral discs dehydrate, lose elasticity, and collapse. Most commonly it appears in the neck and low back. Despite its name, DDD is not so much of a disease, but a natural occurrence that comes with aging. In most people, spinal discs degenerate over time. By the age of 35, approximately 30 percent of people will show evidence of disc degeneration at one or more spinal levels. By the age of 60, more than 90 percent of people will show evidence of some disc degeneration. Degeneration itself is normal and does not necessarily cause pain. Painless degeneration is just called degeneration. The term DDD describes disc degeneration which causes pain and other symptoms.

As gathered from numerous e-mail correspondence as well as the requested action, the applicant's emphasis in this case has been to reveal a worsening of his pre-existing spinal condition (showing

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disc compression) which he states happened during his active duty tour; especially while deployed in 2009 and 2010. The applicant's claimed cited proof of such worsening was presented by comparison, radiographs pre-and post-deployment. Nowhere in the casefile did the Medical Advisor find any sort of lower spine x-rays which were considered normal in vertebral structure and unaltered (arthritis-free) integrity. The times the applicant was seen for back pain in the 1980's revealed abnormal findings consistent with surrounding muscles and not the bony spinal components; hence his diagnosis of a low back strain (nearby muscle or tissue injury). All radiographic evidence in this case as cited above is/was in one form or another a component of degenerative bony disease...osteoarthritis, spurring, osteophytes, spondylosis, stenosis, osteochondrosis, and facet arthropathy. The radiographic evidence both before and after deployment remained with degenerative findings about the spinal vertebra and discs. As a matter of fact, the pre-deployment and pre-surgery magnetic resonance imaging (MRI) appeared to be worse than the first post-deployment scan by having three levels of actual disc herniations: a finding not seen to the same degree after his deployment. Post-deployment only revealed the expected progression of osteoarthritic degeneration.

In the chronological summary of testimony and evidence, presumed to be authored by counsel, it was cited the applicant's prior lumbar spine surgery with artificial disc implants (ADI) would predispose the applicant for further and accelerated degenerative changes at the remaining (non-ADI) disc levels; no literature citation was listed. However, according to a meta-analysis study total disc replacement versus fusion for lumbar degenerative diseases, a meta-analysis of randomized controlled trials, the following is cited, "Compared to lumbar fusion, total lumbar disc replacement significantly improved patient satisfaction, overall success, reoperation rate, reduced operation time, shortened duration of hospitalization, and decreased post-surgical complications." Additionally, the long-term outcome studies also revealed disc replacement reduces the chances of the symptomatic adjacent segment degeneration by more than 50 percent when compared to fusion. In other words, such prior surgical disc implants may be considered protective in decreasing the typical aging degeneration of the spine. The sole visit while deployed on 19 Feb 10 for a back issue was diagnosed as Lumbago. Lumbago is the general term simply referring to lower back pain (LBP), and the two terms are often used interchangeably. The physical examination (PE) on that date revealed tenderness on the left side of his low back (not on the actual bony vertebra/spine). Such physical findings being off the center of the spine with a known mechanism of injury being an act of muscle use (lifting a 70-pound box) is medically consistent with a muscle injury; a paraspinal muscle strain and not an injury to the degenerated vertebra spine itself.

The Medical Advisor concurs with past boards in that the radiographic imaging provided clear and convincing evidence the applicant's DDD was present prior to his deployment and became unfitting years after his re-deployment. The known long-term and slow progressive nature of the degenerative low back condition provides near exclusive evidence it was not incurred while in a duty status and the acute muscular strain, diagnostically labeled as lumbago while deployed is not medically consistent or plausible to permanently aggravate his DDD.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 17 Mar 23 for comment (Exhibit I), and the applicant replied on 16 Apr 23. In his response, the applicant contends the advisory correctly identifies he had sufficient active duty time to qualify for the eight-year rule; however, the Medical Advisor does not actually review any of his radiologist images nor did he account for the neglect during his medical appointment in Jan 09. The evidence he presented from doctors who examined him show service -aggravation of the spine. His spine damage could not have occurred while he was seated in his office or as a result of physical therapy on his left shoulder, this caused a flare-up of his condition. He should have been kept on military orders and provided medical care until his spine improved per 37 U.S.C 204. Furthermore, the advisory does not mention his physical profile where he could not run or perform sit-ups due to his neck and back pain after his active duty tour in 2009-2010. His spine permanently worsened while he was on this active duty tour. He should have been medically retired with a 100 percent DVA disability under the eight-year rule per 10 U.S.C. Section 1207a.

To further support his request, the applicant submitted DVA medical documentation, medical documentation of his injuries, a memorial ceremony service program, email correspondence, his DVA disability ratings letter, and a copy of his informal line of duty determination.

The applicant's complete response is at Exhibit J.

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 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. The mere existence of a medical diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. Specifically, the Board finds the applicant's military duties were not degraded due to his medical condition following his deployment and did not become unfitting until several years later nor did they find his acute muscular strain, diagnostically labeled as lumbago warranted MEDCON orders following his deployment. They find this injury to be more in line with a muscle strain and not an injury to the degenerated vertebra spine. Furthermore, the Board does not find the applicant's intervertebral disc degeneration and chronic myalgia was service aggravated above and beyond natural progression due to his military duties. Additionally, the Board finds the applicant is not eligible under eight-year rule since he was not on active duty orders when his back and neck condition became unfitting in 2015. Furthermore, based on the recommendation from the AFRC/SGP advisory, the Board finds no error or injustice occurred during the applicant's processing of his DES case. As for the applicant's request to increase his DVA disability rating and his OPM disability retirement rating, this is outside the Board's purview. The applicant must appeal these decisions to the appropriate agencies. As for his request for promotion to chief master sergeant, the Board finds no compelling reason to

grant this request. Again, the decision to increase his OPM disability retirement pay is outside the Board's prevue; because of this, the Board would not grant a promotion to the applicant to offset this loss of pay. Therefore, the Board 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 evidence did not demonstrate material error or injustice, 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-2022-01533 in Executive Session on 26 Apr 23 and 21 Aug 23:

Work-Product [Redacted] Panel Chair
[Redacted], Panel Member
Work-Product [Redacted] Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 18 May 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Non-Viable Letter, SAF/MRBC to Applicant, dated 2 Jun 22.
- Exhibit D: New Application, DD Form 149, w/atchs, dated 2 Jun 22.
- Exhibit E: Advisory Opinion, AFRC/SGP, dated 25 Oct 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 10 Nov 22.
- Exhibit G: Applicant's Response, w/atchs, dated 7 Dec 22.
- Exhibit H: Advisory Opinion, AFBCMR Medical Advisor, dated 12 Mar 23.
- Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Mar 23.
- Exhibit J: Applicant's Response, w/atchs, dated 16 Apr 23.

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.

1/1/2024

Work-Product [Redacted] _____
Board Operations Manager, AFBCMR
Signed by: *Work-Product* [Redacted]