

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01776

XXXXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He be given a medical retirement.

APPLICANT'S CONTENTIONS

The Informal Physical Evaluation Board (IPEB) erred in its 23 May 96 decision that he be found fit and returned to duty. His kidney condition was a disqualifying condition under medical retention standards established in DoDI 6130.03, *Medical Standards for Military Service: Retention*. Furthermore, he rebuts the presumption of fitness relied upon by the IPEB and that his condition was congenital. He should have been medically retired with a disability rating of at least 30 percent with his condition being service-aggravated. He had no kidney issues when he joined the military, he incurred his renal condition while performing his military duties. His kidney disease posed a medical risk; were he to continue on active duty, it would have placed unreasonable requirements on the military.

To support his claim, the applicant submitted his medical records and his Department of Veterans Affairs (DVA) disability rating showing he was rated at 30 percent disabled for his service-connected medical condition of renal insufficiency with post-operative bladder neck obstruction and history of hypertension dated a few months post-discharge. He also submitted various excerpts from his military records to support his claim.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 23 May 96, AF IMT 618, *Medical Board Report*, provided by the applicant indicates he was referred to the IPEB for renal insufficiency-etiology unknown, urologic abnormalities, mild hypertension, and gout.

On 14 Jun 96, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, provided by the applicant indicates his medical conditions of renal insufficiency-etiology unknown, associated with multiple congenital urologic malformations and hypertension, and gout were found as Category II conditions, which can be unfitting but are not currently unfitting. The Board found him fit with a recommendation of "Return to Duty."

On 28 Jun 96, a letter provided by the applicant from the MEB coordinator indicates his case was referred to Medical Standards who concurred with the recommendation of the IPEB. They returned the applicant to duty without limitations and removed his medical hold.

On 12 Jul 96, 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 4 years, 3 months, and 27 days of active duty. He was discharged, with a narrative reason for separation of "Completion of Required Active Service."

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 indication that an error or injustice occurred during the Disability Evaluation System (DES) processing. The applicant did not qualify for or overcome the presumption of fitness and the IPEB followed the proper procedures at that time for its return to duty decision.

A complete PEB case file was not available for this review; however, documentation provided by the applicant and applicable instructions were used in preparation of this advisory. According to the MEB Narrative Summary (NARSUM) dated 6 May 96 provided by the applicant, he was first diagnosed with significantly elevated serum BUN (Blood Urea Nitrogen) and creatinine during his routine separation physical in Feb 96 and was subsequently diagnosed with renal insufficiency. He had an approved regular separation date of 15 Mar 96, which was cancelled to allow for further testing and MEB processing. The NARSUM did not identify any significant medical history of this condition and the condition did not interfere with his ability to perform his assigned duties or warrant duty restrictions prior to its discovery during the separation physical. There was only one mention of an emergency room visit on 5 Apr 96, due to a high fever and right flank pain due to a probable infected nephrostomy tube which had previously been inserted into the right kidney. He was administered Intravenous antibiotics and the nephrostomy tube was removed without further complications. The NARSUM did, however, show that he had been seen periodically by medical providers with complaints of knee, ankle and foot pain and had been treated with huge amounts of Motrin, Indocin, Naprosyn, Clinoril and other nonsteroidal anti-inflammatory agents for years. He also denied any past medical history of renal disease or kidney problems. A nuclear medicine renal scan conducted on 11 Feb 96 showed a very small left kidney with 27 percent of renal function and the remaining 73 percent of existing renal function present in the right kidney. The final diagnoses and recommendations listed: Renal insufficiency-etiology unknown. Most likely due to congenital urologic malformations with probable chronic urinary reflux resulting in scarred hypotrophic left kidney with minimal remaining function and right hydronephrosis with evident damage to the right kidney as well. The pertinence of previous heavy use of nonsteroidals was unclear. The NARSUM also indicated that he was likely to eventually progress to end stage renal disease and would require dialytic support or renal transplantation.

On 14 Jun 96, the IPEB recommended he be returned to duty. Block 13 of the AF Form 356 was marked NA (not applicable) for overcoming the presumption of fitness. Additionally Block 15 details the IPEB's rationale for their decision which reads "Member's renal condition was discovered during the routine separation physical. Numerous labs were done which suggested that condition was likely due to congenital urologic formations. Member's condition prior to separation physical had not presented any functional impairment. IPEB opines member is fit."

Under Title 10, U.S.C., the Physical Evaluation Board (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.

While the applicant's counsel contends that the IPEB improperly applied the presumption of fitness during DES processing it is important to clarify how the presumption of fitness is applied. During DES processing, the IPEB had to follow procedures as outlined in AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, dated 14 Jun 94 which does not make mention of "Presumption of Fitness." However, a copy of the current AFI 36-3212, dated 15 Jul 19 and DoDI 1332.18, *Disability Evaluation System*, dated 5 Aug 14 are provided. Presumption of fitness applies to Service members with an approved retirement date or military career termination point (e.g., high year of tenure, mandatory separation date, etc.) at the time of DES referral. The member is presumed fit for the remainder of their service. Service members may overcome the presumption by presenting a preponderance of evidence to the PEB that they are unfit for military service. In the applicant's case, the presumption of fitness did not apply because he was not retirement eligible and was not separating due to high year of tenure; he only had four years of service.

Additionally, policies and procedures have changed over the years since the applicant processed through the DES. Per AFI 36-3212, dated 14 Jun 94 (in affect at the time of DES processing), paragraph 3.30, the PEB had to provide specific rationale explaining an unfit determination on a member who was within 12 months of a scheduled non-disability separation or retirement. Furthermore, per paragraph 3.36, the IPEB had to follow additional processing procedures for its "Fit – Return to Duty" decision. At that time, the AF Form 618 had to be stamped and signed by the IPEB president or board member and routed to the designated assistant to the Director, Air Force Personnel Council (AFPC) [now known as the Secretary of the Air Force Personnel Council (SAFPC)] for review and approval prior to completion of the AF Form 356. Records provided by the applicant show that these procedures were followed when the "Fit – Return to Duty" decision was made. Additionally, the applicant does not provide any documentation to show that a special review would have been warranted per AFI 36-3212, paragraph 3.37. Upon

completion of DES processing and return to duty, the applicant's normal separation was reinstated and he was separated on 12 Jul 96 for completion of required active service.

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 26 Sep 22 for comment (Exhibit D), and the applicant replied on 25 Oct 22. In his response, the applicant's counsel disagrees with the advisory opinion that asserts the applicant did not qualify for the presumption of fitness because the AFI in effect at the time did not include or mention a "Presumption of Fitness." In making this assertion, the advisory opinion cites the 1994 AFI 36-3212 that the IPEB relied upon in reaching its conclusion that the applicant was fit for duty. Moreover, the advisory opinion argues that regardless of whether the presumption was applied, the applicant was fit for duty at the time of discharge because his condition allegedly presented no functional impairment up until his separation physical and did not interfere with his ability to perform his duties.

The opinion suggests that the applicant was not presumed fit because the regulations in effect at the time of his discharge did not include a presumption of fitness. This assertion, however, is unfounded. The advisory opinion relies on an improper application of the "Presumption of Fitness" standard. Contrary to the assertion made in the advisory opinion, the 1994 version of AFI 36-3212 does contain a section on the "Presumption of Fitness" at paragraph 3.17. The applicant would have overcome the standard in the 1994 AFI 36-3212 if properly applied to the facts of his case. He overcame the presumption of fitness and was unfit at the time of discharge. Furthermore, under the relevant fitness standards in DoDD 1332.18, the applicant was in fact unfit for duty at the time of discharge. His condition was service-connected, occurred coincident with his time of discharge, and was not conclusively proven to be congenital. Additionally, the advisory opinion's claim that his condition did not interfere with his duties is contradicted by the evidence of his symptoms and the basic duties reasonably expected to be performed by an aircraft mechanic. He suffered from urinary frequency, hypertension, fatigue and gout which interfered with the duties that an aircraft mechanic would reasonably be expected to do, including working long hours in airfields and working in loud environments for prolonged periods of time.

Additionally, counsel requests the application be expedited due to his health and his family's immediate need for benefits. Despite undergoing two kidney transplants, his health has continued to decline. Earlier this year, his doctors informed him that his next surgery would be his last. After narrowly missing a feeding tube and hospice in September, he underwent his tenth gastrointestinal surgery. Time is therefore of the essence. Furthermore, his case is urgent because of the family's immediate need to access his medical disability retirement benefits. The award would provide his wife, with the survivor benefits and income to support his daughters after he dies.

The applicant's complete response is at Exhibit E.

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 recommendation of AFPC/DPFDD 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. The Board finds the applicant's military duties were not degraded due to his medical condition; his condition prior to his separation physical did not present any functional impairment and was congenital; therefore, he was properly returned to duty. A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. Furthermore, 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 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. Lastly, the Board noted counsel's contention that the PEB misapplied the presumption of fitness and that his condition was not congenital. However, since the applicant was scheduled for a normal separation within 12 months, the Board finds the applicant did not overcome the presumption of fitness. His condition was found through routine lab work during his separation physical and had not caused any duty restrictions prior to his discharge; therefore, he was physically able to do the duties of his office or grade. 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 (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2022-01776 in Executive Session on 25 Jan 23:

- , 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 24 May 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 19 Sep 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Sep 22.
- Exhibit E: Applicant's Response, w/atchs, dated 25 Oct 22.

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.

X

Board Operations Manager, AFBCMR