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**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

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RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02355

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COUNSEL: Work-Product

HEARING REQUESTED: YES

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APPLICANT'S REQUEST

The findings of the Formal Physical Evaluation Board (FPEB) be nullified, and he be retained instead of being medically retired.

APPLICANT'S CONTENTIONS

He believes that the findings of the FPEB be nullified for multiple reasons:

The FPEB insufficiently justified their reasoning on the AF Form 356, *Informal Physical Evaluation Board (IPEB), Findings and Recommended Disposition of USAF Physical Evaluation Board*, dated 12 May 22, signed on 5 May 22, which contained multiple errors, inaccuracies and falsely reported his condition and ability to perform within his Air Force Specialty Code (AFSC). The form was false when it was received by his Physical Evaluation Board Liaison Officer (PEBLO) on 16 May 22, as it did not capture evidence presented during his FPEB hearing nor the exhibits brought forward prior to the hearing. A Memorandum for Record (MFR), provided by his specialist expanded on items addressed within the AF Form 356 and he has completed and passed a full component Physical Fitness Assessment (PFA).

The Acting Assistant Secretary for Manpower and Reserve Affairs, SAF/MR, signed a memorandum for AFPC/DPFDD on 2 May 22, in which he concurred with the Formal Physical Evaluation Board's (FPEB) recommendation for permanent medical retirement. However, it does not seem correct that the SAF/MR signed the MFR on 2 May 22 when the FPEB president didn't sign the AF Form 356 until 5 May 22 and the form itself was not completed until 12 May 22.

On 16 May 22, he appealed the FPEB decision to AFPC which was denied by the same individual who signed his retirement orders. This same individual also denied the *Request to Recall a Case from the FPEB*, which was submitted by his squadron commander. This denial was an unjust use of power, or at the very least, a conflict of interest as not only did they deny the request to Recall, which contained his specialist's MFR, Commander's Impact Statement, and Physical Fitness Assessment scoresheet, within two days, but also halted his election to appeal to the Secretary of the Air Force (SECAF).

Neither he nor his Office of Disability legal counsel were notified on the disposition or movement of his case after January 2022 until May 2022 [sic]. This shows that the order of operations or standard procedures, in violation of AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, were not adhered to pertaining to communication from AFPC regarding the movement of his case from the FPEB to the SAF office resulting in him having no legal representation during the SAF/MR review process.

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Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

This case was not handled with impartiality or without bias. With precedence in mind, the condition for which he is being medically retired is considered retainable as outlined in the Department of Defense (DoD) and Air Force Medical Standards directories. In accordance with these directories, he is also able to deploy. The articulation from the FPEB uses a generic “catch all” for their final reasoning when they made their decision “<applicant’ name> Chronic Obstructive Pulmonary Disease; DVA rated as Chronic Obstructive Pulmonary Disease, Asthma, and Emphysema with Pulmonary Nodule, represents a decided medical risk to the health of the member or to the welfare/safety of other members and/or imposes unreasonable requirements on the military to maintain or protect them and is therefore incompatible with long term rigors of military service in accordance with DoDI 1332.18, Appendix 2 to Enclosure 3, paragraph 2 and unfitting.” This would be true if he had Asthma or Pulmonary Nodule or if his condition was imposing any undue hardship on the Air Force or on his fellow Airmen, but it is not. At no point in time has his condition kept him from completing any aspect of his duty requirements nor was he on any type of profile, other than the MEB assigned Assignment Limitation Code (ALC) 37, prior to starting terminal leave.

He has no limitations. There are thousand of airmen still serving with an ALC 37 due to medical conditions which are much more aggressive or adverse such as: Type 1 Diabetes; Epilepsy; TBI; HIV/AIDS; and cancers to name a few. These airmen still perform their tasks, and so can he, if given the opportunity.

Finally, if the Board gives credence to merit testimonies from his Senior Leaders, letter of recommendations from throughout his chain of command, his record, the support form Senior Enlisted Leaders from the office of the Chief Master Sergeant of the Air Force (CMSAF) on down to his Command Chief for him to be retained should be considered to correct the FPEB decision. His leaders all believe that he meets the definition of “Retain the Right Airman”. He has turned down a 60 percent disability rating from the Air Force and a 90 percent disability rating from the DVA three times in the hopes of being retained. Additionally, he has advocated to a senator, a congressman, filed a DoD/IG complaint, and attempted to appeal his case three time to SAF and he still has not given up hope that the right thing will be done and that he be allowed to continue to serve.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a Regular Air Force technical sergeant (E-6).

On 10 Nov 21, according to AF IMT 618, *Medical Board Report*, the applicant was referred to the Informal Physical Evaluation Board (IPEB) for Chronic Obstructive Pulmonary Disease (COPD).

On 9 Dec 21, according to AF Form 356, the IPEB found the applicant’s unfitting medical condition, COPD, prevents him from reasonably performing the duties of his office, grade, rank, or rating and recommended his be permanently retired with a disability rating of 60 percent in accordance with Veteran Affairs Schedule for Rating Disabilities (VASRD) guidelines

On 7 Jan 22, according to AF Form 356, signed 11 Jan 22, the FPEB found the applicant unfit for COPD and recommended permanent retirement with a 60 percent disability rating in accordance VASRD guidelines. He was found unfit due to both the medical risk associated with his COPD and the unreasonable requirements that his condition would impose on the military to maintain and protect his health.

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On 2 May 22, SAF/MR concurred with recommendation of the FPEB and directed that the applicant be Permanently Retired with a disability rating of 60 percent under the provisions of Title 10, United States Code, Section 1202.

On 30 Jun 22, according to memorandum subject "*Physical Evaluation - <applicant name>*", the Secretary of the Air Force directed that the applicant be permanently retired under the provisions of 10 USC 1201, with a compensable percentage for physical disability of 60 percent.

On 14 Jul 22, according to the memorandum for AFPC/DPFD, dated 14 Jul 22, the applicant's squadron commander submitted a *Request to Recall a Case from the FPEB*, stating that new information and/or evidence regarding the applicant's medical condition have been identified. The applicant's Medical Group Commander concurred with the request.

On 20 Jul 22, according to memorandum *Response to Case Recall Request*, AFPC/DPFD stated that the memorandum, and its' attachments, were carefully reviewed and considered; however, they do not establish that a major change to the applicant's condition has occurred and therefore denied the request.

On 16 Nov 22, according to his DD Form 214, *Certificate of Release or Discharge from Active Duty*, dated 16 Nov 22, the applicant was permanently disability retired and credited with 10 years, 1 month, and 7 days of 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/DPFDF recommends denying the applicant's request to overturn the decision of the FPEB and that he be allowed to continue to serve. The purpose of the Disability Evaluation System (DES) is to maintain a fit and vital force. Disability law and policy allows SECAF to remove from active duty those who can no longer perform the duties of their office, grade, rank, or rating and ensure fair compensation to members whose military careers are cut short due to service-incurred or service aggravated physical disability.

On 7 Jan 22, the FPEB found the applicant unfit for COPD and recommended a permanent retirement with a 60 percent disability rating in accordance with VASRD guidelines. The AF Form 356, dated 7 Jan 22 and signed 11 Jan 22, documents the FPEB's decision and justification is factually correct and contains no errors or false reports. AF Form 356, Block 12, *Remarks*, provides a full summary for the FPEB's decision.

In rendering its decision, the FPEB considered the General Criteria for Making Unfit Determinations as outlined in Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System (DES)*, Appendix 2 to Enclosure 3. These criteria state a Service member will be considered unfit when the evidence establishes that the member, due to disability, is unable to reasonably perform duties of his or her office, grade, rank, or rating. A Service member may also be considered unfit when the evidence establishes that: (1) The Service member's disability represents a decided medical risk to the health of the member or to the welfare or safety of other members: or (2) The Service member's disability imposes unreasonable requirements on the military to maintain or protect the Service member.

As documented on the AF Form 356, the FPEB justified its decision to find the applicant unfit both due to the medical risk associated with his COPD and the unreasonable requirement his

condition would impose on the military to maintain and protect his health. COPD is a chronic inflammatory lung disease that cause obstructed airflow from the lungs. Symptoms include breathing difficulty, cough, mucus (sputum) production and wheezing; there is also a risk for sudden incapacitation with exertion. While the applicant may be able to perform certain aspects of his duties, The FPEB found him unfit in accordance with DoDI 1332.18, Appendix 2 to Enclosure 3 and recommended permanent retirement due to risk associated with his COPD, the type of treatment he requires, how the treatment is administered, and the special handling requirements associated with his medication.

His COPD is due to an inherited alpha-1 antitrypsin deficiency and has required weekly intravenous (IV) infusions of Prolastin-C since early 2021 to preserve his already compromised lung function. This medication regimen requires administration by a trained medical professional and specialized handling (refrigeration) which cannot be assured in a deployed setting. These issues contributed to the mobility restrictions which were established for the applicant. When combined with the physical nature of his AFSC, Security Forces, and the historically high deployment rate for his career field, these factors all led to the FPEB's decision to find the applicant unfit. While he provided a memorandum of support from his military pulmonologist dated 20 Dec 21, the memo indicated that his COPD was stable but will require on-going treatment. It must be highlighted and emphasized that the applicant's case file, and medical records, were independently reviewed by at least seven physicians; Medical Evaluation Board, AFPC Medical Retention Standards review, IPEB, FPEB, and SAF/MR appeal process, with each medical provider independently concluding that the applicant's COPD is an unfitting condition. Although he states that he has passed a full component Air Force Fitness Assessment, this accomplishment in and of itself does not render a service member fit for duty; it is only one of several factors the FPEB considers in determining fitness for duty. Furthermore, at the time of his FPEB hearing, he had only recently been cleared to perform a full-component Air Force Fitness Assessment (at sea level) but he admitted to the FPEB that he was unable to achieve the minimum passing aerobic score at the time, which the Board factored into its decision.

The applicant asserts there are alleged errors and inaccuracies on the AF Form 356. First, he alleges the AF Form 356 "did not capture evidence presented during my FPEB hearing nor the exhibits brought forward prior to the hearing." AF Form 356, Block 12, under the heading, *Justification*, the second sentence highlights and addresses some of his testimony, "He testified to experiencing recurrent episodes of bronchitis treated with "Mucinex and steroids" before medical evaluation uncovered an alpha-1 antitrypsin (AAT) deficiency, SS phenotype in Jan 2020." On page 2, still under the heading *Justification*, it states "The Board carefully considered the squadron commander's testimony, his recommendation for retention (supported in writing by both the O-7 Wing Commander and AFMC/CC)..." Last, AF Form 356, Item 13, *Exhibits Attached*, lists Exhibits A-Q, which account for the contention and all statements provided on the applicant's behalf. The references to the applicant's and his squadron commander's testimony, as well as by name acknowledgement of the two most prominent letters of support (MAJCOM/CC and WG/CC), plus the listing of all memos in support in Item 13 refute his first allegation regarding his AF Form 356. As a matter of practice and due to time constraints, the FPEB cannot address each memo provided on a service member's behalf, but the Board reads them all and takes them into consideration when making its decision.

The applicant further alleges lack of due process with his case. Of note, he has filed Congressional complaints, an Inspector General (IG) appeal, an appeal to SAF/MR, and has also engaged the support of several influential high-ranking Air Force members to support his quest to return to duty. In each case, the FPEB has unwaveringly stood by its decision to find the applicant unfit and recommend permanent retirement. The reply to his IG complaint specifically addresses his concern regarding due process with his SAF appeal and to present new evidence for consideration,

and it was thoroughly explained to him “there is no option to counter, rebut, or add new information to the case as SAF/MR is reviewing with [sic] the same information the FPEB used in their deliberations.” Per SAF/MR policy guidelines, following internal coordination with SAF/GC, as well as AF/A1 and AF/SG, on 2 May 22, SAF/MR concurred with the FPEB decision. The applicant’s squadron commander and servicing medical treatment facility (MTF) initiated a recall request claiming a major change in his condition had occurred; the recall request was disapproved by the appeal authority (AFPC/DPCD). Next, the applicant is of the belief “the FPEB Board President didn’t sign his recommendation (AF Form 356) until 5 May 22 and the 356 was not completed until 12 May 22.” This May 2022 AF Form 356, which contains the same content as the January 2022 AF Form 356, dated 7 Jan 22 and signed 11 Jan 22, should not have been generated and has since been rescinded. This was explained to the applicant’s Air Force appointed disability counsel. The AF Form 356, signed 11 Jan 22 is the official FPEB AF Form 356 as it pertains to the applicant’s hearing, rendering moot this insinuation of a conspiracy or foul play surrounding his case. All other assertions made by him regarding impropriety with his case – lack of representation at SAF/MR appeal, lack of opportunity for an appeal to SAF/PC, and perceived impartiality are addressed in the reply to the IG complaint.

The applicant’s desire to continue his Air Force career is commendable. However, to reiterate, his COPD requires treatment with weekly IV infusions necessary to slow disease progression. This renders him non-deployable worldwide and creates inequities should other service members have to deploy in his place, potentially for the next 10+ years. Additionally, his medication requires special handling (refrigeration), which may not be available at all downrange locations. His medication must be administered every week by a licensed medical professional, which creates a burden on the healthcare system and may not always be available or supportable at remote and deployed locations. The verbiage used to capture the Board’s final decision is in line with and deliberately extracted from DoDI 1332.18 in an effort to highlight that the FPEB’s decisions are in line with prevailing DES guidelines. Each service member who enters the DES is a unique case and it weighed on their own merits and factors. One simply cannot compare their medical condition to those other service members and conclude, in a vacuum and without all pertinent facts, that the Air Force has retained someone with a more serious health condition, and therefore, I should also be retained.

The Board’s decision was consistent with the opinion of a least seven other military physicians from the base level (MEB), HQ AFPC, AF/SG, and up to SAF/MR where at each level the case file was reviewed and decided independent of each other. The Board has maintained its position in the face of inquiries from Congress, Air Force senior leaders, the IG, and others.

Finally, there is no objective evidence that an error or injustice occurred throughout the applicant’s DES processing. His COPD renders him unfit for military service; he received a full and fair FPEB hearing which lasted over two hours and 30 minutes (which, is far above the average hearing length), his AF Form 356, dated 7 Jan 22 and signed 11 Jan 22, is accurate, and lastly, no policies or procedures were violated in the handling of his case.

Regarding the vast support he received, the FPEB determined that the applicant is unfit *despite* advocacy from both his MAJCOM and Wing Commander to retain him, which is an unusual occurrence for the Board and underscores the gravity of his medical condition.

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 31 Oct 22 for comment (Exhibit D), but has received no response.

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 AFPC/DPFDF and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The applicant asserts the condition for which he was being medically retired is considered retainable, as outlined in the Department of Defense (DoD) and Air Force Medical Standards directories, and in accordance with these directories, he is also able to deploy. However, the Formal Physical Evaluation Board (FPEB) determined otherwise. The Board finds that the FPEB properly considered the “General Criteria for Making Unfit Determinations” in making their determination. These criteria state that a member will be considered unfit when the evidence establishes the member, due to disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. Additionally, a service member may also be considered unfit when the evidence established the member’s disability imposes unreasonable requirements on the military to maintain or protect the Service member. With respect to the applicant’s assertion there are alleged errors and inaccuracies on the AF Form 356 along with an alleged lack of due process and refers to an AF Form 356, dated May 22 as evidentiary. Upon review of both the AF Forms 356, the Board accepts the FPEB explanation the May 22 AF Form 356 was erroneously generated and was rescinded as was explained to both the applicant and his Air Force appointed disability counsel. Although the Board commends the applicant’s desire to continue his Air Force career, as evidenced by his leadership’s advocacy, the Board determined the FPEB was correct in its decision to find the applicant unfit due to both the medical risk associated with his COPD and the unreasonable requirement his condition would impose on the military to maintain and protect his health and that there is no objective evidence that an error or injustice occurred throughout the applicant’s DES processing. 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 Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-02355 in Executive Session on 21 Dec 22:

Work-Product	Panel Chair
Work-Product	Panel Member
Work-Product	Panel Member

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

Exhibit A: Application, DD Form 149, w/atch, dated 2 Sep 22.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, AFPC/DPFDF, w/atchs, dated 25 Oct 22.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 31 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.

7/14/2023

X 

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Board Operations Manager, AFBCMR

Signed by: USAF