



Work-Product

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02377

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His medical separation, disability with severance pay (DWSP) be changed to a medical retirement.

APPLICANT'S CONTENTIONS

His Disability Evaluation System (DES) rating for his right foot injury should be changed to 30 percent due to a rating increase by the Department of Veterans Affairs (DVA). This change will allow him to receive the necessary medical treatment for his leg. His foot was injured while deployed to South Korea and was not healed before his discharge. His foot was amputated on 13 Jan 21, after his discharge. He has incurred financial loss due to the medically necessary amputation. He is now unable to ensure the procedure's success, nor support himself and his family, because of the consequences of his erroneous and unjust discharge by the Air Force. His 10 percent rating was based on an incomplete and deficient set of medical records related to his right foot, which had already been the subject of two major surgeries while he was in the Air Force and whose condition was aggravated during an incident while he was deployed to the Middle East. On 17 Mar 17, the DVA proposed assigning him a combined disability rating of 80 percent approximately five months before his discharge, of which 60 percent was related to his right foot and ankle. He did not appeal the Physical Evaluation Board's (PEB) decision as it would have prolonged his discharge and possibly make travel back to the states delayed due to his wife's pregnancy. He was mistakenly advised he could appeal the decision after his discharge.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force staff sergeant (E-5).

On 10 Feb 17, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for chronic right foot pain.

On 22 Mar 17, the DVA proposed a disability rating for his Category I unfitting medical condition of residuals with osteophytic changes, right foot status-post arthroplasty at 10 percent.

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

On 6 Apr 17, 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 chronic right foot pain, with malunion and surgical repair of cuboid bone; DVA rated as residuals with osteophytic changes, right foot status/post arthroplasty with a disability compensation rating of 10 percent with a recommendation of “DWSP.” It is noted, the Board considered all other medical conditions rated by the DVA and found these conditions were not currently unfitting for duty either separately or collectively.

On 11 Apr 17, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant agreed with the findings and recommended disposition of the board and waived his rights to a formal hearing. He also indicated he would not request a one-time reconsideration of his disability ratings for the conditions found unfit by the board.

On 28 Aug 17, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged in the grade of staff sergeant (E-5) after serving eight years, four months, and eight days of active duty. He was discharged, with a narrative reason for separation of “Disability, Severance Pay, Non-Combat (Enhanced).”

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibits C and F.

AIR FORCE EVALUATION

AFPC/DPFDD recommends denying the application finding no evidence of an error or injustice during the Integrated Disability Evaluation System (IDES) processing. During the IDES processing, the applicant did not submit a request for a one-time DVA rating reconsideration request and the DVA did not consider his supplemental claim after separation to be part of the original IDES rating decision. Upgrade of a disability rating by the DVA after separation does not warrant change to the original IDES ratings after the fact.

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.

On 6 Apr 17, the Informal PEB found him unfitting for chronic right foot pain, with malunion and surgical repair of cuboid bone; DVA rated as residuals with osteophytic changes, right foot status/post arthroplasty with a 10 percent compensable disability rating and recommended DWSP. Under the IDES the PEB must utilize the ratings assigned by the DVA during IDES processing. The DVA proposed ratings, dated 21 Mar 17, confirms this condition was rated at 10 percent. The DVA based their rating decision on “moderate symptoms.” Additionally, the DVA commented a higher evaluation of 20 percent is not warranted for foot injuries unless the evidence shows moderately severe symptoms. On 11 Apr 17, the applicant agreed with the IPEB findings and did not elect to request a one-time DVA rating reconsideration request which could have possibly resulted in a rating increase, if approved, during IDES processing. As part of his AFBCMR submission, the applicant submitted an eBenefits printout which shows the DVA increased his rating for residuals with osteophytic changes, right foot status/post arthroplasty to 30 percent effective 7 Feb 18. According to the DVA rating decision, dated 10 May 18, the DVA made the effective date of this increase 7 Feb 18 because that was the date, he filed a supplemental claim. If a supplemental claim is filed within 1 year of separation and the DVA determines a rating increase is warranted for an IDES unfitting condition due to an earlier rating decision error; they would normally make the increase effective the day after separation (original award date) and comment on that decision. This rating increase has no such additional comment.

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 13 Oct 22 for comment (Exhibit D), and the applicant replied on 10 Nov 22. In his response, the applicant’s counsel contends AFPC/DPFDD inappropriately misstated the basis of the applicant’s submission. The applicant should have received a disability rating of at least 30 percent by the Air Force because the medical condition of his right foot was misdiagnosed. The Air Force PEB and the DVA did not have complete information for its evaluation of his right foot prior to his separation from the Air Force; therefore, they were not able to diagnose the source of the pain in his right foot correctly. His diagnosis was in error as evidenced by the chronic and debilitating pain he experienced before and after his evaluation, before and after his separation from the Air Force, and until his foot was ultimately amputated. He was unfit for military duties before, at the time of, and after his evaluation. Most importantly, the advisory opinion did not dispute any factual statements documented in his application regarding his medical condition or his untenable family situation and the erroneous advice he was given by the Air Force. Contrary to the statement in the advisory opinion, his application is not a plea for increased disability payment; he has subsequently been rated by the DVA as 100 percent disabled and already receives payments for full disability. What the applicant is seeking through his request for correction of military records is eligibility to receive medical treatment for his amputated foot at military medical centers. Based on the documentation provided in his application and in this response, the applicant has clearly demonstrated he has been subjected to an error and injustice in his medical evaluation by the Air Force and the advice he was given by the Air Force representative. He respectfully requests the AFBCMR correct this error and injustice by increasing his Air Force disability rating to at least 30 percent and granting

him a medical retirement. To support his claim, the applicant provided several witness statements to support his medical assertion.

The applicant's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends granting the applicant's request for a medical retirement increasing his disability rating to 30 percent. Although there was no error found regarding the claim of a misdiagnosis by the PEB, the Medical Advisor did find the PEB's partial selection of the DVA's rating for the single foot/ankle condition did foster an injustice to the applicant by not adequately applying guidance set forth in AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, and in coordination with the DVA.

Cuboid fractures can be the result of an avulsion injury involving any ligament attachments of the cuboid bone. Such an injury is attributed to an ankle sprain because of a twisting injury of the foot. Cuboid fractures are not always recognized promptly due to the special anatomy of the foot and the difficulty in interpreting the x-ray findings. Although conventional x-rays can provide much information about the nature of a cuboid bone injury, the considerable overlap of bony structures in the foot leads to a failure regarding the depiction of occult (hidden) cuboid fractures. An occult fracture is one that does not appear well on plain film x-rays. A possible occult fracture is a suspected fracture that needs to be confirmed with other types of enhanced imaging. One scientific study found that in 17 patients with pain over the lateral aspect of the mid-foot, the plain film x-rays revealed cuboid fractures in only seven (41 percent) of them (Miller TT, Pavlov H, Gupta M, Schultz E, Greben C. *Isolated injury of the cuboid bone*. *Emerging Radiology*; 2002; 9:272-277). Computerized tomography (CT) scans will reveal a clearer picture of the tarsal metatarsal (TMT) joints as well as fracture healing progression. Delayed identification and effective treatment of cuboid type injuries may have adverse effects on the biomechanics of the foot, resulting in a host of possible compensatory foot anomalies. Specific anatomic disorders of the bone articulations with tarsal bones may lead to foot stiffness and painful arthritis as well as foot deformity (*Update and Diagnosis and Management of Cuboid Fractures*; National Library of Medicine; *World Journal of Orthopedics*; 10(2): 71-80; 18 Feb 2019).

Complex regional pain syndrome (CRPS) is a severely disabling condition that usually affects the limbs, after injury or surgery. The main symptoms of CRPS are severe pain, swelling, loss of range of motion, temperature changes, and changes in the skin. Although CRPS can occur anywhere in the body, it usually affects an arm, leg, hand, or foot. CRPS most often follows trauma, such as a fracture. Still, it can even occur after a minor injury, like a sprained ankle. The degree of pain is severe and is usually much greater than the injury would typically cause (Stanford Medicine; Division of Pain Medicine, Department of Anesthesiology; CRPS; med.stanford.edu/pain/about/chronic-pain/crps.html). Through counsel's writings, it was mentioned multiple times the PEB misdiagnosed the applicant's foot condition and cited proof of such as "...the continuing and debilitating pain in his foot before, at the time of, and after his evaluation by the Air Force PEB, before and after his separation from the Air Force, and until his right foot was amputated." From the Medical Advisor's opinion, there exists no doubt as to the

continued, although fluctuating, levels of pain the applicant experienced throughout his military service nor does doubt exist the injury to his right foot/ankle occurred as stated while on active duty; however, counsel's statement of "...he is a victim of an error and injustice because the Air Force PEB misdiagnosed his medical condition before he was discharged from the Air Force" is incorrect. The treatment provided within the confines of his military duties and orders was medically appropriate and accurate in assessing the differential diagnosis of the presenting condition. The applicant himself may have contributed to the significant worsening of his condition by being non-compliant with recommended medical treatment and advisement. Such examples include an initial 3-day delay in seeking care from the original incident, his admittance of minimizing symptoms to his primary care physician (PCP) as to proceed on the Alaskan temporary duty (TDY), and he was non-compliant with wearing the orthopedic boot at times while on TDY and not taking his medication as he was directed, all of which could have been the nidus for his rapidly worsening condition. Nonetheless, the reviewed medical records did not reveal any evidence of a misdiagnosis on the part of the PEB or within the DoD.

Per AFI 36-3212, paragraph 1.10.1, "The PEB assigns the disability rating percentage(s) provided by the DVA's Rating Agency Site for unfitting medical conditions of service members in the IDES." Additionally, under paragraph 1.10.2. it further states, "When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability, such doubt will be resolved in favor of the service member." In reviewing the final PEB Form 356, the Medical Advisor questions the 10 percent rating (coded as foot, other injuries) as taken from the DVA's rating proposal. The original PEB occurred prior to the DVA's rating determination and thus remained pending for its final impairment recommendation. The PEB correctly diagnosed and documented the multiple components of the applicant's foot/ankle condition. The DVA also captured and documented on all the same components of the applicant's foot/ankle condition and appropriately rated each one. The Medical Advisor remains unclear as to why the PEB only chose one of the three DVA conditions; all of which directly dealt with the applicant's right foot/ankle condition. It remains ambiguous as to why the PEB rated as it did. This is not a case of an impairment rating by virtue of combined effect, but rather when considering the historical facts, each one of the DVA's listed diagnoses could in and of themselves be considered separately unfitting due to continued and constant painful motion; the surgical residuals as listed, and the painful scar with the simple act of walking, prolonged standing, or simply holding of the foot and ankle for what would have been his fitness testing. The Veterans Affairs Schedule for Rating Disabilities (VASRD) code choice of 5284 is also questioned by the Medical Advisor. There exists an actual code for malunion of bones within the foot which is 5283 (tarsal, or metatarsal bones, malunion of, or nonunion of) with three impairment ratings: moderate at 10 percent, moderately severe at 20 percent and severe at 30 percent. The longstanding parameters and complications of this case coupled with an apparent abstract DVA code selection by the PEB, does bring forth a component of reasonable doubt as to the real degree of impairment and therefore, the Medical Advisor opines although the PEB correctly diagnosed the applicant's condition, their single selected DVA rating was insufficient and incorrectly rated at 10 percent. A more accurate depiction of impairment from the right foot/ankle condition in this case does rise to a maximum of 30 percent.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 29 Mar 23 for comment (Exhibit G), and the applicant replied on 5 May 23. In his response, the applicant's counsel urges the Board to accept the advisory opinion from the AFBCMR Medical Advisor which recommends granting the applicant a medical retirement at the 30 percent disability rating so he may receive the necessary rehabilitation treatment at military medical facilities. The advisory opinion correctly noted the error made in the applicant's PEB when the board selected the wrong VASRD and selected only one DVA rating when the PEB should have selected three ratings for his right foot/ankle condition.

The applicant's complete response is at Exhibit H.

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 the victim of an error or injustice. While the Board agrees with AFPC/DPFDD no error occurred with the diagnosis of the applicant's foot injury; however, the Board does find an error concurred when assigning the applicant, the rating for his injury. Therefore, the Board agrees with the rationale and recommendation of the AFBCMR Medical Advisor and finds a preponderance of the evidence substantiates the applicant's contentions. Specifically, the Board finds the PEB made an error when it partially selected the DVA's rating for the single foot/ankle condition and did not adequately apply guidance set forth in AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*. Therefore, the Board recommends correcting the applicant's records as indicated below.
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 pertinent military records of the Department of the Air Force relating to the APPLICANT be corrected to show the following:

- a. On 6 April 2017, he was found unfit to perform the duties of his office, rank, grade, or rating by reason of physical disability, incurred while he was entitled to receive basic pay; the diagnosis in his case was chronic right foot/ankle pain, with malunion and surgical repair of cuboid bone; DVA rated individually at 10 percent each; residuals with osteophytic changes, right foot status/post arthroplasty; residuals, right ankle status post-surgery; and right ankle painful scar, his condition was under the Veterans Affairs Schedule for Rating Disabilities (VASRD) code 5283; with a disability rating of 30 percent; the

degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during a period of unauthorized absence; and the disability was not a direct result of armed conflict or caused by an instrumentality of war and was not combat-related.

b. On 28 April 2017, he was not discharged with a compensable disability rating of 10 percent with severance pay; but on that date, he was permanently retired with a compensable percentage for physical disability of 30 percent.

c. His election of the Survivor Benefit Plan option will be corrected in accordance with his expressed preferences and/or as otherwise provided for by law or the Code of Federal Regulations.

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-2022-02377 in Executive Session on 24 May 23:

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

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 5 Aug 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 12 Oct 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 13 Oct 22.
- Exhibit E: Applicant’s Response, w/atchs, dated 10 Nov 22.
- Exhibit F: Advisory Opinion, AFBCMR Medical Advisor, w/atchs, dated 28 Mar 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 29 Mar 23.
- Exhibit H: Applicant’s Response, dated 5 May 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.

1/28/2024

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Board Operations Manager, AFBCMR

Signed by: Work-Product