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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

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DOCKET NUMBER: BC-2022-02668

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Her DD Form 214, *Certificate of Release or Discharge from Active Duty*, be changed to reflect a Medical Retirement with placement on the Permanent Disability Retired List (PDRL).

APPLICANT'S CONTENTIONS

Prior to her separation from active duty, she met all the criteria necessary for referral to the Medical Evaluation Board (MEB)/Physical Evaluation Board (PEB) processes to be considered for medical retirement but was instead allowed to separate without this evaluation. A MEB or PEB would determine if her disability of severe spinal injury would have reasonably met the criteria for placement on the TDRL or the PDRL prior to her separation.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force captain (O-3).

On 21 Feb 07, the applicant agreed to serve in the Ready Reserve to receive voluntary separation pay (VSP).

On 29 Sep 07, the applicant's DD Form 214 reflects she was honorably discharged in the grade of O-3 after serving 7 years, 8 months, and 13 days of active duty. Her narrative reason for separation is "Force Shaping - VSP."

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

AIR FORCE EVALUATION

AFPC/DP2SSR does not make a recommendation and provides an advisory opinion for information only. According to the Military Personnel Flight Memorandum (MPFM), one of the

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circumstances that would have precluded the applicant from applying for separation under the VSP Incentive was “officers currently being considered for disability retirement or separation.” DP2SSR opines the Military Personnel Flight (MPF) would have verified the applicant met all eligibility requirements including any form of MEB/PEB processing at the time of application. In addition, VSP applications were sent to the Air Force Personnel Center (AFPC) for review; therefore, DP2SSR believes AFPC Separations would have conducted the final verification of eligibility before the applicant was approved to separate.

The complete advisory opinion is at Exhibit C.

The AFBCMR Medical Advisor reviewed the available records and finds insufficient evidence to support the applicant’s request to change her discharge outcome to reflect a medical retirement or placement on the PDRL. Based on the records available for review, the applicant’s various believed reasons for meeting the requirements for permanent medical disability were not decisively outlined. The burden of proof is placed on the applicant to submit evidence to support her request. Therefore, the applicant may choose to submit new and or additional evidence from all sources for reconsideration of her case.

The complete advisory opinion is at Exhibit D.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 13 Apr 23 for comment (Exhibit E), and the applicant replied on 7 May 23. In her response, the applicant contends she should have been referred for MEB/PEB processing by her primary care physician. If this would have happened, the MPF would have denied her application to separate under the VSP program. The applicant has provided additional medical records she believes outlines multiple service-connected spinal events that were unresolved prior to separation, which would have led to a MEB/PEB.

The applicant’s complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

The AFBCMR Medical Advisor completed a comprehensive review of all available records and now finds sufficient evidence to support the applicant’s request to “facilitate a MEB/PEB (or similar) evaluation.” The additional evidence the applicant submitted was assessed to support her request for additional consideration and processing through the Disability Evaluation System (DES). The error made by the Air Force in not referring her to the DES in the spring of 2005 was well before she applied for VSP in early 2007. Pursuant to the applicant’s physical condition as described on the profile dated 4 May 05 noting “1’s” across the P-U-L-H-E-S profile system, the Medical Advisor recommends granting a positive impairment rating for the applicant’s lumbar spine condition with surgical intervention no greater than the same disability rating that was provided by the Department of Veterans Affairs (DVA) effective as of 30 Sep 07. The Medical Advisor recommends granting the applicant relief by changing the narrative reason for separation to a “medical (disability) discharge, with severance pay,” with a 20 percent disability rating for

intervertebral disc syndrome of the lumbar spine under the Veterans Affairs Schedule for Rating Disabilities (VASRD) code 5243.

The complete advisory opinion is at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the additional advisory opinion to the applicant on 27 Jun 23 for comment (Exhibit H) and she responded on 25 Jul 23. In her response, the applicant agrees with the AFBCMR Medical Advisor's opinion her case should have had the opportunity to meet the MEB/PEB prior to separation. She agrees with the advisory opinion her intervertebral disc syndrome of the lumbar spine was unfitting at the time of her discharge; however, she believes her other conditions of sciatic nerve involvement and residual right foot drop should also be considered as unfitting and compensable based on the DVA rating decision dated 13 Mar 09. The DVA determined this condition as service-connected and assigned a 60 percent disability rating with an effective date of 30 Sep 07. The DVA's decision and rationale clearly stated this condition was directly related to her intervertebral disc syndrome. Based on this logic, this condition should be found unfit and she should be medically retired with a 70 percent overall disability rating.

The applicant's complete response is at Exhibit I.

FINDINGS AND CONCLUSION

1. Although the application was not timely filed within the three-year limitation period established by 10 U.S.C. § 1552 (b), the untimeliness is waived in the interest of justice.
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. The Board concurs with the rationale and recommendation of AFBCMR Medical Advisor and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the evidence provided by the applicant supports her request for processing through the Disability Evaluation System (DES) with an unfit finding for her intervertebral disc syndrome of the lumbar spine. However, for the remainder of the applicant's request to find her sciatic nerve involvement and residual right foot drop as unfitting, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. The applicant underwent surgery on 3 Apr 07 and approximately five months after this surgery, she was reported to have had occasional numbness on the top of her right foot but otherwise, no pain in her right leg and strength was improving in the muscles of her right foot and would continue to improve. Therefore, the Board finds this condition as not unfitting and compensable at or near the time of her discharge. A Service member shall be considered unfit when the evidence establishes 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 or near the time of separation and not based on post-service progression of disease or injury. 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:

- a. On 28 September 2007, she was found unfit to perform the duties of her office, rank, grade, or rating by reason of a physical disability, incurred while she was entitled to receive basic pay; the diagnosis in her case was intervertebral disc syndrome of the lumbar spine, under the Veterans Affairs Schedule for Rating Disabilities (VASRD) code 5243, with a 20 percent compensable disability rating. It is noted 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 as a direct result of armed conflict or caused by an instrumentality of war and was not combat-related.
- b. On 29 September 2007, she was discharged from active duty due to physical disability – entitled to severance payment, with a 20 percent compensable disability rating.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

CERTIFICATION

The following quorum of the Board, as defined in 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-2022-02668 in Executive Session on 26 Jul 23 and 4 Apr 24:

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

Work-Product Panel Chair,
 Panel Member
 , Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 28 Sep 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DP2SSR, w/atchs, dated 18 Oct 22.
- Exhibit D: Advisory Opinion, AFBCMR Medical Advisor, dated 7 Apr 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 13 Apr 23.
- Exhibit F: Applicant's Response, w/atchs, dated 7 May 23.
- Exhibit G: Advisory Opinion, AFBCMR Medical Advisor, dated 22 Jun 23.
- Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 27 Jun 23.
- Exhibit I: Applicant's Response, w/atchs, dated 25 Jul 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.

4/19/2024

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Board Operations Manager, AFBCMR

Signed by: **Work-Product**

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