

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00763

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His official military personnel record amended to reflect a medical retirement.

APPLICANT'S CONTENTIONS

The Physical Evaluation Board (PEB) stated there was no medical evidence from 2006-2013, which was evidenced in submitted notes from his provider. In addition, the PEB form stated, at the time they did a review, he did not have a Department of Veterans Affairs (DVA) rating for mental health. However, at that time, his rating was 70 percent for mental health and is now 100 percent. The PEB did not use evidence provided from two different National Guard Directors of Psychology. Both Directors stated direct correlation between mental health and incidents on base. The Director of Psychology at XXXXXXXX did a mental health assessment narrative summary, which included many meetings and record reviews, and recommended his conditions as in the line of duty. The PEB did not use evidence from multiple therapists seen who also link mental health conditions to service. The PEB also did not use emergency room reports or buddy statements provided.

He served almost 19 years, and it is an injustice that he was not given a medical retirement based on the medical evidence alone. The DVA did a comprehensive review of all records and found him to be 160 percent disabled; all linked to his service. However, the PEB did a review and found no correlation between conditions with his service. The PEB made a mistake, and it needs to be corrected.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired [State] Air National Guard technical sergeant (E-6) awaiting retired pay at age 60.

On 23 Oct 20, according to DVA Rating Decision, provided by the applicant, service connection for Post-Traumatic Stress Disorder with panic and major depressive disorder was granted with an evaluation of 70 percent, effective 31 Oct 19.

On 9 Feb 21, according to NGB/SGPS memorandum, a Prior Service Condition Review was conducted, and the applicant recommended for further review by the Informal Physical Evaluation Board (IPEB) for a Non-Duty Related Fitness for Duty assessment.

On 23 Feb 21, according to *Statement of Selection (Non-Duty DES)*, the applicant elected, "I desire to enter into the DES [Disability Evaluation System]. I understand that my case is Non-Duty related and that it will be for a Fitness determination only."

On 10 Mar 21, according to AF Form 469, *Duty Limiting Report*, the applicant was undergoing a Medical Evaluation Board to determine medical fitness for continued worldwide duty and retention.

On 15 Jun 21, according to NGB/A1PS memorandum, the applicant was identified with a non-duty related physical defect or condition that renders him unfit for duty and requested entry into DES solely for a fitness determination in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, Section 4E - *ARC Non-Duty Related Impairments*.

On 12 Aug 21, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Informal)*, the applicant was found unfit for continued military service with the following diagnosis:

- Category I – Unfitting Conditions: Panic Disorder with Generalized Anxiety Disorder (GAD) and Post-Traumatic Stress Disorder (PTSD), Veterans Administration Schedule for Rating Disabilities (VASRD) Code 9412, Not Combat Related, Not Incurred in a Combat Zone or Incurred During the Performance of Duty in Combat-Related Operations, Condition is Permanent and Stable.

On 27 Aug 21, according to the DVA Rating Decision, provided by the applicant, service connection for Traumatic Brain Injury (TBI) was denied because medical evidence of record failed to show this disability had been clinically diagnosed.

On 20 Sep 21, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the recommendation of the IPEB and waived his right to further appeal.

On 18 Nov 21, according to NGB Form 22, *National Guard Report of Separation and Record of Service*, the applicant was furnished an honorable discharge, with Authority and Reason: AFI 36-3209, Paragraph 3.12.6.; Transfer to the USAF Reserve Retired List – Retirement Voluntary/Under Age 60, SPD: RBD [Sufficient Service for Retirement], and credited with 18 years total service for retired pay.

On 19 Nov 21, according to Reserve Order XXXXX, dated 9 Dec 21, the applicant was assigned to the Retired Reserve section and placed on the USAF Reserve Retired List, with Reason: Retirement -15 to <20 Sat Svc-Med Disq, Elig for retired pay except for attainment of eligibility age.

On 3 May 22, according to the DVA Rating Decision, provided by the applicant, his generalized anxiety disorder with panic disorder and agoraphobia (previously rated as PTSD with panic and major depressive disorder) was evaluated and percent disabling increased from 70 percent to 100 percent, effective 10 Jan 22.

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

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request.

The applicant is seeking to overturn the decision of the PEB and grant him a medical retirement. In effect, he is asking the Board to reverse the determination made by the National Guard Bureau in Feb 21 that his anxiety disorder, undisputedly unfitting for continued military service, was not

incurred in the line of duty, nor permanently aggravated by it. While the applicant's GAD was likely initially diagnosed in 2006, and some symptoms may have been noted as early as 2004 when he was also involved in an on-duty motor vehicle accident, an extensive review of the available evidence did not conclusively demonstrate that the condition was in fact incurred during military service, or permanently aggravated by it. In fact, several provider notes support the NGB/SGP's conclusion that the condition was not duty related. Furthermore, the applicant himself concurred with the assessment of the medical providers at his duty station who did not find his unfitting condition to be duty-related, as evidenced by his signature on the Statement of Selection (Non-Duty DES) dated 23 Feb 21.

It should be noted that liberal consideration is not appropriate to be applied to the applicant's request for a medical discharge/retirement. This type of request is not covered under this policy.

Additionally, it should also be noted that the applicant is currently receiving a 100 percent disability rating from the DVA for his generalized anxiety disorder. The military's Disability Evaluation System, established to maintain a fit and vital fighting force, can by law, under Title 10, United States Code (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 time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of law, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary [improve or worsen] over the lifetime of the veteran.

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 25 Sep 23 for comment (Exhibit D), and the applicant replied on 15 Oct 23. In his response, the applicant contended the advisory stated he was mobilized on Title 10 orders for only four months; however, he was actually on Title 10 orders twice for a total of eight months. He worked as a full-time, dual status military technician from 2005-2021. The advisory also states his disqualifying conditions were determined not in the line of duty and NGB/SPGS [sic]¹ reviewed his case and could not connect his conditions to the vehicle rollover in 2004. The DVA found sufficient evidence that these conditions are directly linked to the rollover accident and his military service and found him 70 percent disabled prior to his separation.

The advisory also states that no therapy notes were provided to substantiate a claim of ongoing work stressors. There are multiple reports that substantiate this claim by multiple medical practitioners and colleagues. The advisory memorandum also states there are "inconsistencies between the member's 2004 evaluation and his 2020 evaluation." He would like clarification on what inconsistencies were found.

The narrative summary (NARSUM) from Jun 21 concluded his condition was in the line of duty and he was referred to a Medical Evaluation Board, clear proof that this determination of medical disqualification should be a medical retirement. The Commander's Impact Statement states he was "in military status when the condition originated" which is more clear proof this condition is

¹ NGB/SGP

military-related. Further, the advisory memorandum states his civilian therapist treated him since 2018; however, his treatment began in 2015. The memorandum goes on to state no documentation can be found to substantiate the events described by his therapist or any documentation of hospitalizations related to diagnoses. He has attempted to get records from the base that show the military vehicle rollover accident report. He has been told they are lost or no longer available. Additionally, the driver of the vehicle has since passed away. He has provided documentation to help substantiate the rollover event with this rebuttal. He has also provided documentation of hospitalization related to psychiatric diagnoses as well as documentation of bullying incidents by supervisors. Also provided is a letter from a co-worker relating his recollection of the incident where he was stuck in the test cell.

According to the advisor, the rollover accident resulted in only minor injuries, not TBI, and no residuals. It was noted in documentation provided that a head injury did occur which caused a laceration and neck pain. Furthermore, he has been advised by medical professionals that TBI does not always present on imaging scans and can be difficult to diagnose. However, even mild TBI can contribute to mental health conditions. While the advisor considered DVA guidance to determine that he does not have a TBI, they did not consider DVA's decision that his mental health diagnosis is due to military service.

The advisory states NGB determined his psychiatric conditions were not in the line of duty, but he believes this determination is wrong. While he does not dispute that he signed the statement saying his case was non-duty related and for fitness determination only, he was essentially not given an option. If he did not sign the document, he would have been discharged with no compensation. The advisory memorandum also stated that "several provided notes support the NGB/SGP's conclusion that the condition is not duty-related." He does not see any evidence of that claim and would like to see the provider notes which state this fact. All of his documentation shows providers that consider this condition in the line of duty along with the findings of the narrative summary and DVA. He would like to be provided the names of the providers and their documentation. The DVA has granted him a 100 percent disability rating due to his military service. Clearly the DVA believes his conditions were sustained in the line of duty and is why they granted him a rating before he left service.

Finally, regarding Title 10, U.S.C. stating the military DES can only offer compensation for those "service-incurred diseases or injuries" and "only for the degree of impairment present at the time of separation", at the time of his separation, DVA had determined he incurred service-related disabilities at a level of 70 percent.

The applicant's complete response is at Exhibit E.

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 AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the applicant's military status during the motor vehicle accident in 2004 is not disputed, review of the evidence did not conclusively demonstrate the applicant's mental health conditions were incurred during military service, or permanently aggravated by it. Additionally, the applicant was afforded due process via the IPEB where he acknowledged the conditions were non-duty status related, and later, agreed with the IPEB unfit determination,

electing to waive his rights for any further appeal. 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 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-2023-00763 in Executive Session on 20 Dec 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 10 Mar 23.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 17 Aug 23.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Sep 23.
Exhibit E: Applicant's Response, w/atchs, dated 15 Oct 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.

X

Board Operations Manager, AFBCMR