

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-00833

XXXXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

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

### APPLICANT'S CONTENTIONS

Military injuries have caused him to be 100 percent disabled, permanently/totally (P&T) and unemployable. Mental health records were incomplete and not used as he was still in treatment. Left wrist Line of Duty (LOD) [injury] was also not used. He was told by current and former military and Department of Defense personnel to submit his records that were not used in his separation.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is an honorably discharged [State] Air National Guard senior airman (E-4).

On 13 Jul 08, according to AFRC IMT 348, *Informal Line of Duty Determination*, the applicant's shoulder injury occurring on 2 May 07, was determined to be in the line of duty (ILOD).

On 10 Feb 12, according to AF IMT 348, *Line of Duty Determination*, provided by the applicant, his wrist injury occurring on 4 Oct 11, was determined to be ILOD.

On 22 Jul 13, according to AF IMT 348, the applicant's re-aggravated shoulder injury occurring on 2-3 Mar 13, was determined to be ILOD.

On 30 Jan 14, according to AF Form 469, *Duty Limiting Condition Report*, the applicant's medical defect/condition requires Medical Evaluation Board (MEB) or Physical Evaluation Board (PEB) processing in accordance with Air Force Instruction (AFI) 41-201, *TRICARE Operations and Patient Administration*.

On 18 Apr 14, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, the applicant was evaluated for the following:

- Category I – Unfitting Conditions: Right shoulder strain with impingement, Status post-arthroscopic surgery, with disability compensation rating of 20 percent
- Category II – Conditions That Can Be Unfitting But Are Not Currently Unfitting: 1) S/P left scaphoid fracture S/P open reduction internal fixation; 2) Scar, left wrist S/P open reduction internal fixation; 3) Scar, right shoulder S/P arthroscopic surgery
- Category III – Conditions That Are Not Unfitting and Not Compensable or Ratable: Prescription Drug Abuse

The PEB recommended Discharge With Severance Pay (DWSP) with a combined compensable percentage of 20 percent.

On 29 Apr 14, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the findings and recommended disposition of the informal PEB and waived the right to a formal PEB hearing. Additionally, he did not request a one-time reconsideration of the disability ratings for the conditions found unfitting by the PEB.

On 27 Jun 14, according to Special Order XXXXX, dated 8 Sep 14, the applicant was honorably discharged from the [State] Air National Guard and as a member of the Reserve of the Air Force.

On 23 Mar 20, according to Department of Veterans Affairs (DVA) Rating Decision, provided by the applicant, evaluation of his major depressive disorder with generalized anxiety disorder was increased from 70 percent disabling to 100 percent, effective 28 Feb 20.

On 17 Aug 20, according to United States Office of Personnel Management letter, provided by the applicant, he was found to be disabled for his position as an aircraft mechanic due to major depressive disorder secondary to chronic instability of the right shoulder.

On 6 Oct 20, according to Social Security Administration Office of Hearings Operations letter, provided by the applicant, he was found to be disabled, under sections 216(i) and 223(d) of the Social Security Act, since 17 Sep 19.

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

## **AIR FORCE EVALUATION**

BCMR Medical recommends granting the application. After a comprehensive review of all available record, this medical advisor finds sufficient evidence to support granting the applicant's request for a medical retirement.

According to his application, the applicant simply requested medical retirement with an additional comment that "military injuries have caused [me] to be 100% permanent and total/unemployable" [sic]. Regarding disability, the phrase "permanent and total" is a DVA term that encompasses a service-connected disability that is both "total" and "permanent." To warrant a permanent and total disability rating, the individual must have a condition that is fully disabling and does not show signs of improvement. The military's Disability Evaluation System (DES), 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/near the time of separation and not based on future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service-incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to serve, or the length of time since date of discharge in mid-2014.

There is no debate that both identified conditions of the right shoulder and the left wrist/arm/elbow pain and numbness occurred while ILOD. The remaining question in this case pertains to fitness for continued military service. Of the few medical records contained in the case file, documents did reveal that 3+ years prior to separation (Apr 11), the applicant was cleared to perform all physical tests and duties without difficulty. After that, a 16-month

timeframe was unaccounted for from late-2011 through early-2013 regarding the applicant's right shoulder condition for which he underwent successful surgery to repair a torn labrum. Being symptom-free for seven months (Oct 13), his right shoulder pain simply returned without a history of additional trauma. Henceforth, his shoulder treatment remained non-surgical. No further clinic follow-up examinations as to assess his healing process and physical abilities were contained in the case file. Therefore, at first take, this advisor had no clear picture of the applicant's right shoulder condition near his service discharge in mid-2014.

Specific to his left wrist, the applicant stated in his request that the "left wrist line of duty [sic] not used." This medical advisor has interpreted his statement that the left wrist condition, having been found in the line of duty, was not considered in determining if processing through the DES was appropriate. The records are clear that while deployed, a left (dominant hand) injury did occur and although immediate and appropriate care was provided in the deployed setting, more definitive care continued at home station where it was determined that there was non-union healing of a wrist bone (scaphoid) and surgery ensued. As only told by the applicant, he claims to have nerve damage due to his arm cast being too tight. Actual documentation of any specific cause was not in evidence or verified by a medical provider, but nonetheless, variable numbness and pain about the dominant left fourth and fifth fingers and a portion of the palm persisted. Despite having long time intervals where no medical records were available to show the severity status of the applicant's physical conditions, of those that were submitted were of enough concern to question his capacity and ability to continue performing his required military duties.

A major issue in this case was to first reconcile the obvious inconsistency of the applicant's ability to perform work. It came down to the narrative summary in deciding where to place the greater probative value; either on the medical provider's clinical opinion of an additional two-weeks of light duty prior to returning to full duty versus the self-reported description of physical symptoms and capable abilities by the applicant himself. At first glance, this medical advisor would tend to place a greater amount of probative value on this specialist written word in the record. However, in the same narrative summary its author documented a "current" physical evaluation (PE) of the applicant. The described written PE on 13 Nov 13 (seven months prior to separation) is copied below:

- Left wrist: examined tenderness over entire wrist. He noted significant pain with any flexion or extension of the wrist. He had decreased flexion and extension of the wrist.
- Left elbow: examined noted tenderness with palpation of any part of the elbow, with increased tenderness on the medial portion, which he notes also causes tingling/numbness in the ulnar side of his hand. He noted pain with any flexion or extension of the elbow.
- Right Shoulder: examined he noted significant tenderness with palpation of any of the shoulder [sic]. He also noted severe pain with any movement of the shoulder and was unable to abduct or forward flex the shoulder up to 90 degrees.

Such persistent and worsening symptoms (described above) of numbness tingling and severe pain within his dominant left hand/arm coupled with the significant limited range of motion of his shoulder should have been interpreted as interfering with his ability to perform his overall military duties and therefore, having been identified as occurring while in duty status, DES processing should have been initiated through the Deployment Availability Working Group (DAWG) and Reserve Headquarters. According to the submitted evidence, none of these actions occurred. This advisor's opinion of the greatest probative value lies within the actual PE that was performed as part of the narrative summary in Nov 13.

The Narrative summary of 13 Nov 13 noted a combined 90 percent DVA service-related disability rating which included 10 percent for his right shoulder, another 20 percent for the right shoulder, 10 percent for the left wrist/arm, 10 percent for tinnitus, and 70 percent for anxiety and depression. However, the DVA rating summary to verify these actual rating percentages was not

submitted with the application and therefore, these numbers were not able to be verified. There was the DVA rating and explanation report only for the mental health condition, but not for the other non-mental health conditions.

This medical advisor opines that the written descriptive PE findings as authored by the narrative summary provider would have found the applicant potentially unfit for service retention and thus the MEB process should have commenced. Each of the above listed conditions in and of themselves (persistent paresthesia [numbness/tingling]), severe pain in the dominant upper extremity, severe pain upon any movement of the wrist, and the inability to perform overhead work secondary to severe pain and significantly limited range of motion of the shoulder would have rendered the applicant incapable of adequately performing his job duties as an aircraft mechanic.

The applicant's ILOD conditions regarding his right shoulder, left wrist/hand and elbow conditions were disqualifying for service retention in accordance with Air Force Instruction (AFI) 48-123, *Medical Examinations and Standards*, Chapter 5, *Continued Military Service (Retention Standards)*. Paragraph 5.3.11.16. *Other neurological conditions*, states under other neurologic conditions, "any other neurological condition, regardless of ideology, when after adequate treatment, there remains residuals, such as persistent weakness or paralysis of important muscle groups, or pain or sensory disturbance such a degree as to interfere with the performance of duty is disqualifying for service retention." Given the cited intensity of pain and identified range of motions, additionally, both the wrist and right shoulder were disqualifying under paragraph 5.3.13.1. *Upper extremities*, of the same AFI. The residuals of each condition would significantly interfere with his ability to perform his military aircraft mechanic duties and therefore, should have been rated under the DVA Schedule for Rating Disabilities (VASRD). Not having the actual DVA rating breakout explanations for the non-mental health conditions, this advisor recommends DVA rating impairments based upon the PE criteria as described in the latest provider's narrative summary examination. This medical advisor recommends granting a positive impairment rating for the applicant's unfitting left wrist condition at 10 percent under VASRD code 5299-5215, Wrist; limitation of motion [painful motion], and additional 10 percent for 'mild' neuralgia under VASRD code 8716-8516, Paralysis of the ulnar nerve (dominant hand), and lastly, an additional 20 percent impairment rating under VASRD code 5201, Arm limitation of motion of the non-dominant arm unable to reach 90 degrees of forward flexion. This Board recommendation, if granted, would provide a combined DVA disability impairment rating of 40 percent (actual number of 35 percent, rounded up to 40 percent).

The complete advisory opinion is at Exhibit C.

AFRBA Psychological Advisor, after an exhaustive review of the available record, finds insufficient evidence to support the applicant's request. The applicant may consider submitting new documentation supporting his assertion that his psychiatric conditions were incurred, or permanently aggravated, ILOD, and were unfitting (rather than unsuited) for reconsideration of his petition.

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 find that his mental health diagnoses, which in the years preceding his separation may have included adjustment disorder, ADHD [Attention Deficit/Hyperactivity Disorder], MDD [Major Depressive Disorder], GAD [General Anxiety Disorder], personality disorders, and substance abuse, were both ILOD and unfitting for continued military service.

While the applicant clearly has a long-standing history of mental health issues possibly dating to adolescence (i.e., mention of oppositional defiant disorder of childhood), there is no evidence that these were duty-limiting at the time of his discharge from military service. On the contrary,

according to the provider notes mentioned above, only his orthopedic problems were deemed to be disqualifying. Also, there is no evidence that any of the psychiatric conditions, even if potentially disqualifying, were either incurred ILOD or permanently aggravated by it and would therefore, not constitute a basis for medical retirement.

Furthermore, mental health diagnoses can potentially be either unsuited or unfitting for continued military service. The former, such as ADHD, adjustment disorder of less than six months duration, personality disorders, and substance use disorders, may result in administrative separation rather than medical retirement. In this case, the applicant appeared to have primarily unsuited conditions at the time he underwent his MEB, so even if sufficient evidence was found to support his contention that these issues should have been deemed duty-limiting, such a finding would still not result in a medical retirement. 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.

It should also be noted that the applicant is currently receiving a 100 percent disability rating from the DVA for his depression and generalized anxiety disorder. 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 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 D.

#### **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent copies of the advisory opinions to the applicant on 8 Sep 23 for comment (Exhibit E) but has received no response.

#### **SUPPLEMENTAL AIR FORCE EVALUATION**

BCMR Medical recommends granting the application. After a comprehensive review of all available records, to include the newly submitted documents, this medical advisor's recommendation to the Board remains unchanged from the original advisory.

The newly submitted records/documents contained vital information regarding DES actions via an MEB, and PEB processing that was not available when the original advisory was completed.

The original medical advisory will not be fully re-stated in this supplemental advisory, but the Board is encouraged to weigh significant probative value to the still relevant information previously authored.

Although this advisor previously pointed out various inconsistent reporting with regards to the applicant's ability to adequately perform his required military duties as an Air Force mechanic, the additional (newly submitted) documents have essentially made clear his persistent physical pain conditions and their nexus to his impaired capabilities.

In review of the new documents, it was discovered that through the DES, an informal PEB did occur on 18 Apr 14 with the following categorical conditions:

- Category I = unfitting conditions.
  - a. Right Shoulder Strain with Impingement, Status Post (S/P) Arthroscopic Surgery
- Category II = conditions that can be unfitting but are not currently unfitting.
  - a. S/P Left Scaphoid Fracture (S/P) Open Reduction Internal Fixation (surgery)
  - b. Scar, Left Wrist S/P Open Reduction Internal Fixation
  - c. Scars, Right Shoulder S/P Arthroscopic Surgery
- Category III = conditions that are not unfitting and not compensable or ratable
  - a. Prescription Drug Abuse

The informal PEB determined the unfitting right shoulder was compensable (according to the VASRD) at 20 percent and thus, the applicant was discharged with severance pay.

Although the PEB, in its remarks, made mention of the applicant's left wrist as well as his elbow, its mention was only as historical surgical procedures that had been done. Additionally, the PEB made note of the DVA finding that the left wrist rated 0 percent and the left elbow was determined not to be service-connected.

This advisor disagrees with the final and overall impairment rating determined by the Department of Defense (DoD) (as ascertained from the DVA) and hence, disagrees with the DVA's ratings as well. Additionally, the DoD left out the applicant's left upper extremity neuropathy condition. This advisor strongly opines the greatest degree of evidential probative value solely lied within the NARSUM [Narrative Summary] addendum, which clearly described three separate potentially unfitting conditions, all of which should have been sent forth to the MEB; however, only right shoulder pain was referred as unfitting. This advisor finds that the DoD was correct in processing this applicant through the DES, but in doing so, they erred in not including a full evaluation of separate physical conditions that the NARSUM clearly noted (via PE) and established a nexus in rendering the applicant incapable of performing his Air Force job-related duties.

The complete supplemental advisory opinion is at Exhibit F.

AFRBA Psychological Advisor, after a review of newly discovered records, continues to find insufficient evidence to support the applicant's request for a medical retirement based on his mental health condition. The information, opinions, and recommendations provided in the original mental health advisory remain unchanged.

The original mental health advisory was completed using records and information available at the time that advisory was completed. A new set of the applicant's military records had since been discovered recently and was received a couple of months after the original advisory was completed. This supplementary mental health advisory will include and discuss the new records for the Board's consideration of the applicant's request. The Board should review this supplementary advisory in addition to the original mental health advisory as most information provided in the original advisory is still relevant to the applicant's case file and request and not conducive to being reiterated in this advisory. This advisory is limited to his mental health condition.

This psychological advisor has reviewed the newly discovered records and continues to find there is insufficient evidence to support the applicant's request for a medical retirement for his mental health condition. The applicant's mental health condition of prescription drug abuse caused his erratic and destructive behaviors that impacted his ability to function in a military environment and impaired his ability to perform his duties; however, this condition is an

unsuited and not unfitting condition for military service. The informal PEB had determined his drug abuse was unsuited and this psychological advisor concurs with the informal PEB's findings. Drug use/abuse is classified as an unsuited condition and therefore, is not compensable. Unsuited conditions meet the criteria for an administrative discharge and not medical discharge and thus, the reason his condition of drug abuse was found to be not unfitting. Moreover, the applicant's commander had identified his self-destructive behaviors were not solely caused by his substance abuse but that these behaviors had existed prior to service. These self-destructive behaviors are also unsuited and incompatible with military service. There is no evidence or records the applicant had any unfitting mental health conditions, including MDD and GAD as discussed in the original mental health advisory, during service that would meet the criteria for a compensable medical discharge/retirement. It was his physical condition that was determined to be unfitting causing early career termination, and his physical condition was discussed in the medical advisory.

The complete supplemental advisory opinion is at Exhibit G.

### **APPLICANT'S REVIEW OF SUPPLEMENTAL AIR FORCE EVALUATION**

The Board sent copies of the supplemental advisory opinions to the applicant on 17 Nov 23 for comment (Exhibit H) but has received no response.

### **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 the victim of an error or injustice. The Board notes the recommendation of the AFRBA Psychological Advisor against correcting the record and concurs with their rationale specific to the applicant's contentions regarding his mental health. While there is evidence of a long-standing history of mental health issues, there is no evidence that these issues were duty limiting at the time of his discharge from military service. However, the Board concurs with the rationale and recommendation of the BCMR Medical Advisor and finds a preponderance of the evidence does substantiate the applicant's contentions regarding his physical medical conditions. Although the applicant was processed through the DES, only his right shoulder condition was found to be unfitting. According to the physical examination performed as part of the narrative summary, the conditions of persistent paresthesia [numbness/tingling], severe pain in the dominant upper extremity, severe pain upon any movement of the wrist, and the inability to perform overhead work secondary to severe pain and significantly limited range of motion of the shoulder would have rendered the applicant incapable of adequately performing his job duties as an aircraft mechanic. The LOD conditions regarding his right shoulder, left wrist/hand, and elbow were disqualifying for service retention in accordance with AFI 48-123 and support granting a positive impairment rating for the applicant's unfitting left wrist condition at 10 percent under VASRD code 5299-5215 [Wrist; limitation of motion (painful motion)], and additional 10 percent for 'mild' neuralgia under VASRD code 8716-8516 [Paralysis of the ulnar nerve (dominant hand)], and lastly, an additional 20 percent impairment rating under VASRD code 5201 [Arm limitation of motion of the non-dominant arm unable to reach 90 degrees of forward flexion]. Under a combined VA disability impairment rating of 40 percent (actual calculation of 35 percent, rounded up to 40 percent), the applicant is eligible for a medical retirement vice discharge with severance pay. 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 APPLICANT be corrected to show:

- a. On 18 Apr 14, 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 Left Wrist [limitation of motion] under VASRD code 5299-5215 and 10 percent disability compensation rating; Mild Neuralgia/Paralysis of the ulnar nerve (dominant hand), under VASRD code 8716-8516 and 10 percent disability compensation rating; Right Arm limitation of motion (non-dominant arm), under VASRD code 5201 and 20 percent disability compensation rating; the degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during 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 27 Jun 14, he was discharged from the Air National Guard, and on 28 Jun 14 he was permanently retired with a compensable percentage for physical disability of 40 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 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-2023-00833 in Executive Session on 20 Dec 23:

, Panel Chair  
, Panel Member  
, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 15 Feb 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, BCMR Medical, dated 6 Sep 23.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 7 Sep 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Sep 23.
- Exhibit F: Supplemental Advisory Opinion, BCMR Medical, dated 8 Nov 23.
- Exhibit G: Supplemental Advisory Opinion, AFRBA Psychological Advisor, dated 14 Nov 23.
- Exhibit H: Notification of Supplemental Advisory, SAF/MRBC to Applicant, dated 17 Nov 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