

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-00849

XXXXXXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXX

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

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

### **APPLICANT'S CONTENTIONS**

Counsel, on behalf of the applicant contended, prior to the applicant's discharge, one of his most severe medical conditions had not been properly diagnosed. The misdiagnosis resulted in a lower disability rating of 20 percent, insufficient to be found eligible for medical retirement. After separation from active duty, he was correctly diagnosed with fibromyalgia, a debilitating disease that was the direct result of his service. This was clearly a disability that he had at time of separation. He also suffers from degenerative arthritis and intervertebral disc syndrome in the lumbar spine with gastric ulcer.

The rating he received at the time of discharge was due to a misdiagnosis of fibromyalgia and degenerative arthritis and intervertebral disc syndrome lumbar spine as well as suffering from persistent depressive disorder, all of which were determined by the Department of Veterans Affairs (DVA) to be service-connected. He was suffering from each of these things at the time of discharge but were not diagnosed until after separation. After he was diagnosed with fibromyalgia as a service-connected disability, he believed that there was an error but was told because he was not diagnosed within three years of separation, it would not be considered. He was recently informed that his fibromyalgia may be connected to his exposure to the burn pits and that his back pain and his persistent depressive disorder are issues that should be considered to upgrade his disability discharge to retirement. A proper and equitable review of his records is warranted to upgrade his discharge to a medical retirement.

Counsel further contended the applicant received a 40 percent disability rating from DVA on 20 Feb 13, for service-connected fibromyalgia. The widespread musculoskeletal pain and tender points were constant or near constant and were refractory to therapy. Although DVA believes there may be improvement of the symptoms through medication, the applicant will always be afflicted with the disease.

At that same time, the applicant also received a 30 percent disability rating for persistent depressive disorder with pure dysthymic syndrome. Here the DVA found the applicant's duty to investigate major accidents and his exposure to the deaths of United States military personnel from a motor vehicle attack by a national, exposed him to severe incidents of stress, which resulted in the development of a persistent depressive disorder. The anxiety, chronic sleep impairment, and depressed mood caused an occasional decrease in work efficiency, and intermittent periods of inability to perform occupational tasks. Although he may be able to take medication and have therapy to manage his depressive disorder, he was clearly suffering from the disorder at the time of his discharge and will have to continue to manage the symptoms for the rest of his life.

According to counsel, the applicant's medical records indicate several incidents where he complained of severe lower back pain, the first incident in 1999, and another in 2004. In 2008, he had a discectomy and an MRI in 2009 showed he had degenerative disc disease and status post-lumbar nucleotomy, finding him unfit for duty. On 25 Jan 11, the DVA awarded the applicant a 10 percent disability rating for degenerative disc disease, which was subsequently raised to 40 percent on 1 Aug 12. This represents a significant increase of 30 percent in a 17-month period, less than 3 years after separation. Had he been properly diagnosed he could have possibly received earlier treatment and would have retired from the Air Force instead of being discharged. On 19 Sep 17, DVA found the applicant's gastric ulcer was a direct result of the degenerative arthritis and intervertebral disc syndrome. The DVA awarded 60 percent disability for the gastric ulcer.

Finally, the applicant suffered an injury, straining his rotator cuff, in 2009, while playing softball with his unit. The DVA awarded him 10 percent disability for his shoulder. His service treatment records indicate in 2009 he was diagnosed with right elbow anconeus strain and medial epicondylitis for which the DVA awarded him 10 percent. In 2006, he was diagnosed with carpal tunnel for pain in his right wrist. DVA awarded him 10 percent. All three of these awards amount to 30 percent; all were service-connected, and the awards were effective 26 Feb 10.

The combined disability scores from DVA are far above 100 percent. The DVA originally awarded him 30 percent upon his discharge from active duty. He is aware that the process of evaluation by the DVA is different from that used by the Air Force, but failure to diagnose the fibromyalgia, the persistent depressive disorder, and the degenerative arthritis that resulted in a gastric ulcer, was improper and the resulting discharge was inequitable.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is an honorably discharged Air Force technical sergeant (E-6).

On 10 Jul 09, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with chronic low back pain, with an administrative line of duty (LOD), and referred to the informal Physical Evaluation Board (IPEB).

On 20 Aug 09, 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 Which are Compensable and Ratable: Chronic Low Back Pain due to Degenerative Disc Disease, Status Post-Lumbar Nucleotomy, Veterans Administration Schedule for Rating Disabilities (VASRD) Code 5243, Incurred While Entitled to Receive Basic Pay, Line of Duty, with a Disability Rating of 10 percent and Recommended Disposition of Discharge With Severance Pay (DWSP).

On 11 Sep 09, according to AF Form 1180, *Action on Informal Physical Evaluation Board Findings and Recommended Disposition*, the applicant disagreed with the findings and recommended disposition of the IPEB and requested a formal hearing.

On 3 Dec 09, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Formal)*, the applicant was found unfit for continued military service with the following diagnosis:

- Category I – Unfitting Conditions Which are Compensable and Ratable: Chronic Lower Back Pain due to Degenerative Disc Disease, Status Post-Lumbar Nucleotomy, VASRD Code 5243, Incurred While Entitled to Receive Basic Pay, Line of Duty, with a Disability Rating of 20 percent and Recommended Disposition of DWSP.

On 3 Dec 09, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the recommendation of the formal PEB (FPEB).

On 25 Feb 10, the applicant was furnished an honorable discharge, with Narrative Reason for Separation: Disability, Severance Pay, SPD Code: JFL [Disability, Severance Pay], and credited with 12 years, 11 months, 7 days active service.

On 24 Nov 10, according to DVA Rating Decision, a decision on entitlement to compensation for degenerative disc disease of the lumbar spine status post-surgery (claimed as herniated intervertebral disc and annular tear at L4-5, scoliosis, and lumbago) is deferred.

On 25 Jan 11, according to DVA Rating Decision, service connection for degenerative disc disease of the lumbar spine status post-surgery (claimed as herniated intervertebral disc and annular tear at L4-5, scoliosis, and lumbago) is granted with an evaluation for 10 percent, effective 26 Feb 10.

On 1 Aug 12, according to DVA Rating Decision, evaluation of degenerative disc disease of the lumbar spine status post-surgery (claimed as herniated intervertebral disc and annular tear at L4-5, scoliosis, and lumbago) is currently 40 percent.

On 20 Feb 14, according to DVA Rating Decision, service-connection for fibromyalgia is granted with an evaluation of 40 percent, effective 20 Feb 13. Service-connection for persistent depressive disorder with pure dysthymic syndrome is granted with an evaluation of 30 percent, effective 20 Feb 13.

On 26 Jul 16, according to DVA Rating Decision, service-connection for acute peptic ulcer is denied.

On 3 Jan 18, according to DVA Rating Decision, evaluation of persistent depressive disorder (previously rated as persistent depressive disorder with pure dysthymic syndrome) is increased from 30 percent to 70 percent disabling, effective 19 Sep 17.

On 5 Feb 18, according to DVA Rating Decision, service-connection for gastric ulcer (claimed as acute peptic) is granted with an evaluation of 60 percent, effective, 19 Sep 17.

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

## **AIR FORCE EVALUATION**

AFPC/DPFDD recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice during the DES processing. Award of a disability rating for a medical condition or change of a rating by the DVA after separation does not warrant change to the original DES rating after the fact.

The Air Force and 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. 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 10 Jul 09, a Medical Evaluation Board (MEB) found the applicant potentially unfitting for chronic lower back pain. The accompanying Narrative Summary (NARSUM) revealed he had an 8-year history of back pain and sciatica symptoms, eventually found to be a herniated lumbar disc which required corrective surgery in Nov 08. Despite the surgery, epidural injections, physical therapy, and medication, his back pain persisted. There is no mention of fibromyalgia, gastric ulcer, or persistent depressive disorder also being considered potentially unfitting conditions.

On 20 Aug 09, the IPEB found the applicant unfitting for chronic low back pain due to degenerative disc disease status post-lumbar nucleotomy and recommended DWSP with a 10 percent compensable disability rating in accordance with DVA Schedule for Rating Disabilities guidelines. On 11 Sep 09, he non-concurred with the IPEB findings and appealed to the FPEB. During the FPEB, the applicant contended his lumbosacral strain was severe and should be rated at 20 percent along with radiculopathy, right shoulder joint pain and right elbow joint pain for a combined compensable disability rating of 60 percent. Once again there was no mention of fibromyalgia, gastric ulcer, or persistent depressive disorder during the DES processing.

The FPEB partially approved his request and changed his unfitting condition to chronic low back pain due to degenerative disc disease status post-lumbar nucleotomy with a 20 percent disability rating and recommended DWSP, with a detailed rationale for its decision. The applicant was processed under the older legacy DES in which the PEB and DVA made independent assessments of a member's medical condition(s) and could assign different ratings for the same condition based on available documentation and or examinations. Under today's Integrated DES, the PEB must utilize the VASRDs, and disability ratings assigned by the DVA during its medical examination process to prevent this disparity. On 3 Dec 09, the applicant agreed with the FPEB's findings, and was subsequently DWSP on 25 Feb 10.

On 25 Jan 11, DVA initially awarded a 10 percent rating for his back condition, retroactive to his date of separation. On 1 Aug 12, DVA upgraded the rating for his back condition to 40 percent, retroactive to 9 Sep 11. This change was due to a worsening of symptoms for this condition and was considered a new claim, which is why the award date was not retroactive to his date of separation. Although the DVA increased the award for this condition, it is not grounds for the Air Force to change its DES disability rating. On 20 Feb 14, DVA published another rating decision which awarded compensation for fibromyalgia and persistent depressive disorder with pure dysthymic syndrome, retroactive to 20 Feb 13. The DVA noted it conceded to the award in the applicant's favor based on a reported single stressful incident involving a military death while responding to a motor vehicle incident while deployed. This award by DVA does not signify these conditions rose to the level of being considered unfitting for military service for DES purposes.

On 26 Jul 16, DVA denied the applicant's request for an increased rating for his back condition and service-connection for acute peptic ulcer. The first recorded occurrence was more than four

years post-military service and would indicate it developed after he separated; therefore, it was not compensable for DES purposes. The DVA changed the diagnosis for persistent depressive disorder with pure dysthymic syndrome to persistent depressive disorder and assigned a 70 percent rating, on 3 Jan 18, effective 19 Sep 17. Finally, on 5 Feb 18, DVA granted his request for service-connection for gastric ulcer and awarded a 60 percent rating, effective 19 Sep 17, opining the pain medication for his lumbar spine may have been a contributing factor to his ulcer. This condition would not be compensable under DES because although the back condition may have been a contributing factor, the ulcer did not present itself until over four years after separation and would not have contributed to his unfitness for service.

The complete advisory opinion is at Exhibit C.

The AFRBA Psychological Advisor finds insufficient evidence to support his request for medical retirement for his mental health condition of persistent depressive disorder (PDD).

This advisory is limited to the applicant's mental health condition. A review of the available records finds no evidence the applicant had any unfitting mental health conditions including PDD that would provide him with an additional and separate disability rating meeting criteria for a medical retirement. The applicant's legal counsel claimed the applicant suffered from PDD and this condition had existed at the time of service; however, his available service treatment records found no evidence to corroborate the existence of this diagnosis or similar conditions during his military service. There were no records he received any mental health treatment or mental disorder diagnosis during service. At his psychiatric evaluation with the DVA psychiatrist to initiate mental health treatment on 13 Dec 10, which was 10 months after his discharge, he reported having difficulties controlling his anger or temper over the years and spoke with a Chaplain a few times during service that he found to be helpful. He acknowledged never seeking formal treatment but also declared he was "functioning well in the military as an MP [military police]" even though he had problems controlling his anger. As he stated, he was functioning well, and there is no evidence his mental health condition had impacted his functioning in the military environment. He was never placed on a duty limiting condition profile for his mental health condition, he was never deemed not worldwide qualified or not deployable due to his mental health condition, and there were no statements from his leadership such as from his commander, commandant, supervisor, and/or the group superintendent attesting to his mental health condition having an impact or interfering with his ability to reasonably perform his military duties in accordance to his office, grade, rank, or rating. These individuals had discussed and identified it was his physical condition of back and knee pain hindering his duty performance and requirements. The commandant and superintendent stated that despite his pain and limitations from his physical condition, he continued to be driven and motivated and was dedicated and willing to help his fellow service members. The applicant also attested via his memorandum to the MEB that he continued to be driven and motivated. These statements at the time of service do not demonstrate the applicant was depressed or persistently depressed but were to the contrary. The applicant did not address or discuss having any mental health condition or emotional distress in his memorandum to the MEB. Common symptoms of depression include low motivation, low energy, lack of interest, feeling hopeless, worthless, down, sad, and depressed, and being isolated from others according to the current Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition-Text Revision (DSM-5-TR). His behaviors at the time of service were not congruent with symptoms of depression as delineated in the DSM-5-TR. The applicant may have experienced depression during service, but again, there was no evidence in the objective military or service treatment records he had depression during service. Experiencing depression, receiving treatment, and/or receiving a mental disorder diagnosis do not automatically make a condition unfitting. His mental health condition needs to demonstrate it had impacted his ability to perform his military duties, which his military records do not support or reflect. He was referred to the MEB and was found unfit by the IPEB and

FPEB for his physical condition and not for his mental health condition of PDD. There was no mention of his mental health condition whatsoever during his medical discharge process.

As mentioned previously, the applicant began to receive mental health treatment from the DVA for anxiety about 10 months after discharge starting in Dec 10. His psychiatric evaluation performed on this date reported since his discharge, he has been having increased difficulties with anger and irritability, fatigue/energy loss, some restlessness, difficulty concentrating, hypervigilance, guardedness around others and in public places, and difficulty dealing with frustrations. There was no evidence he experienced any of these symptoms during service. These symptoms were reportedly triggered by his post-service stressors of his wife being recently diagnosed with an illness, being unemployed, having financial problems, having ongoing pain with degenerative joint disease, and having adjustment problems since leaving the military. He denied experiencing depressive symptoms of depressed mood, anhedonia, guilt, worthlessness feelings, appetite disturbance or suicidality but had energy loss and sleep difficulties because of his untreated pain at the time. He would receive intermittent and brief mental health treatment through the years primarily for anxiety and depression caused by his post-service stressors of occupational and family problems and his disappointment with his military career being cut short from being medically discharged. The applicant was diagnosed with anxiety disorder/unspecified and dysthymic disorder also known as PDD by his DVA mental health providers after discharge. There was no evidence he met diagnostic criteria for any of these conditions during service. To give the benefit of the doubt to the applicant, while his anxiety and depression may have begun during service despite no evidence to support this hypothesis, his symptoms appeared to have developed further after service that was exacerbated and aggravated by his post-service stressors causing him to meet diagnostic criteria for these conditions at a later time.

The applicant was granted a service-connected disability rating of 30 percent that was later increased to 70 percent for PDD by the DVA years after discharge. The DVA cited his PDD was developed from his stressful experiences sustained by his military duties of investigating major accidents and exposure to the deaths of service members from a motor vehicle attack by a national. Symptoms he experienced included anxiety, chronic sleep impairment, and depressed mood causing an occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. He may have had these stressful experiences from his military duties but no evidence he had any of the ensuing symptoms during service and certainly, no evidence to corroborate his symptoms caused an occasional decrease in his work efficiency or produced intermittent periods of inability to perform his tasks. These impairments were assessed from his functioning at the time of his evaluation for DVA's compensation and pension purposes and not of his functioning at the time of service or discharge. For awareness, 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 laws, 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 applicant's legal counsel claimed he was misdiagnosed during service. For his mental health condition, this claim was not substantiated by his military records. He was never diagnosed with a mental health condition during service because he never sought or met with a mental health provider for an evaluation or treatment to receive a mental disorder diagnosis. He

could not have been misdiagnosed or undiagnosed because of these non-existent events. It appeared his mental health condition was not bothersome, acute, chronic, or impactful enough to the applicant for him to seek mental health treatment during service. He was able to manage his symptoms adequately because he was able to still function well as an MP or Security Forces Craftsman as he had asserted to the DVA's psychiatrist. There was no evidence to support the notion his mental health condition was unfitting and that would provide him an additional and separate disability rating for a medical retirement as desired. Therefore, this psychological advisor finds no error or injustice with his discharge from a mental health perspective.

Lastly, liberal consideration is not appropriate to be applied to the applicant's request for a medical retirement and/or to receive an additional rating for his mental health condition. These requests are not covered under this policy.

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 25 Sep 23 for comment (Exhibit E) 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 not the victim of an error or injustice. The Board concurs with the rationales and recommendations of AFPC/DPFDD and the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no evidence in the applicant's military service treatment records that indicate he was diagnosed with fibromyalgia or gastric ulcer, or suffered from, or sought treatment for, a mental health condition during his military service. Additionally, supporting documentation provided during the DES process from the applicant and his commander does not address fibromyalgia, gastric ulcer, or any mental health conditions. The applicant's MEB, IPEB, and FPEB findings were related to the low back pain that was diagnosed during his service and directly impaired his ability to perform his primary duties. In this regard, the DES process followed the guidance under Title 10 U.S.C., evaluating his unfitting condition(s) and level of disability at the time of DES processing. The applicant's evaluation by DVA that resulted in diagnosis of service-connected conditions, after his separation, was conducted in accordance with Title 38, U.S.C. and its findings, while applicable to the DVA compensation system, do not apply to the military DES and do not warrant a change to the compensable disability rating established by the FPEB, which the applicant concurred with prior to separation. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, U.S.C. and Department of the Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. While the applicant asserts a date of discovery within the three-year limit, the Board does not find the assertion supported by a preponderance of the evidence. The Board does not find it in the interest of justice to waive the three-year filing requirement. Therefore, the Board finds the application untimely and recommends against correcting the applicant's records.

## RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; 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-2023-00849 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 16 Mar 23.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 27 Apr 23.  
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 31 Aug 23.  
Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 25 Sep 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.

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Board Operations Manager, AFBCMR