

## RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01372

XXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

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

### APPLICANT'S CONTENTIONS

His separation was based on medical grounds, and he believes his current Department of Veterans Affairs (DVA) rated disabilities warrant a change in his discharge status. Since his separation from the military in 2012, he has been diagnosed with several service-connected disabilities, including obstructive sleep apnea, left ankle tendonitis with arthralgia, right ankle tendonitis with arthralgia, cervical spine strain, left knee degenerative joint disease, right knee degenerative joint disease, lumbosacral strain, tinnitus, radiculopathy, right lower extremity, bilateral shin splints, left ear hearing loss, hypertension, temporomandibular joint disc displacement, scar, left upper extremity, scar, right upper extremity, and eczema. These conditions have significantly impacted his daily life and he is currently rated 90 percent by DVA for his disabilities. He believes his medical conditions were incurred or aggravated during his service in the military and they warrant a change in his discharge status.

He is aware changing his discharge status to retirement can be a complicated and lengthy process, but he believes he is eligible for retirement benefits based on his service-connected disabilities. A change in his discharge status would provide him access to additional benefits, including health care and disability compensation, which would significantly improve his quality of life.

The only reason for the delay was ignorance on his part, not knowing this was a possibility. He was not fully aware of this option until he became a Veterans Service Officer and started helping other veterans.

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 27 Jul 11, according to AF IMT 618, *Medical Board Report*, the applicant's medical records were reviewed for right tibial stress fracture and sleep apnea to determine his fitness for continued military service, and he was referred to an informal Physical Evaluation Board (IPEB).

On 29 Aug 11, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, the applicant was found unfit due to physical disability, and recommended for Discharge with Severance Pay (DWSP) with the following diagnosis:

- Category I – Unfitting Conditions Which Are Compensable And Ratable:
  - Right Tibial Stress Fracture; Incurred while entitled to receive basic pay: Yes;  
Line of Duty: Yes; Disability Compensation Rating: 10 percent; Veterans

Administration Schedule for Rating Disabilities (VASRD) Code: 5022; Combat Related: No.

- Category II – Conditions That Can Be Unfitting But Are Not Currently Compensable Or Ratable:

- Obstructive Sleep Apnea (OSA) on Continuous Positive Air Pressure (CPAP)

- Category III – Conditions That Are Not Separately Unfitting And Not Compensable Or Ratable:

- Obesity: BMI 34

On 9 Sep 11, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant did not agree with the findings and recommended disposition of the IPEB and requested a formal hearing of his case.

On 8 Nov 11, according to applicant letter, Subject: Request to Waive Formal Physical Evaluation Board Hearing, the applicant concurred with the IPEB's recommendations and findings and requested his earlier election to demand a formal hearing be waived.

On 26 Feb 12, the applicant was furnished with an honorable discharge, with Narrative Reason for Separation: Disability, Severance Pay, Non-Combat, and credited with 17 years 4 months, 8 days active service.

On 12 Jul 13, according to *DVA Decision Letter*, service connection was established, and the applicant was awarded disability ratings for the following, effective 27 Feb 12:

- 50 percent for obstructive sleep apnea with CPAP and periodic limb movement
- 10 percent for cervical spine strain
- 10 percent for degenerative disc disease of the thoracic and lumbar spine and intervertebral disc syndrome
- 10 percent for left knee degenerative joint disease (claimed as anserine bursitis)
- 10 percent for right knee degenerative joint disease (claimed as pes anserine bursitis)
- 10 percent for tinnitus
- 10 percent for radiculopathy, right lower extremity associated with degenerative disc disease of the thoracic and lumbar spine and intervertebral disc syndrome
- 0 percent for bilateral shin splints (claimed as bilateral shin splints)
- 0 percent for left ankle tendonitis
- 0 percent for right ankle tendonitis
- 0 percent for left ear hearing loss
- 0 percent for hypertension
- 0 percent for scar, left upper extremity
- 0 percent for scar, right upper extremity
- 0 percent for eczema (claimed as bilateral arm skin condition with scarring)
- 0 percent for temporomandibular joint disc displacement with reduction; right joint popping

On 14 Sep 22, according to *DVA Rating Decision*, the applicant's disability rating percentages were amended as follows, effective 9 Feb 22:

- cervical spine strain increased from 10 percent disabling to 20 percent
- left ankle tendonitis with arthralgia increased from 0 percent disabling to 20 percent
- right ankle tendonitis with arthralgia increased from 0 percent disabling to 20 percent

- left knee degenerative joint disease (claimed as pes anserine bursitis) continued as 10 percent disabling
- lumbosacral strain (previously rated as degenerative disc disease of the thoracic and lumbar spine and intervertebral disc syndrome) continued as 10 percent disabling
- right knee degenerative joint disease (claimed as pes anserine bursitis) continued as 10 percent disabling

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 Disability Evaluation System (DES) process.

The Air Force and the DVA disability systems operate under separate laws. Under the Air Force system (Title 10, United States Code [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 27 Jul 11, a Medical Evaluation Board (MEB) was convened and found the applicant potentially unfitting for a right tibial stress fracture and sleep apnea. The accompanying Medical Narrative Summary (NARSUM), dated 19 Jul 11, revealed that he stated he had an approximate 16-year history of bilateral shin/tibial pain going back to Basic Military Training. An Aug 10 bone scan read positive for a possible stress fracture of the right tibia with the left tibia being normal. The NARSUM also indicates he had failed Physical Training (PT) testing multiple times and was in the process of being administratively separated. In Dec 10, he complained of daytime somnolence and a sleep study conducted at the time indicated the need for a CPAP machine. According to the NARSUM, he reported a drastic improvement in sleep quality and daytime sleepiness after starting daily use of the CPAP. The NARSUM indicated he also had a past medical history for hypertension, hyperlipidemia, and nicotine dependence which were not determined to be potentially unfitting conditions under the DES since they did not preclude him from fulfilling his military duties as mentioned above.

On 29 Aug 11, the IPEB found the applicant unfitting for right tibial stress fracture and recommended DWSP with a 10 percent compensable disability rating in accordance with the VASRD. The IPEB noted the NARSUM indicated his obstructive sleep apnea was treated successfully; therefore, this condition was placed in Category II, Conditions That Can Be Unfitting But Are Not Currently Compensable or Ratable. Additionally, sleep apnea is normally not considered an unfitting condition for DES purposes unless it contributes to or exacerbates another boardable condition. The IPEB also noted his commander stated the applicant's medical condition did not impact his garrison or deployed duty performance; but clearly stated he should be discharged for failure to meet PT standards. On 9 Sep 11, the applicant initially indicated he

disagreed with the IPEB findings but subsequently waived his right to a formal PEB hearing. This would have been his opportunity during DES processing to request the formal PEB add any conditions that he thought should have also been considered unfitting by the IPEB.

It is also noted the applicant's case was processed under the Legacy DES (LDES) in which the PEB and DVA made independent assessments of his medical conditions based on available records and examinations and could therefore assign different ratings for the same condition. Under the LDES, the PEB did not request nor receive disability ratings from the DVA for DES purposes. According to the documentation provided by the applicant as part of this Air Force Board for Correction of Military Records submission, the DVA has never service-connected his DES boarded condition for right tibial fracture. However, in its 12 Jul 13 rating decision, the DVA initially awarded a 0 percent rating for his bilateral shin splints, which according to the provided 14 Sep 22 (10.5 years after separation) rating decision, was changed to right ankle tendonitis with arthralgia, based on current examinations, which he had not been diagnosed with while in service. If the applicant had been processed under the current Integrated DES process, in which the PEB utilizes the ratings provided by the DVA, he would have received a 0 percent rating for his boarded right leg condition.

Although the DVA service-connected additional medical conditions for which he was not boarded by the IPEB, there is no indication that these conditions were severe enough to be considered unfitting by Department of Defense standards for DES processing. Additionally, many of these conditions did not receive a rating for numerous years following the applicant's separation. Finally, award of a DVA disability rating for a medical condition or change in diagnosis or rating by the DVA after separation does not warrant change to the original DES rating after the fact.

The complete advisory opinion is at Exhibit C.

BCMR Medical Advisor recommends denying the application. There was insufficient service evidence to warrant a change in reason for discharge to medical disability retirement.

The military 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 future progression of injury or disease. Specifically, Department of Defense Instruction (DoDI) 1332.38, *Physical Disability Evaluation*, Enclosure 3, Part 3, *Standards For Determining Unfitness Due To Physical Disability Or Medical Disqualification*, paragraph E3.P3.2.1, in effect at the time of the applicant's separation, reads, "A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties) to include duties during a remaining period of Reserve obligation."

On the other hand, operating under a different set of laws, Title 38, Code of Federal Regulations (C.F.R.), 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, the narrative reason for separation, or length of time since date of separation. This is the reason an individual may be separated for one reason and yet sometime thereafter receive a compensation rating from the DVA for one or more medical conditions that were determined service-connected, but not proven militarily unfitting at the time of release from military service. The DVA is also empowered to conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease), as the level of impairment from a given service-connected medical condition may vary (improve or worsen, affecting future employability) over the lifetime of the veteran; as

noted in the applicant's adjusted combined disability rating of 90 percent, made effective 9 Feb 22.

Although the applicant has since received compensation ratings for a variety of service-connected medical conditions, the Medical Advisor found no objective evidence to indicate that either of these condition(s) permanently, or persistently without the prospect of improvement or resolution, precluded him from reasonably performing the duties of his office, grade, rank, or rating. Specifically, there is insufficient evidence to show the applicant's medical condition(s) was (were) so severe as to individually disqualify him from worldwide duty to the extent or duration to warrant inclusion in the MEB/PEB processes; as would have been first depicted on either a legacy AF Form 422, *Physical Profile Serial Report*, coded "L4," non-deployable, for a low back, cervical, or knee condition; or AF Form 469, *Duty Limiting Condition Report*, coded "37" to indicate that MEB/PEB processing was required. Although obstructive sleep apnea was included in the applicant's MEB processing, as potentially unfitting, when under treatment with a CPAP device, the condition was not/is not considered a contributory basis for career termination.

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 4 Dec 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 BCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no objective evidence to indicate the medical conditions determined to be service-connected by the DVA prevented him from performing the duties of his office, grade, rank, or rating, as required by DoDI 1332.18, for a determination of unfitness. The applicant's MEB and IPEB findings were related to the right tibial stress fracture 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 and level of disability at the time of DES processing. The applicant's evaluation by the 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 IPEB, 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, United States Code, 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-2023-01372 in Executive Session on 21 Feb 24:

, 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 24 Apr 23.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 11 Jul 23.  
Exhibit D: Advisory Opinion, BCMR Medical Advisor, dated 27 Nov 23.  
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 4 Dec 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