



Work-Product

## UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2023-01522

COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

He be given a medical retirement.

### APPLICANT'S CONTENTIONS

His retirement status should be corrected to show a classification to a Chapter 61 medical retirement, with an effective date of 4 Jul 22, with a disability rating of at least 90 percent. He retired due to the inability to get proper and timely medical care and processing. He was not counseled or made aware of the process as it relates to his medical conditions or the implication and impact the process would have on his earned benefits. He had an extensive history of multiple medical conditions that each independently, should have driven Disability Evaluation System (DES) processing because they rendered him unfit for continued service. All of his conditions are listed in the Medical Standards Directory (MSD) and are service connected and were diagnosed and originated while he was in an active-duty status. The medical processes were not properly followed and none of his diagnoses initiated any follow-up actions for a Deployment Availability Working Group (DAWG) review, a fit for duty evaluation, a Medical Evaluation or Physical Evaluation Board (MEB/PEB), an Initial Review in Lieu of (IRILO), or any other component of the DES processing. To support his request, he submitted his Department of Veterans Affairs (DVA) disability ratings and his medical records showing the diagnosis of his various medical conditions.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force Reserve (AFR) chief master sergeant (E-9) awaiting retired pay at age 60.

Dated 31 Oct 18, AF Form 911, *Enlisted Performance Report (MSgt thru SMSgt)*, indicates the applicant received an annual performance report for the period of 1 Aug 17 thru 31 Jul 18. His overall performance rating was a five which denotes he exceeded most, if not all, expectations. It

**AFBCMR Docket Number BC-2023-01522**

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CUI Categories: Work-Product  
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was noted he was awarded the highest first sergeant honor for execution of his duties and greatly exceeded expectation.

Dated 4 Oct 19, AF Form 911, indicates the applicant received an annual performance report for the period of 1 Aug 18 thru 31 Jul 19. His overall performance rating was a five which denotes he exceeded most, if not all, expectations. It was noted he was awarded the 2018 Major General Harold McClelland Information Dominance Award and was a gifted leader.

On 1 May 20, AF Form 224, *Recommendation and Authorization for Promotion of Airman as Reserve in the Air Force*, indicates the applicant was promoted to chief master sergeant (E-9).

Dated 2 Jul 20, AF Form 912, *Enlisted Performance Report (CMSgt)*, indicates the applicant received an annual performance report for the period of 1 Aug 19 thru 31 May 20. It was noted he was a key player in squadron goals and priorities and was ready now for higher responsibility.

On 26 Jun 20, ARPC/DPTT sent the applicant the standard Notification of Eligibility for retired pay (20-year letter) informing him he completed the required years under the provisions of Title 10 United States Code, Section 12731 (10 U.S.C § 12731) and is entitled to retired pay upon application prior to age 60.

On 25 Jan 21, the applicant received a Meritorious Service Medal (MSM) for the period of 8 Jan 17 thru 7 Jan 20.

Dated 29 Jul 21, AF Form 912, indicates the applicant, as a squadron superintendent, received an annual performance report (reporting period not annotated). It was noted he led 137 members and 1,806 sorties during the COVID-19 crisis and drove 24/7 Air Force Defense Cyber Operations.

Dated 19 May 22, Reserve Order **Work-Product** indicates the applicant was assigned to the Retired Reserve, effective 4 Jul 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 AFBCMR Medical Advisor recommends denying the applicant's request for a medical retirement. Addressing the applicant's contention, he was wrongfully deprived of a MEB and a medical disability retirement; he is advised a medical diagnosis does not automatically render a service member unfit for continued military service. Per DoDI 1332.18, *Disability Evaluation System*, paragraph 6.2, under *General Criteria for Making Unfitness Determinations*, a Service member shall be considered unfit when: (a) 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; to include duties during a remaining period of Reserve obligation. (b) The evidence establishes their disability represents a decided medical risk to their health or to the welfare or safety of other members; or imposes unreasonable requirements on the military to maintain or

protect the Service member. Therefore, although conditions appear in the MSD as potentially disqualifying or unfitting, there is no objective service evidence that either of the applicant's medical diagnoses rendered him unable to reasonably perform the duties of his office, grade, rank, or rating. Whether due to implicit inaction of the part of the applicant's military providers or alleged lack of counseling and awareness of the process, and the impacts the processes would have on the applicant's earned benefits, the preponderance of objective evidence shows no indicators his medical conditions triggered restrictions to duty, neither triggered a DAWG review, or prevented him from performing his military duties, nor posed a decided health risk in the treated state.

The Medical Advisor cannot commit speculation or conjecture, with respect to what actions may have taken place had the applicant undergone a MEB for either of his medical conditions. Thus, the Medical Advisor provides two additional policy extracts, to help with the Board's decision and rationale. The Medical Advisor first directs attention to an extract from DoDI 1332.18, paragraph 6.3, which states the Secretaries of the Military Departments will consider all relevant evidence in assessing Service member fitness, including the circumstances of referral. To reach a finding of unfit, the PEB must be satisfied the evidence supports that finding. (a) Referral Following Illness or Injury - When referral for disability evaluation immediately follows acute, grave illness or injury, the medical evaluation may stand alone, particularly if medical evidence establishes that continued service would be harmful to the member's health or is not in the Military Department's best interest. (b) Referral for Chronic Condition - When a Service member is referred for disability evaluation under circumstances other than as described in paragraph 6.3.a, a supervisor's evaluation or personal testimony of the Service member's duty performance may more accurately reflect the capacity to perform. Supervisors may include letters, efficiency reports, and, in the case of medical officers, credential reports and status of medical privileges, to provide evidence of the Service member's ability to perform their duties. In the case under review, the applicant's Enlisted Performance Reports (EPR) speak volumes of his ability to perform the duties of his office, grade, rank, or rating.

Secondly, the Medical Advisor provides another important extract from DoDI 1332.18, relevant to the applicant's possible predicament, under paragraph 6.5, presumption of fitness would have applied had he undergone an MEB during the 12 months approaching his chosen retirement date. This paragraph states Service members who are pending retirement at the time they are referred for disability evaluation will be presumed fit for military service. However, the Medical Advisor is not aware of the date the applicant requested retirement, nor the date it was approved. Nevertheless, the Secretaries of the Military Departments will presume Service members are pending retirement when the Service member's referral into the DES occurs after any of these circumstances: (1) A Service member's request for voluntary retirement has been approved. Revoking voluntary retirement orders for purposes of referral into the DES does not negate application of the presumption. (2) An officer has been approved for selective early retirement or is within 12 months of mandatory retirement due to age or length of service. (3) An enlisted member is within 12 months of their retention control point, high year of tenure, or expiration of active obligated service, but will be eligible for retirement at that point. (4) A Reserve Component (RC) Service member is within 12 months of mandatory retirement or removal date

and qualifies for a 20-year letter at the time of referral for disability evaluation. (5) A retiree is recalled, including those who transferred to the Retired Reserve, with eligibility to draw retired pay upon reaching the age prescribed by Title 10, U.S.C. unless the recalled retiree incurred or aggravated the medical condition while on their current active-duty orders and overcomes the presumption of fitness. However, assuring proper clinical judgment is considered in such decision-making, Service members may overcome the presumption of fitness by presenting a preponderance of evidence that they are unfit for military service. The presumption of fitness may be overcome when: (1) an illness or injury occurs within the presumptive period that would prevent the Service member from performing further duty, if they were not retiring; (2) a serious deterioration of a previously diagnosed condition, including a chronic one, occurs within the presumptive period, and the deterioration would preclude further duty if the Service member were not retiring; or (3) the condition for which the Service member is referred is a chronic condition and a preponderance of evidence establishes that they were not performing duties befitting either their experience in the office, grade, rank, or rating before entering the presumptive period because of the condition. The Medical Advisor opines a preponderance of evidence shows the applicant's medical conditions would unlikely prevent him from performing further duty if he was not retiring. There has also been no evidence of serious deterioration of either of his medical conditions during the presumptive period, and there is no evidence he was not performing duties befitting of his office, grade, rank, or rating.

Finally, the Medical Advisor acknowledges it appears counterintuitive for the applicant to have received disability ratings and compensation for conditions determined service connected by the DVA. He is advised the military's role in the DES is to maintain a fit and vital fighting force, and by law, operating under Title 10, U.S.C., can only offer compensation for those service-incurred diseases or injuries which specifically rendered a member unfit for continued active service and was the cause for career termination. 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, or the narrative reason for release from military service. This is the reason an individual can be separated for one reason and yet receive compensation ratings from the DVA any medical conditions that were determined service-connected, but not proven militarily unfitting at the time of release from military service.

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 8 Jan 24 for comment (Exhibit D), and the applicant replied on 7 Feb 24. In his response, the applicant contends the Medical Advisor does not address the fact that no evaluations were ever conducted or initiated for his conditions presented in his request even though they are listed in the MSD and are outlined in DoDI 6130.03 Volume 2, *Medical Standards for Military Service: Retention*. His conditions are identified as disqualifying for military service per DAFMAN 48-123, *Medical Examinations and Standards*, paragraph 4.2 and are required to be medically evaluated for continued military service.

If he was evaluated properly, he would have received a fitness for duty determination rather than the speculative and subjective determination presented by the Medical Advisor. Any assumptions made are invalid and the benefit of doubt should support his contentions because he was denied equal opportunity and due process. Shortly after retirement, his service-connected conditions deteriorated to the point his primary care doctor determined he was now handicapped, and he was issued a handicap license plate. During the last few years of his military service, healthcare was extremely limited due to the COVID-19 outbreak and it would take several months to get appointments and referrals. He determined due to the lack of medical care, he should curtail his Active Guard Reserve (AGR) tour and become a traditional Reservist to obtain civilian medical care. His Rosacea and ocular Rosacea were treated but not satisfactorily as he still had severe skin and vision problems. In Oct 20 he went through a three week intensive chronic pain management program. He was then diagnosed with Fibromyalgia. These issues, along with his insomnia and hypertension, should have triggered a fitness for duty determination. He was dealing with pain that was incapacitating and interfered with his ability to function normally and impacted his ability to perform the duties of his office and rank. If his Physical Health Assessments (PHA) were reviewed properly, his conditions would have been identified rendering him non-deployable and would have triggered a review by the DAWG or submitted to a PEB. Due to the COVID-19 environment where work functions were significantly reduced and in the absence of his commander, this environment did not allow others to witness the decline in his health. His EPRs reflected his outstanding service; however, his last EPR showed his decline in health as affecting his performance when he was not granted a path to continued service as a traditional Reservist. His intention was to serve for 33 years but due to the lack of military medical care, he had to stop serving so he could seek civilian medical care to treat the decline in his medical conditions.

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 AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant's contention his conditions appear in the MSD and should therefore be considered as potentially disqualifying or unfitting; however, the medical evidence does not support he was unable to reasonably perform the duties of his office, grade, rank, or rating or that he overcame the presumption of fitness. The mere existence of a medical diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The applicant's military duties were not degraded due to his medical conditions. 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. 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 narrative reason for 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 against correcting the applicant's records.

## 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-2023-01522 in Executive Session on 21 Feb 24:

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Panel Chair

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Panel Member

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Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 3 May 23.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, AFBCMR Medical Advisor, dated 5 Jan 24.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Jan 24.

Exhibit E: Applicant's Response, w/atchs, dated 7 Feb 24.

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.

3/11/2024

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Board Operations Manager, AFBCMR

Signed by: USAF

**AFBCMR Docket Number BC-2023-01522**

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