

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01726

XXXXXXXXXXXXXX

COUNSEL: XXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel record amended to reflect:

- a. Retirement under Temporary Early Retirement Authority (TERA).
- b. Retirement effective date of 31 May 15.
- c. Retroactive award of Combat-Related Special Compensation (CRSC).

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, requested expedited review based upon hardship and injustice contending the applicant has been denied proper retirement benefits and compensation since his separation from the Air Force. His first petition to the Air Force Board for Correction of Military Records (AFBCMR) was denied on 17 Nov 15. He continued his pursuit, and on 13 Dec 16, his request for medical retirement was granted. His petition requested relief based on his injuries that were present at the time of his separation. He has been financially denied the additional compensation that would otherwise be available to him if the Air Force followed their procedures, allowing the applicant to complete 15 years of active service, and retire under TERA.

His request for relief has been ongoing since 2014, over eight years without delay on his part. His request for relief is founded upon the 27 Nov 18 conclusion that his medical evaluation board (MEB) was inappropriately concluded. He contends if the MEB process was conducted properly, he would have remained on active duty and accrued enough active duty time to qualify for TERA.

The applicant previously submitted a petition to the AFBCMR requesting his military records be corrected from reduction in force separation to medically retired. His initial request was denied on 17 Nov 15, and he submitted a request for reconsideration on 13 Dec 16. The applicant's request for reconsideration highlighted the inconsistencies in the separation procedures related to his simultaneous consideration by a Quality Force Review Board (QFRB) and an MEB. Neither board was aware of the other, and the applicant's commander failed to intervene in his best interests. He was separated from the Air Force with 14 years, 3 months, 8 days [sic]¹ active federal service. Upon reconsideration, the AFBCMR concluded although he was properly processed by the QFRB, his MEB was inappropriately halted. The applicant's military record was corrected to reflect a 40 percent disability rating and a medical retirement date of 18 Aug 14. Following separation from the Air Force, the applicant applied to the Department of Veterans Affairs (DVA) for treatment of injuries and conditions due to his service. He currently has a service-connected rating of 100 percent, including spinal strain and degenerative joint disorder. His rating includes injuries that occurred while deployed in support of contingency operations.

The National Defense Authorization Act (NDAA) for the fiscal year 2012 (FY12), P.L. 112-81, reinstated certain provisions of the NDAA for FY93, authorizing the military services to offer

¹ Applicant was credited with 14 years, 3 months, 9 days active service.

early retirement to service members who have completed at least 15 years of active service. The provisions of the NDAA FY12 authorizing the TERA program expired on 31 Dec 18.

CRSC is an additional benefit paid to combat-related disabled uniformed services retirees who elect benefits under the provisions of Title 10, United States Code, Section 1413a (10 USC § 1413a). Eligible retirees are members of the uniformed services who are: (1) entitled to retired pay, and (2) have a combat-related disability. Combat-related disabilities include a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and (1) is attributable to an injury for which the member was awarded the Purple Heart; or (2) was incurred (as determined under criteria prescribed by the Secretary of Defense): (A) as a direct result of armed conflict; (B) while engaged in hazardous service; (C) in the performance of duty under conditions simulating war; or (D) through an instrumentality of war.

Per Department of Defense Instruction 1332.28, *Discharge Review Board (DRB) Procedures and Standard*, E4.2.1.A [sic]², a discharge will be deemed proper unless it is determined that an error of fact, law, procedure, or discretion existed at the time the applicant was discharged and the error prejudiced the rights of the applicant. An error will constitute prejudicial error if there is substantial doubt that the discharge would have remained that same if the error had not been made. The applicant's command made a material legal error when they simultaneously subjected the applicant to a QFRB and MEB, and inappropriately terminating the MEB. A summary of his medical history was prepared at the request of the AFBCMR, and it clearly shows injuries, conditions, and disorders because of his service to the Air Force. His MEB was inappropriately halted by his chain of command and replaced by a QFRB which led to his involuntary separation at just over 14 years. He contended if he were permitted to continue his MEB process, he would have achieved over 15 years of service, allowing him to retire under the provisions enacted by TERA.

The applicant's eligibility for CRSC should be granted for his injuries sustained while serving in a hazardous duty location. Medical entries in his file show he was treated for localized neck and shoulder pain while deployed to Kuwait. These injuries did not receive the proper attention while he was serving, and it was not until his examination at the DVA that he would be properly diagnosed. His conditions diagnosed by DVA were severe enough to warrant a service-connected rating.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force staff sergeant (E-5).

On 18 Aug 14, according to AFBCMR directive BC-2015-00247, dated 27 Nov 18, the applicant 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 and right shoulder degenerative joint disease, status post-surgery (also claimed as collarbone arthritis), that his conditions were under Veterans Affairs Schedule for Rating Disabilities code 5003-5201; with a disability rating of 20 percent for each shoulder for a combined rating of 40 percent; the degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during a 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. On 18 August 2014, he was discharged from active duty, and on 19 August 2014, he was permanently retired with a compensable percentage for physical disability of 40 percent.

² Paragraph cited should be E4.2.1.1. not E4.2.1.A.

On 18 Aug 14, the applicant was furnished an honorable discharge, with Narrative Reason for Separation: Disability, Permanent IDES, and credited with 14 years, 3 months, 9 days active service.

On 19 Aug 14, according to Special Order Number XXXXXX, dated 18 Dec 18, the applicant was permanently disability retired with a compensable percentage for physical disability of 40 percent. The disability was not received in line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in line of duty during a period of war, and the disability was not the direct result of a combat-related injury as defined in 26 U.S.C. 104.

On 30 Dec 14, DVA letter to the applicant provided a list of his service-connected disabilities, with a combined rating of 100 percent.

On 9 Oct 19, according to DD Form 2860, *Claim for Combat-Related Special Compensation (CRSC)*, the applicant applied for CRSC.

On 4 Nov 19, according to AFPC/DPFDC [USAF Physical Disability Division] letter, the applicant's request for CRSC was denied.

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/DPFDC recommends denying the applicant's request for CRSC based on the documentation provided by the applicant and analysis of the facts.

The applicant's CRSC claim, dated 16 Oct 19, was disapproved as non-combat related. In his claim, he contended that while deployed to Iraq, someone put an empty gun to his head and pulled the trigger as a joke. He contended exposure to mortar attacks caused depressive disorder, and a forklift accident caused him to fall and separate his right shoulder. Documentation submitted by the applicant in his claim and to the AFBCMR has been reviewed and there is no evidence provided, such as in-service medical records (for physical injuries) from the time of the injuries and evaluations, and/or decoration citation (for depressive disorder) that confirms his injuries were the direct result of a combat-related event.

The fact that a member incurred the disability during a period of war, while serving in an area of armed conflict, and/or while participating in combat operations, is not sufficient by itself to support a combat-related determination. When making combat-related determinations, with regard to armed conflict, hazardous service, simulation of war, or an instrument of war, the CRSC board looks for definite, documented, causal relationship between the combat-related event and the resulting disability.

The complete advisory opinion is at Exhibit C.

AFPC/DP2SSR recommends denying the applicant's request for a retirement under TERA. The applicant was not eligible for TERA as he did not meet the 15 years of service threshold needed to retire early from active duty.

When offered by the Secretary of the Air Force during periods of force management, TERA was only available to overage Air Force Specialty Codes (AFSC) and grades. The eligibility criteria are dependent upon each fiscal year's manning and mission needs to meet congressionally mandated end strength requirements for the Air Force. Servicemembers pending involuntary

separation, medical evaluation board processing/physical evaluation board processing, court-martial, and dismissal have always been excluded from TERA eligibility even if they held an overage AFSC.

As outlined in Personnel Services Delivery Memorandum (PSDM) 13-127 from the Officer of the Secretary of Defense, dated 17 Dec 13 and amended on 24 Apr 14, a member of the military services who is approved for early retirement must not be under evaluation for disability retirement under Chapter 61 of Title 10. Additionally, the applicant did not complete 15 or more years of active service upon the effective date of retirement.

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 28 Nov 23 for comment (Exhibit E), and the applicant replied on 27 Dec 23. In his response, the applicant's counsel contended the advisory opinion denying his CRSC claim due to lack of supporting evidence did not account for the equitable relief requested. He provided all in-service medical documentation available to him; however, as previously concluded by the AFBCMR, his MEB was inappropriately halted and prevented the applicant from entering into the Integrated Disability Evaluation System (IDES), and he was unjustly discharged under the QFRB. This precluded any further examination that would have established a nexus between his injuries and his time in hazardous duty locations.

Additionally, the advisory opinion dated 16 Nov 23 stated the applicant was ineligible for retirement under TERA due to not obtaining 15 years of service, not being in an overage AFSC, and pending separation. The applicant contends his separation under QFRB was inappropriate, and had he been able to fully medically process through the IDES, he would have met his 15-year service obligation, or at the very least have been able to receive the proper medical examination prior to discharge.

Applicant served honorably for over 14 years, during which he deployed in support of multiple combat operations and suffered physical and mental injuries as a result of his service. He received multiple surgeries that limited his ability to perform within his AFSC, specifically the Air Force Fitness test. Additionally, he received punitive punishments for physical injuries, despite receiving limited duty profiles and multiple medical examinations. He was wrongfully discharged due to a lack of communication in his command and was separated under QFRB instead of receiving the proper medical evaluation under IDES. Had the applicant received the proper medical evaluation at the end of service, he would have been properly diagnosed for all service-connected disabilities and received a proper medical discharge or would have received the necessary medical treatment to continue his service until retirement.

The applicant's complete response is at Exhibit F.

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, to include applicant's response, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationales and recommendations of AFPC/DPFDC and AFPC/DP2SSR and finds a preponderance of the

evidence does not substantiate the applicant's contentions. Despite the applicant's claim to receiving multiple medical examinations and providing all in-service medical documentation available to him, there is insufficient evidence that his disabilities were the direct result of armed conflict, hazardous service, simulation of war or an instrumentality of war in accordance with 10 USC § 1413a. Regarding the applicant's request for retirement under TERA, he did not meet eligibility criteria in accordance with PSDM 13-127 as he did not have more than 15 years but less than 20 years total active federal military service to apply for retirement. The applicant's contention that halting his MEB prevented him from meeting the 15-year threshold is purely speculative; however, even had the MEB process extended his service beyond 15 years, servicemembers pending action under the disability evaluation system were specifically excluded from TERA eligibility by this same guidance. In light of the applicant's ineligibility under TERA, his request to amend his retirement date is rendered moot. 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-2023-01726 in Executive Session on 20 Mar 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 18 Nov 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DPFDC, w/atchs, dated 31 Oct 23.
Exhibit D: Advisory Opinion, AFPC/DP2SSR, w/atchs, dated 16 Nov 23.
Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 28 Nov 23.
Exhibit F: Counsel's Response, w/atchs, 27 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