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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01866

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COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His retirement on 24 Feb 11 for physical disability be with a compensable rating of 80 percent, instead of 10 percent, and he be provided all back pay.
2. His DD Form 214, *Certificate of Release or Discharge from Active Duty*, be corrected to reflect his correct rating.

APPLICANT'S CONTENTIONS

At the time of his physical evaluation board (PEB) processing, he was given a service connected disability rating of 80 percent by the Department of Veterans Affairs (DVA). However, upon contacting the Defense Finance and Accounting Service (DFAS) recently, he was told his disability rating was only 10 percent. As such, his military retired pay has not been computed correctly since Feb 11. Additionally, the DVA on 9 Jun 21 awarded him a 70 percent service connected rating for his post-traumatic stress disorder (PTSD).

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force master sergeant (E-7).

On 20 Jul 04, the applicant elected to receive the Career Status Bonus (CSB). The applicant requested a single lump sum payment of \$30,000 and acknowledged that his future retired pay, if based on length of service, would be reduced in the form of a reduced multiplier before age 62, and cost of living adjustments (COLA) that are one percentage point less.

AF Form 469, *Duty Limiting Condition Report*, dated 17 May 10 reflects the applicant was placed on duty and mobility restrictions, with no lifting greater than 20 pounds, no running or repetitive bending at the waist and/or cyclic motion at the ankles. The applicant had already been mobility restricted nine months for the same condition. A medical evaluation board (MEB) was initiated on 26 Oct 09.

The MEB Narrative Summary (NARSUM) dated 10 Jun 10 states the applicant had a back injury several years prior and the pain in his lower back had gotten progressively worse. The applicant was barely able to perform the duties required of him and required epidural steroids to be able to function. Also, during a workup in the past year for his back pain, the applicant answered a screening questionnaire and reported some headaches and daytime fatigue. Subsequently he was

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found to have obstructive sleep apnea (OSA). He received the continuous positive airway pressure (CPAP) machine a month prior and his sleep quality and daytime somnolence improved with the use of the CPAP.

AF IMT 618, *Medical Board Report*, dated 6 Aug 10 reflects a MEB convened and referred the applicant to the informal physical evaluation board (IPEB) to determine his fitness for continued active duty for his conditions of back pain and OSA. In the commander's recommendation dated 21 Jul 10, his commander recommended the applicant be retained; however, due to his inability to deploy, the unit could not maintain readiness. His commander believed he would be a valued member to any squadron.

On 19 Aug 10, the IPEB found the applicant's chronic low back pain with intervertebral disc degeneration was unfitting. However, the IPEB found his OSA, a Category II condition, was currently not compensable or ratable. The applicant's case was processed under the Integrated Disability Evaluation System (IDES) and his case would be finalized upon receipt of the rating by the Department of Veterans Affairs (DVA).

The DVA Disability Evaluation System (DES) Proposed Rating dated 7 Oct 10, reflects the DVA proposed a 10 percent rating for his lumbar spine degenerative disc disease (PEB referred as chronic low back pain with intervertebral disc degeneration). For purpose of entitlement to DVA benefits, it established service connection for OSA as directly related to military service with a 50 percent evaluation. The applicant's DVA combined service connected disability rating for his multiple conditions is 80 percent.

On 26 Oct 10, the applicant agreed with the findings and recommended disposition of the IPEB.

On 9 Nov 10, the Secretary of the Air Force Personnel Council (SAFPC) directed the applicant be retired under the provisions of 10 U.S.C. § 1201.

On 23 Feb 11, the applicant was discharged and retired in the grade of E-7 effective 24 Feb 11, with a compensable percentage for physical disability of 10 percent. He was credited with 21 years, 6 months and 28 days of active duty service.

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

AIR FORCE EVALUATION

AFPC/DPFDD recommends denial. The Air Force and DVA disability systems operate under separate laws. The Air Force system, under 10 U.S.C., must determine whether an airman's medical condition rendered 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 and is not subject to change. The DVA, under 38 U.S.C., may increase or decrease ratings based on changes. However, a higher rating by the DVA based on new or current examinations conducted after discharge from service do not warrant a change in the total compensable rating awarded at the time of separation.

On 30 Jul 10, the MEB found the applicant potentially unfitting for back pain and OSA. On 14 Oct 10, the IPEB found him unfit for chronic low back pain with intervertebral disc degeneration with a 10 percent compensable disability rating. The IPEB placed the OSA along with seven other

DVA claimed/service connected conditions in Category II-Conditions, these conditions can be unfitting but were not currently compensable or ratable. The IPEB noted the applicant's sleep quality and daytime somnolence were much improved with the use of the CPAP, so the OSA was not unfitting for duty. The other conditions in Category II were not addressed by the MEB and did not appear to affect the applicant's ability to perform his duties and were not independently unfitting for duty. Further, the applicant provided the 7 Oct 10 DVA proposed rating decision used during the IDES process, which confirms the DVA had proposed an 80 percent rating for all service connected disabilities.

The applicant's DD Form 214 was properly prepared with Block 28, *Narrative Reason for Separation*, indicating he was permanently disability retired. It does not contain a reference to any disability ratings which is standard practice.

The applicant also provides a 9 Jun 21 DVA rating decision that reflects the DVA awarded a 70 percent disability rating for PTSD, effective 15 Apr 21 (over 10 years following his retirement from the Air Force). The applicant does not claim this condition should have been considered unfitting by the PEB. It is noted that the DVA routinely service connects additional disabilities following separation; however, the newly service connected disabilities have no impact on a member's IDES rated unfitting conditions after the fact. There is also no evidence to show his condition was either diagnosed or claimed while he was on active duty and the rating decision cites an initial DVA PTSD Compensation and Pension (C&P) examination dated 21 May 21 as the source document used for the award.

The complete advisory opinion is at Exhibit C.

DFAS states the applicant receives reduced retired pay because he chose to take a CSB. By receiving the CSB, he agreed to complete 20 years of service and upon retiring would receive reduced retired pay.

Under 10 U.S.C. § 1201, a member with a disability rating of at least 30 percent or served at least 20 years can be retired for disability that incurred while entitled to basic pay. The applicant's disability for retirement is 10 percent. He qualified for career disability retiree with more than 20 years of service. His retired pay is computed using his longevity and cannot exceed the amount of what he would have received had he not retired for disability. When the applicant reaches the age of 62 and qualifies to have his pay computed using the percentage multiplier of .5375, the offset will also be adjusted so that he receives his full retired pay without the deduction. His pay will continue to be reduced for the reasons stated unless the Board determines the disability at retirement should have been higher.

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 7 Dec 23 for comment (Exhibit E), and the applicant replied on 29 Dec 23. The applicant states the reason for denial was the assertion his OSA was not considered in the calculation of his disability rating and that his OSA condition did not make him unfit for duty. The completed AF IMT 618 referring him to the IPEB included back pain and OSA. He had already received a 50 percent rating from the DVA during his initial evaluation before separating from the Air Force. The OSA should have been factored into his disability rating and the 50 percent awarded by the DVA should be reflected in his records.

On 26 Oct 10, he signed the AF Form 1180 agreeing with the findings and recommendations of the IPEB, while waiving his right to a formal PEB (FPEB). Notably, this document does not reflect the disability rating and he assumed that the 80 percent rating given to him before his medical retirement was considered.

The AFPC/DPFDD advisory states, “to be unfitting, the condition must be of such that it alone precludes the member from fulfilling their duties.” His role as a crew chief for the MQ-1, remotely piloted aircraft, necessitated him to deploy to austere locations. The lack of his ability to deploy due to the medical requirement to use a CPAP directly impacted his duty performance. It is an injustice for the Air Force to calculate his final Air Force disability rating at 10 percent.

The inconsistencies within the evaluation process unjustly influenced his military disability rating. While he acknowledges that some of his disability conditions were found not to contribute to his MEB, the two conditions for which he was medically retired should be considered.

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, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendations of AFPC/DPFDD and DFAS and finds a preponderance of the evidence does not substantiate the applicant’s contentions. 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. Although the DVA service connected several additional medical conditions, both while in service and following his retirement, that were not included in the PEB, there is no indication these conditions were severe enough to be considered unfitting by DoD standards for DES processing. Under 10 U.S.C. § 1201, a member with a disability rating of at least 30 percent or served at least 20 years of service can be retired for a disability incurred while entitled to basic pay. The applicant’s disability for retirement is 10 percent and he qualified for career disability retiree with more than 20 years of service. The applicant’s retired pay is computed using his longevity and cannot exceed the amount of what he would have received had he not retired for disability. The Board notes the applicant receives reduced retired pay because he chose to take a CSB. By receiving the CSB, he agreed to complete 20 years of service and upon retiring would receive reduced retired pay. Therefore, the Board recommends against correcting the applicant’s records. 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 and finds the application untimely.

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-2023-01866 in Executive Session on 17 Apr 24:

Work-Product, Panel Chair
Work-Product, Panel Member
Work-Product, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 31 May 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 27 Nov 23.
- Exhibit D: Advisory Opinion, DFAS, dated 27 Nov 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Dec 23.
- Exhibit F: Applicant's Response, dated 29 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.

4/25/2024

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Board Operations Manager, AFBCMR
Signed by: USAF