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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01945

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His official military personnel record amended to reflect an increase in his physical disability retirement from 30 percent to 75 percent.

APPLICANT'S CONTENTIONS

The Informal Physical Evaluation Board (IPEB) disallowed ratings for injuries to the neck and arms that the medical reports clearly showed as service-connected. The IPEB did not address the unfitting condition of Bipolar which was rated by the Department of Veterans Affairs (DVA) at 70 percent and in the Narrative Summary (NARSUM). The entire process took place during the start of the COVID pandemic. The DVA rating system at the time was shutdown and the Legacy Disability Evaluation System (DES) was offered as a timely alternative. While DVA ratings do not have to be used in the Legacy DES, the evidence they produce should be addressed and cause should be shown to overturn.

The unfitting Bipolar Disorder shown in the NARSUM was ignored by the IPEB, a clear violation of procedures. The cervical conditions of the spine were shown in the NARSUM to be attributed to active duty service injuries but disallowed by the IPEB (injuries to the head affect the neck). A prior 2018 DVA disability evaluation linking the cervical neck ratings and associated radiculopathy was either ignored or disallowed with no cause. The Bipolar disability was shown related by the DVA prior to the IPEB and in the NARSUM but never addressed by the IPEB as a disqualifying condition as by Air Force regulations. During a review by the DVA in Nov 22, the counselor pointed out obvious errors in his IPEB. A new DVA rating was issued in Mar 23, and he was waiting for the final award before submitting this application. He missed the three-year window by one month waiting for additional medical evidence from the DVA. The latest DVA rating is not complete but has been updated to 100 percent in Mar 23.

He would like to appeal the decision of the IPEB because it was during the start of the COVID pandemic and what little support he could find recommended he accept the findings because appealing them could cause a delay of years to his retirement since it was unknown if the evaluation system would open back up because of COVID.

On 20 Mar 20, the IPEB disagreed with the Medical Board's finding of service-connection for a neck injury. A single doctor overruled the findings. On 1 Mar 20, three Air Force doctors signed his medical board report after reviewing his medical records. They referred to the IPEB two conditions: cervicgia with radiculopathy and low back pain with lumbar radiculopathy. The diagnosis of Bipolar Disorder, while stated in the NARSUM, was not brought up as an unfitting

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condition. Air Force regulation clearly states that Bipolar Disorder is an unfitting condition and not waivable. This error was gross negligence in proper processing for an IPEB.

The records of his IPEB and NARSUM should be enough to overturn this decision. His DVA ratings prior to his IPEB were neck/30 percent; left arm/20 percent, right arm/20 percent; and Bipolar/70 percent. While the Legacy DES does not have to accept DVA ratings, any disagreement with the DVA rating should have clear and irrefutable proof to overturn, and none was given by the IPEB. He does suffer from a severe diagnosed mental disability which often causes delays in his processing.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired [State] Air National Guard lieutenant colonel (O-5).

On 1 Jun 19, according to DVA Rating Decision (Excerpt), provided by the applicant, the following conditions were evaluated, and service-connection established:

- Bipolar Disorder, Severe and Hypothyroidism without Psychotic Features (claimed as depression) associated with Hypogonadism; Veterans Administration Schedule for Rating Disabilities (VASRD) Code 7903-9432; compensable at 70 percent from 10 Mar 18
- Spinal Stenosis, Degenerative Disc Disease and Multilevel Degenerative Changes of the Cervical Spine associated with Degenerative Disc Disease with Herniation Lumbar Spine L5-S1 (claimed as low and mid-back condition); VASRD Code 5242; compensable at 20 percent from 10 Mar 18
- Hypertension; VASRD Code 7101; compensable at 20 percent from 10 Mar 18
- Right Upper Extremity Radiculopathy associated with Spinal Stenosis, Degenerative Disc Disease and Multilevel Degenerative Changes of the Cervical Spine; VASRD Code 8511; compensable at 20 percent from 10 Mar 18
- Left Upper Extremity Radiculopathy; VASRD Code 8511; compensable at 20 percent from 10 Mar 18
- Degenerative Disc Disease with Herniation Lumbar Spine L5-S1 (claimed as low and mid-back condition); VASRD Code 5237; compensable at 10 percent from 10 Mar 18
- Tinnitus; VASRD Code 6260; compensable at 10 percent from 10 Mar 18
- Erectile Dysfunction VASRD Code 7522; compensable at 0 percent from 10 Mar 18
- Hypogonadism; VASRD Code 7599-7523; compensable at 0 percent from 10 Mar 18

Combined evaluation for compensation is 90 percent from 10 Mar 18.

On 2 Aug 19, according to AF Form 469, *Duty Limiting Condition*, the applicant was found not worldwide deployable and referred to the Medical Evaluation Board (MEB).

On 17 Oct 19, according to an NGB/SGP [Physical Standards Branch] memorandum, the applicant's prior-service condition of chronic back pain was incurred during a period of active duty, establishing an administrative Line of Duty (LOD) determination. Applicant was recommended for review by the MEB.

On 12 Dec 19, according to *Legacy DES Election Statement Memorandum*, the applicant elected to undergo Legacy DES processing.

On 15 Jan 20, according to AF Form 1185, *Commander's Impact Statement for Medical Evaluation Board*, the applicant was not able to perform all primary Air Force Specialty Code duties in-garrison or in an austere/deployed environment.

On 10 Mar 20, according to AF IMT, *Medical Board Report*, the applicant was diagnosed with cervicgia with radiculopathy and low back pain with lumbar radiculopathy and referred to the IPEB.

On 12 Mar 20, according to the *Impartial Medical Review (IMR) and Rebuttal Action Form*, the applicant agreed with the MEB results and elected not to submit a request for an IMR or rebuttal.

On 20 Mar 20, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Informal)*, the applicant was evaluated for the following Category I – Unfitting Conditions:

- Degenerative Arthritis of the Lumbosacral Spine, VASRD Code 5242, with disability compensation rating of 20 percent.
- Right Lower Extremity Radiculopathy, VASRD Code 8720, with disability compensation rating of 10 percent.
- Degenerative Arthritis of the Cervical Spine with Spinal Stenosis, VASRD Code 5242-5238, Not Incurred While Entitled to Receive Basic Pay.
- Bilateral Lower Cervical Radiculopathy, VASRD Code 8712, Not Incurred While Entitled to Receive Basic Pay.

The applicant was found unfit because of physical disability and recommended for permanent retirement with a combined compensable percentage of 30 percent.

On 16 Apr 20, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the finding and recommended disposition of the IPEB and waived his rights for any further appeal.

On 16 May 20, according to Special Order **Work-Product**, dated 27 May 20, the applicant was relieved from assignment and honorably discharged from the [State] Air National Guard, and transferred to the United States Air Force Reserve, effective 17 May 20.

On 17 May 20, according to Special Order Number **Work-Product**, dated 28 Apr 20, the applicant was relieved from active duty, organization, and station of assignment. Effective 18 May 20, he was permanently disability retired with a compensable percentage for physical disability of 30 percent.

On 8 Mar 23, according to DVA Rating Decision, provided by the applicant, the following conditions were evaluated, and service-connection established:

- Left Lower Extremity Radiculopathy (femoral nerve) (claimed as nerve damage); compensable at 20 percent from 22 Nov 22
- Left Lower Extremity Radiculopathy (sciatic nerve); compensable at 20 percent from 22 Nov 22
- Right Lower Extremity Radiculopathy (femoral nerve); compensable at 20 percent from 22 Nov 22
- Right Lower Extremity Radiculopathy (sciatic nerve); compensable at 20 percent from 22 Nov 22

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

AIR FORCE EVALUATION

NGB/SGPS 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 regarding the applicant's physical disability retirement.

The applicant concurred with the IPEB recommendation based on the discharge order dated 28 Apr 20. He stated in his letter to the Air Force Board for Correction of Military Records, dated 1 May 23, that he did not appeal the IPEB's decision. There is no documentation submitted nor in the applicant's electronic health record indicating he appealed the IPEB decision to address his Bipolar Disorder. The applicant was permanently disability retired with a compensable percentage of 30 percent for his physical disability, effective 18 May 20. The applicant is currently being seen by the DVA for his Bipolar Disorder.

The DES can by law, under Title 10, United States Code (U.S.C.), only offer compensation for those service-incurred diseases or injuries which specifically rendered a member unfit for continued service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on future progression of injury or illness. The DVA on the other hand, operates under a different set of laws (Title 38, U.S.C.) with a different purpose and 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 length of time since date of discharge. The DVA can also conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease) over the lifetime of the veteran. The DVA granted the applicant 70 percent service-connected disability for Bipolar Disorder, Severe and Hypothyroidism without Psychotic features (claimed as depression) associated with Hypogonadism, Service Connected, Gulf War, Secondary Status Disability, effective 10 Mar 2018.

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 12 Dec 23 for comment (Exhibit D), and the applicant replied on 8 Jan 24. In his response, the applicant contended his IPEB was conducted during the height of COVID, conducted with only one reviewer, which is not the standard, and the one IPEB reviewer overturned the duty-related conditions of his cervical spine and arms set by the MEB and the 2018 DVA rating without cause. He had a documented airplane crash while on active duty in 2006 [sic¹]. Unfortunately, the Air Force lost his medical records in 1998², deleting his active duty medical care from 1992-1996, to include his airplane crash when he suffered whiplash, but he provided pictures and documentation to the Board and the crash is part of a Federal Aviation Administration record.

The United State Air Force Aerospace Medicine Waiver Guide (Sep 19) states, "Any aviator with any of the bipolar disorders is permanently disqualified and not eligible for a waiver...In such cases, a medical evaluation board should be held..." He had a long history of depression with appropriate waivers during his career. But in 2018, the DVA changed the diagnosis to Bipolar Disorder and rated it at 70 percent disabling. Bipolar was mentioned in his NARSUM but not considered by the MEB or IPEB.

¹ Date of airplane crash identified throughout documentation is 1996, not 2006.

² Date of lost medical records identified throughout documentation is 1996, not 1998.

The Office of Airmen's Counsel (OAC) was conducted during the height of COVID when no one was even reporting to work during this time. His OAC advice was based on the current COVID pandemic and any disagreement with the IPEB could delay his case for years since the boards were shut down and no one was doing medical exams. The advice was short-sighted and not within applicable regulations at the time. Any proper legal guidance at the time should, at a minimum, have brought up the Bipolar Disorder as disqualifying. The NARSUM and MEB already conceded service-connection, as did the 2018 DVA exam that used the same VASRD as the Air Force. The IPEB either did not read the NARSUM and other medical evidence or failed to explain how it overturned the DVA exam and MEB results.

Two further incidents on active duty aggravated his back and neck condition. He had two falls, one in 2011 and one in 2014. Both incidents are part of his medical record. These two incidents plus the plane crash are the only incidents he ever had that required medical care in his life. On both falls, he hit his head (no one says he hit his neck) which can cause damage to the cervical spine. The 2014 accident had a C-130 door fall on him, knocking him to the ground due to faulty maintenance. The DVA rated his cervical conditions at 20 percent, and 20 percent for right arm, and 20 percent for left arm. The DVA concluded the cervical issues were secondary to the lumbar spine issues. The Air Force did a range of motion study on his back and neck before his MEB. Based on this study, his cervical condition would be rated at 30 percent and increase the overall DVA rating. The DVA also rated his Bipolar condition at 70 percent. This is not a tough case as the DVA had already rated all his conditions before the MEB even met.

After the IPEB results came back, he conferred with representation from OAC. His Air Force-appointed lawyer's advice was to accept the IPEB results. This was not proper legal advice and was based on pandemic conditions only.

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 NGB/SGPS and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant concurred with the IPEB recommendation and waived his rights for further appeal. There is no evidence he appealed the IPEB decision to address his Bipolar Disorder. Additionally, according to the IPEB, the applicant's unfitting Degenerative Arthritis of the Cervical Spine with Spinal Stenosis and Bilateral Lower Cervical Radiculopathy are not compensable because they do not have an established LOD determination; therefore, were found to have existed prior to service without service aggravation. Finally, the DES can by law, only address service-incurred diseases or injuries which specifically render a service member unfit for continued service and are the cause for career termination, and then only for the degree of impairment present at the time of separation. The DVA operates under a different set of laws and is authorized to offer compensation for any medical condition determined to be service-incurred, without regard to and independent of its demonstrated or proven impact on a service member's retainability, fitness to serve, or the length of time since the date of discharge. Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

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-2023-01945 in Executive Session on 20 Mar 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 1 May 23.

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

Exhibit C: Advisory Opinion, NGB/SGPS, dated 30 Nov 23.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Dec 23.

Exhibit E: Applicant's Response, w/atchs, dated 8 Jan 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.

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