



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01952

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His unfitting medical conditions of Lumbar Spinal Stenosis and bilateral lower extremity radiculopathy be found as combat-related, as a direct result of armed conflict as defined in 26 U.S.C. 104 combat-related determination.

APPLICANT'S CONTENTIONS

The applicant wants his unfit injuries to be found as combat-related to allow him to be employed as a dual-status technician. He states per AFRCI 36-114, *Procedures on Air Reserve Technicians (ART) Who Lose Active Membership in The Reserve*, paragraph 3.5, if his injury occurred in combat-related operations, he would be permitted to maintain his employment and should not have been terminated as a dual-status technician. He noticed an error with his Line of Duty (LOD) and his medical board which incorrectly noted his injury did not occur in a combat zone. His back pain worsened during his deployment due to the harsh environment and hazardous conditions involving moving heavy equipment, running in full gear, carrying his rifle, jumping on and off aircraft, and moving quickly to the ground during mortar attacks. Due to this back injury, he was processed through the Disability Evaluation System (DES) and found unfit for continued service. There is no evidence he had back problems prior to his military service; therefore, his condition did not exist prior to service. He appealed the decision wanting to be returned to duty but was not successful.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a medically retired Air Force Reserve (AFR) technical sergeant (E-6).

On 14 Dec 16, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged after serving eight months and four days of active duty in support of Operation FREEDOM SENTINEL. He was discharged, with a narrative reason for separation "Member Released due to Demobilization."

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Controlled by: SAF/MRB
CUI Categories: Work-Product
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

On 1 Jun 21, the applicant's review in lieu of (RILO) determination found he was medically disqualified for continued military duty and was referred to the Medical Evaluation Board (MEB) for processing through the DES.

On 13 Jan 22, DAF Form 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for spinal stenosis, lumbar region without neurogenic claudication.

On 27 Jan 22, the Department of Veterans Affairs (DVA) proposed a disability rating for his Category I unfitting medical conditions of lumbar stenosis with degenerative arthritis and laminectomies, foraminotomies and microdiscectomy, and degenerative disc disease (DDD) surgical procedure (s/p) laminectomy rated at 40 percent; radiculopathy, left and right lower extremity, femoral nerve as secondary to the service-connected disability of lumbar stenosis with degenerative arthritis and laminectomies, foraminotomies, and microdiscectomy and DDD s/p laminectomy rated at 10 percent each; radiculopathy, left and right lower extremity sciatic nerve rated at 10 percent each; and surgical scar s/p laminectomy rated a 0 percent.

On 3 Feb 22, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical conditions of lumbar spinal stenosis with left lower extremity radiculopathy (combat zone yes, combat related no) rated at 40 percent; radiculopathy, left and right lower extremity sciatic nerve associated with lumbar stenosis with degenerative arthritis and laminectomies, foraminotomies, and DDD s/p laminectomy rated at 10 percent each; radiculopathy, left and right lower extremity, femoral nerve as secondary to the service-connected disability of lumbar stenosis with degenerative arthritis and laminectomies, foraminotomies, and microdiscectomy and DDD s/p laminectomy rated at 10 percent each; and radiculopathy, right lower extremity, ilio-inguinal nerve associated with lumbar stenosis with degenerative arthritis and laminectomies, foraminotomies, and DDD s/p laminectomy rated at 0 percent with an overall disability compensation rating of 60 percent with a recommendation of "Permanent Retirement." It is noted is medical condition of lumbar spinal stenosis with left lower extremity radiculopathy was determined to be a disability incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense but was not determined as a combat-related condition as defined in 26 U.S.C. 104.

On 15 Feb 22, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings of the board and requested a formal hearing. In his appeal, he asked the board to find him fit for duty stating he is fully capable of performing his reserve duties and has the support of his leadership.

On 9 Mar 22, AF Form 356, *Formal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the board's opinion remained unchanged and found the applicant unfit with an overall disability rating of 60 percent and a recommendation of "Permanent Retirement."

On 14 Mar 22, AF Form 1180, indicates the applicant did not request a one-time reconsideration of the DVA disability ratings for his unfit medical conditions.

Dated 23 Mar 22, Special Order **Work-Product** indicates the applicant was permanently disability retired in the grade of technical sergeant with a compensable percentage for physical disability of 60 percent, effective 9 Apr 22. His disability 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 or his disability was the direct result of a combat-related injury as defined in 26 U.S.C. 104 are both marked no.

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

AIR FORCE EVALUATION

AFPC/DPFDF recommends denying the application finding no evidence of an error or injustice during DES processing or in the decision rendered by the Informal or Formal Physical Evaluation Board (IPEB/FPEB). The information provided by the applicant is insufficient to determine the injuries were combat related as a direct result of armed conflict. In making a combat-related designation, the IPEB and FPEB have consistently relied on the four criteria outlined below and two key factors: did the service member sustain a physical injury or was there a reasonable chance of serious injury or death as a result of hostile action (e.g. was the service member in harm's way). Evidence supporting combat-related in those criteria and factors was not in the evidence provided to the FPEB or in the AFBCMR application.

Under Title 10, USC, the PEB must determine if a member's condition(s) renders them unfit for continued military service relating to their office, grade, rank, or rating. Additionally, per DoDI 1332.18, *Disability Evaluation System*, Section 10, the PEB renders a final decision on whether an injury or disease that makes the service member unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, engaging in hazardous service, conditions simulating war, or was caused by an instrumentality of war. A disability is considered combat related if it makes the service member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances. (1) As a Direct Result of Armed Conflict. Injury or disability was incurred in combat with an enemy of the United States. To qualify under this rule a Service member must be engaged with members of opposing armed forces and forces are in close enough proximity to potentially inflict physical harm on one another. Furthermore, to be "engaged with" indicates each party has the potential to cause physical harm to the other; it is reciprocal. (2) While Engaged in Hazardous Service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty. (3) Under Conditions Simulating War. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports. (4) Caused by an Instrumentality of War. Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military

weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

The FPEB found the applicant unfit for continued military service based on his medical diagnoses of Lumbar Spinal Stenosis and bilateral lower extremity radiculopathies. The FPEB made the determination based on the medical evidence and information contained in his FPEB contention. At the FPEB, he contended he was fit for duty and at the FPEB hearing, he contended his injuries were not unfitting. There was no mention the injuries were incurred as a direct result of armed conflict. He testified the injuries began in prior to 2015. While there was evidence provided in hearing and in the AFBCMR application the injuries worsened while on a deployment, the guidance in AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, paragraph 3.16.2.1 specifically states the fact that a service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support a finding of combat related. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability. Therefore, the AF Forms 356, Blocks 8A and 8F were correctly annotated to indicate his Lumbar Spinal Stenosis with Left Lower Extremity Radiculopathy was deemed as incurred in the combat zone but not deemed combat-related as defined in 26 U.S.C. Section 104 or DoDI 1332.18.

In his application, he states he informed Doctor M----- there was not a singular instance in which his back injury occurred, but due to working 12 plus hours a day, 6 days a week, to include working on aircraft, getting them mission ready, and quickly jumping off the aircraft so the aircraft can depart for its mission. There was no specific mention of a combat-related event (with specific location, date or time) that the injury was incurred or exacerbated. He also includes two witness statements; however, while these statements reference mortar attacks, the statements lack specificity in regards to location, date, time and proximity in order to apply criteria for combat-related injuries.

The complete advisory opinion is at Exhibit C.

AFRC/SGO recommends denying the application. The applicant has an in the line of duty (ILOD) finding and was appropriately disqualified and directed to MEB/DES. AFRC/SG does not make combat-related determinations other than finding the condition in or not in the LOD. The applicant was found unfit for duty. He appealed to the FPEB as he felt he was fit for duty. Fitness for duty declarations were presented to the FPEB stating he was able to perform the duties of his AFSC as a Reservist and as an Air Reserve Technician (ART). He states during his 2016 deployment, he developed "worsening back pain due to the harsh environmental and hazardous conditions involving moving heavy equipment, running with our full gear on, carrying our rifles, jumping on and off aircraft, and quickly moving to the ground during mortar attacks." A LOD was initiated on 8 Dec 16 based on the deployment in question with the diagnosis of other intervertebral disc

displacement, lumbar region. It was noted the applicant received the diagnosis of spinal stenosis in 2015. A magnetic resonance imaging (MRI) completed Jul 15 showed congenital narrowing of the spinal canal along with disc osteophytes encroaching on nerve roots. It was determined the condition existed prior to service but was service aggravated and therefore an ILOD determination was made. Documents submitted with the LOD state there was a history of spinal stenosis but new onset radicular symptoms. In addition, clinical records state the applicant reported there was no injury which occurred. A RILO was initiated on 12 May 21 and the applicant was found disqualified by AFRC/SG on 1 Jun 21 and was directed to a MEB for further processing and determination of military fitness.

The complete advisory opinion is at Exhibit D.

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 E), but has received no response.

ADDITIONAL AIR FORCE EVALUATION

AFRC/A1KK recommends denying the application finding the applicant was not wrongfully terminated from his position within the AFR. He was found medically unfit for military duty which disqualified him for his ART position. He references AFRCI 36-114, as evidence of the alleged wrongful termination. After careful review, it was determined based on the medical findings, the applicant's injuries were deemed as incurred in the combat zone but not deemed combat-related as defined in 26 U.S.C. Section 104 or DoDI 1332.18. In this case, AFRCI 36-114 would not apply due to the fact his diagnosis was not found to be combat-related.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 2 Feb 24 for comment (Exhibit G), but has received no response.

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 recommendations of AFPC/DPFDF, AFRC/SGO, and AFRC/A1KK and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, The Board finds no error or injustice occurred with the processing of his fitness determination case as his back injuries were correctly found to be unfitting for continued military service. Additionally, the Board did not find any of his medical conditions

as combat-related as a direct result of armed conflict; while engaged in hazardous service; under conditions simulating war; or caused by an instrumentality of war. No direct causal relationship was established between combat-related duties and his unfitting conditions that demonstrated how or when hazardous service, or an instrumentality of war spurred the contended conditions. The evidence he presented lacked specifics as to the location, date, time and proximity in order to apply criteria for combat-related injuries. Furthermore, the Board noted is medical conditions incurred in the combat zone; however, were not found as combat-related as a direct result of armed conflict as defined in 26 U.S.C. 104. Therefore, AFRCI 36-114 would not apply due to the fact his diagnosis was not found to be combat-related. Hence, 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-2023-01952 in Executive Session on 20 Mar 24:

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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 4 Jun 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPDF, w/atchs, dated 25 Oct 23.
- Exhibit D: Advisory Opinion, AFRC/SGO, dated 5 Jan 24.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Jan 24.
- Exhibit F: Advisory Opinion, AFRC/A1KK, dated 2 Feb 24.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Feb 24.

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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.

3/27/2024

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Board Operations Manager, AFBCMR
Signed by: USAF

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