Work-Product

UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF: Work-Product

DOCKET NUMBER: BC-2023-01995

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

He be given a medical retirement with a 100 percent disability rating, retroactive back to the date he was found totally and permanently disabled by the Social Security Administration (SSA).

APPLICANT'S CONTENTIONS

His military records indicate numerous visits to at least two different hospitals which are all service connected. He was found totally and permanently disabled by the SSA in Jan 17 and is currently receiving Social Security Income (SSI). Title 38 U.S.C. Section 1151 states this is a disability by treatment and Section 1117(g)(6) states this is a neurological sign with symptoms which was reported to the Department of Veterans Affairs (DVA). His reentry code on his DD Form 214, *Certificate of Release or Discharge from Active Duty*, denoting an ineligibility to reenlist, was given to him as retaliation because he had a 100 percent total and permanent disability which was service connected.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force sergeant (E-4).

On 17 Nov 89, AF Form 1042, *Medical Recommendation for Flying or Special Operational Duty*, indicated the applicant was medically restricted from flying or special operational duty (DNIF) for an estimated duration of seven days.

On 16 May 90, AF Form 1042 indicated the applicant was medically cleared for flying or special operational duty following an illness or injury.

On 29 Jun 90, a letter from the applicant's commander indicates he was not recommended for staff sergeant promotion consideration due to the applicant making sexual allegations against another military member to which the applicant acknowledged.

Not dated, the applicant's determination letter for a medical examination due to his pending separation indicates he elected not to undergo a medical examination before separation. The medical representative indicated his medical records were reviewed and a determination was made the applicant did not require a physical examination or an occupational health examination.

On 18 Nov 90, the applicant's DD Form 214 reflects he was honorably discharged in the grade of sergeant (E-4) after serving four years of active duty. He was discharged, with a narrative reason for separation of "Expiration Term of Service." The reentry code listed on this form is "2X" which denotes ineligible to reenlist, airman non-selected for reenlistment or airman in the Non-Commissioned Officer (NCO) Career Status Program non-selected for continued service.

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 application finding insufficient evidence to support the applicant's request for changing any aspect of his DD Form 214. There was no definitive evidence of a material error, injustice, impropriety or inequity found in the process leading up to the applicant's separation. The Disability Evaluation System (DES) is not a direct option for any individual, but rather is brought forth when there exist a potentially unfitting condition and one's fitness and ability to continue serving remains at bay. The receipt of SSI and or DVA disability ratings are not synonymous with the criteria of the DoD DES, and rating within one designated program does not equally affect the other programs. The DoD standard involves unfitness to perform one's military job.

In this case, the applicant appears to equate the events, findings, and adjudicative results of being designated 100 percent disabled by the SSA years after separation from military service should be equated with a 100 percent DoD disability and is supported by the DVA information sheets on the PACT Act and Public Health criteria. First, it is important to note the information sheets were simply that, information sheets. Within those sheets it addressed possibilities of direct or indirect causations of various health conditions. Often addressed in the information sheets were verbs and or adverbs such as may, could or possibly, to describe a potential nexus to an exposure and adverse health conditions and not simply lump all historical symptoms, from years past, as being eligible for a military retirement. Therefore, the Medical Advisor finds it important to brief the difference in the DES. For awareness sake, 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 near the time of separation and not based on future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), 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 length of time since date of discharge. Regarding the SSA and the benefit of SSI which falls under a different U.S. Code of Federal Regulations; specifically,

Title 20, chapter III, has no connective bearing to the criteria of the DoD system. The applicant's submission did not reveal evidence of what was his health basis for receiving SSI and without a DVA specific disability rating or data-based record encounters, the Medical Advisor remains unsure of what adverse health conditions he believes would have met service requirements for a service medical retirement. Of all the diagnoses either noted in his service medical treatment records (STR) or those with red check marks would not have resulted in the applicant being unable to perform his duties during his four years of military service and thus meeting the DoD's criteria of being unfit for continued military service. There was no evidence found within the records to the contrary.

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 9 Sep 24 for comment (Exhibit D), and the applicant replied on 20 Sep 24. In his response, the applicant contends the compelling evidence he submits document his injuries were incurred and were due to his military service. The finding was that he was unfit to perform the duties of his office, grade, rank, and/or rating because of a physical disability. If the toxic exposure had been resolved, why was he sent to the emergency room. The PACT Act is applicable to his case because injuries can be latent and do not necessarily require a nexus to long-term care exposure. The SSA used the exact same medical evidence as the DVA to determine his disability. The original RE code on his DD Form 214 supports his request that he was not eligible to reenlist due to his unfitness. He was exposed to toxic chemicals and suffered other physical injuries while on active duty. There is sufficient evidence to change his DD Form 214 to reflect his injuries were incurred while he was on active duty.

The DoD standard involves "unfitness" to perform ones' military job. To that end, the original RE code supported this DoD standard. Furthermore, 38 C.F.R. 4.10 states a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity. In accordance with 38 C.F.R. 4.17, he cannot work because of the disability. There are service-connected presumptions that do not require supporting documentation, the PACT ACT covers toxic exposures.

The applicant's complete response is at Exhibit E.

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 recommendation of the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board does not find any of the applicant's medical conditions at the time of his discharge unfitting. 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 severely degraded due to his medical conditions. The Board took note of the applicant's disability ratings from the DVA and his SSI due to his disabilities but did not find this evidence compelling enough to warrant relief. The case law and cases the applicant referenced to include the PACT Act, are applicable to the DVA not the military's DES for medical separation consideration. 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 to which the DVA and SSA can offer compensation. Lastly, the Board finds no evidence the applicant was given a non-reenlistment eligibility code due to retaliation. The Board finds his discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. 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 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-2023-01995 in Executive Session on16 Oct 24:

Work-Product 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 12 Jun 23.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFBMCR Medical Advisor, dated 5 Sep 24.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 9 Sep 24.
Exhibit E: Applicant's Response, w/atchs, dated 20 Sep 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.

11/7/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF