

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-02651

XXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXX

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

His official military personnel records be amended to reflect the spinal injuries that rendered him unfit for duty are combat-related.

### **APPLICANT'S CONTENTIONS**

Counsel, on behalf of the applicant, contended he entered the Air Force Reserve in Aug 88 and had intermittent periods of active duty between that time and Sep 12. Beginning in Feb 08, the applicant was assigned as an Aeromedical Technician and his unit was involved in casualty evacuation missions for United States servicemembers injured in Operation IRAQI FREEDOM. These were wartime operations, not training. He was involved in a mission to evacuate wartime casualties from northern Iraq. The mission involved loading war casualties located at Balad Air Base (AB) into a C-17 transport aircraft and relocating them to Ramstein AB. Balad AB was just one stop among many during the 29 Mar 08 mission. On this mission, the applicant was part of a seven-member crew which included three officers and four enlisted members. The applicant was engaged in his second of two back-to-back 90-day active duty tours. This mission occurred while he was on active duty orders from 6 Feb 08 through 5 May 08.

His 29 Mar 08 mission involved transporting more than 30 ambulatory and 20 non-ambulatory servicemembers to receive necessary medical treatment. He was tasked with loading and securing many patients onto the C-17 aircraft. Prior to reaching Balad AB, his crew had already picked up several patients, and Balad AB was his crew's last stop before returning to Ramstein AB. They approached Balad AB, in an active war zone, early in the morning of 29 Mar 08. The aircraft had to be blacked out so the enemy could not pinpoint its location upon approach. As the C-17 descended from 30,000 feet, the aircraft and crew began to take on enemy fire. Fortunately, the C-17 and crew evaded enemy fire and safely completed their tactical landing at Balad AB.

Once landed, the crew began to load the aircraft. According to the record, all procedures went as planned regarding loading and transportation of patients and all standard operating procedures were followed. The patients were loaded in order of priority, meaning the highest priority patients were loaded last and removed first upon arrival. The patients had to be loaded quickly to avoid the threat of enemy small arms fire, sniper fire, and mortar strikes that were present at Balad AB in Mar 08. One of the last patients to be moved required four crew members to load, including the applicant. While being moved, the patient lurched and one of the crew members dropped his side of the litter. This required the applicant to react by twisting himself underneath the litter to prevent the patient from falling and injuring himself further. As the applicant slid the patient onto the litter stanchion, his feet became tangled in oxygen and electrical lines, and he lost his balance. He then careened into several equipment boxes. The applicant's fall rendered him temporarily unconscious, requiring several other crew members to assist him. He quickly regained his composure and pushed them away and continued to move the rest of the patients.

After the patients were loaded and the aircraft departed Balad AB, the applicant recognized a sharp pain in his neck and numbness in his hands. At that time, he was unable to feel the full extent of his neck injuries until the adrenaline left his system. He brought his concerns to his chain of command and was advised to sit out the rest of the mission and see a specialist upon return to Ramstein AB. After seeing several specialists, it was determined he was experiencing lower cervical radiculopathy of the C6-C7 vertebra. Prior to his mission, the applicant never experienced pain in his neck or shoulders and was relatively fit and active. On 29 Mar 08, his fellow crew members noticed the applicant's hands were shaking so badly he could not even hold his coffee cup.

On 3 Apr 08, the applicant's crew was tasked to transport casualties from Balad AB. Prior to departing, he notified his superiors of his neck pain and hand numbness and was instructed to refrain from any lifting and to report to the Flight Surgeon upon arrival at Ramstein AB. To this day, his conditions have yet to improve with respect to his cervical radiculopathy that he incurred during a time of war while in an active combat zone.

On 15 Dec 11, a Medical Evaluation Board (MEB) concluded his neck and other injuries had not rendered the applicant unfit for duty<sup>1</sup>. He submitted an Impartial Review Request and the impartial reviewer concurred with the findings of the MEB and his case was referred to an Informal Physical Evaluation Board (IPEB). On 5 Mar 12, the IPEB found his cervical radiculopathy was unfitting and compensable, incurred while entitled to basic pay, in the line of duty (LOD), but not combat-related as defined in Title 26, United States Code, Section 104 (26 USC § 104). The IPEB further incorrectly recommended his injuries were not incurred in a combat zone during the performance of duty in combat-related operations as designated by the Secretary of Defense (SecDef) (National Defense Authorization Act 2008 [NDAA 08], Section 1648) [sic<sup>2</sup>]. The IPEB declined to assign a disability percentage pending review by the Department of Veterans Affairs (DVA). On 19 Jun 12, the DVA issued a Proposed Rating Decision with a combined rating of 60 percent for his unfitting disabilities. On 28 Jun 12, the IPEB finalized their original findings to include the input from DVA.

On 13 Jul 12, the applicant did not agree with the IPEB findings and requested a Formal Physical Evaluation Board (FPEB). The FPEB released their findings on 5 Mar 12 [sic<sup>3</sup>] confirming the applicant's lower cervical radiculopathy of C6-C7 was unfitting for duty with a compensable rating of 60 percent. Unlike the IPEB, the FPEB found his unfitting disabilities were incurred in a combat zone during the performance of combat-related operations as designated by the SecDef (NDAA 08, Section 1648) [sic<sup>4</sup>], but again found his injuries were not combat-related as defined by 26 USC § 104 and recommended permanent retirement. The applicant retired on 27 Sep 12 as a master sergeant after more than 20 years of military service.

The Air Force erred in its determination the applicant's cervical radiculopathy is not combat-related. In support, counsel defines and refers to 10 USC § 1413a and Department of Defense (DoD) 7000.14-R, *Financial Management Regulation*, Volume 7B, Chapter 63. As per DoD regulations, where there is a definite causal relationship between the armed conflict and the resulting disability, the resulting disability will be considered combat-related for the purpose of 10 USC 1413a. Under 10 USC 1413a(e)(2)(B), retired veterans may also be compensated for their combat-related disabilities which occurred while engaged in hazardous service. Further, DoD 7000.14-R, Volume 7B, Chapter 63 provides guidance as to what qualifies as a combat-related disability incurred while engaged in hazardous service and makes it abundantly clear that

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<sup>1</sup> The MEB did not conclude the applicant was fit for duty. It referred the applicant's case to the IPEB.

<sup>2</sup> Should read NDAA 08, Section 1646.

<sup>3</sup> The FPEB convened on 3 Aug 12.

<sup>4</sup> Should read NDAA 08, Section 1646.

those injuries directly resulting from performance of duties involving aerial flight operations are considered combat-related.

DoD regulations and 10 USC are silent as to what constitutes a definite causal relationship with regard to combat-related disabilities. When looking at the definition of direct cause, Black's Law Dictionary points the reader to the definition of proximate cause, which is defined as: (1) a cause that is legally sufficient to result in liability, (2) A cause that directly produces an event and without which the event would not have occurred. Proximate Cause, Black's Law Dictionary (7th ed. 1999).

It is clear the applicant's cervical radiculopathy was directly caused by the armed conflict known as Operation IRAQI FREEDOM/ENDURING FREEDOM. Because of these operations, numerous casualties had to be evacuated for medical care. The applicant would not have been required to undergo the 29 Mar 08 mission except as a direct result of that specific armed conflict. But for these operations, he would not have incurred his unfitting injuries, thus, his cervical radiculopathy is a direct result of an armed conflict.

Most notably, the direct small arms fire and continuous mortar fire threat experienced by the applicant supports his contentions that his injuries were directly related to combat. It was the threat of enemy small arms fire and mortar strikes which necessitated a quick and efficient loading of patients onto the C-17 aircraft that led to his injuries. Had the threat of enemy fire not been present, they would have been able to load the patients in a much slower, deliberate manner and, most importantly, he would not have incurred his injuries.

Witness statements provided by the applicant's superiors and fellow crew members establish that prior to the 29 Mar 08 mission, the applicant was an active, hardworking Aeromedical Technician. Clearly, his injuries were the direct result of this mission and the armed conflict, Operation IRAQI FREEDOM; therefore, the FPEB findings and recommended disposition are clearly erroneous.

In the event the Board is not persuaded his injuries are the direct result of armed conflict, it should be noted the only other possible cause was the hazardous service conditions associated with the 29 Mar 08 aerial flight. It appeared the mission went according to plan as evidenced by witness statements. Nothing unusual occurred and all procedures and checklists were followed. Furthermore, the 2010 LOD found his injuries did occur in the line of duty and were not attributable to his own misconduct. As such, there is no evidence his injuries arose from anything other than either (1) the evacuation of military casualties as a direct result of the operation; or (2) the hazardous service conditions associated with the 29 Mar 08 aerial flight mission.

Finally, the applicant's erroneous military records are an injustice as he cannot receive the combat-related special compensation (CRSC) benefits to which he is entitled if they are not corrected. He was retired under 10 USC § 1201. 10 USC § 1201(a) allows for the Secretary of the Air Force to retire disabled veterans who suffered a disability while being entitled to basic pay, with retirement pay to be computed under 10 USC § 1401. Because he was retired under 10 USC § 1201 and is entitled to retired pay pursuant to 10 USC § 1401, the applicant is entitled to retired pay other than by reason of 10 USC § 12731b. Thus, he is eligible for CRSC payments. Until his records are corrected, the applicant will never be able to receive the compensation to which he is legally entitled. Any recommendation that the applicant's cervical radiculopathy is anything but combat-related would be a miscarriage of justice to a combat-injured veteran who has given many years of meritorious service to our country.

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

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

On 30 Jan 08, according to AF IMT 938, *Request and Authorization for Active Duty Training/Active Duty Tour*, the applicant was ordered to active duty for the period 6 Feb 08 through 5 May 08.

On 31 Jul 08, according to AFRC IMT 348, *Informal Line of Duty Determination*, dated 21 Mar 11, the applicant was treated for bilateral C6 and C7 radiculopathy, and the injury was found to be in the line of duty.

On 22 Mar 11, according to AF Form 469, *Duty Limiting Condition Report*, the applicant was not world-wide qualified, and his medical defect/condition required MEB or PEB processing.

On 15 Dec 11, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with cervical radiculopathy, incurred while entitled to basic pay, and referred to the IPEB.

On 5 Mar 12, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board* (Informal), the applicant was diagnosed with the following Category I – Unfitting Condition: Cervical Radiculopathy. The IPEB found the condition was incurred while entitled to receive basic pay and in the line of duty, but not combat-related as defined in 26 USC § 104. The IPEB recommended disposition was unfit; however, under the Integrated Disability Evaluation Program, awaited receipt of ratings from DVA to finalize.

On 19 Jun 12, according to DVA memorandum, *Notification of Completion of Proposed Rating Action*, re: the Disability Evaluation System Proposed Rating Decision, dated 11 Jun 12, the following disabilities are related to his military service:

- Chronic Lower Cervical Radiculopathy of C6-C7, Right Upper Extremity; Proposed Percentage Assigned: 40 percent
- Chronic Lower Cervical Radiculopathy of C6-C7, Left Upper Extremity; Proposed Percentage Assigned: 30 percent

The proposed combined rating for his unfitting disabilities is 60 percent.

On 28 Jun 12, according to AF Form 356 (IPEB), the applicant was diagnosed with the following Category I – Unfitting Conditions:

- Chronic Lower Cervical Radiculopathy of C6-C7, Right Upper Extremity; Veterans Administration Schedule for Rating Disabilities (VASRD) Code 8511; 40 percent disability rating; not combat-related.
- Chronic Lower Cervical Radiculopathy of C6-C7, Left Upper Extremity; VASRD Code 8511; 30 percent disability rating; not combat-related.
- Bilateral Factor applied.

Category II – Conditions That Can Be Unfitting But Are Not Currently Compensable or Ratable:

- Irritable Bowel Syndrome; VASRD Code 7319
- C5-6 Protrusion, S/P Discectomy; VASRD Code 5237
- Patellofemoral Syndrome, Right; VASRD Code 5260
- Patellofemoral Syndrome, Left; VASRD Code 5260
- Tinnitus; VASRD Code 6260

The IPEB recommended permanent retirement with a combined compensable rating of 60 percent.

On 13 Jul 12, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant did not agree with the findings and recommended disposition of the IPEB and requested a formal hearing of his case.

On 3 Aug 12, according to AF Form 356 (FPEB), the applicant was diagnosed with the following Category I – Unfitting Conditions:

- Chronic Lower Cervical Radiculopathy of C6-C7, Right Upper Extremity; VASRD Code 8511; 40 percent disability rating; combat zone/not combat-related.
- Chronic Lower Cervical Radiculopathy of C6-C7, Left Upper Extremity; VASRD Code 8511; 30 percent disability rating; combat zone/not combat-related.
- Bilateral Factor applied.

Category II – Conditions That Can Be Unfitting But Are Not Currently Compensable or Ratable:

- Irritable Bowel Syndrome; VASRD Code 7319
- C5-6 Protrusion, S/P Discectomy; VASRD Code 5237
- Patellofemoral Syndrome, Right; VASRD Code 5260
- Patellofemoral Syndrome, Left; VASRD Code 5260
- Tinnitus; VASRD Code 6260

The FPEB recommended permanent retirement with a combined compensable rating of 60 percent.

On 15 Aug 12, according to AF Form 1180, the applicant agreed with the findings and recommended disposition of the FPEB.

On 27 Sep 12, according to Special Order Number XXXXX, dated 31 Aug 12, the applicant was relieved from active duty, organization, and station of assignment. Effective 28 Sep 12, he was permanently disability retired in the grade of master sergeant with a compensable percentage for physical disability of 60 percent.

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

## **APPLICABLE AUTHORITY/GUIDANCE**

10 USC § 1413a. *Combat-related special compensation.*

(a) *Authority.* The Secretary concerned shall pay to each eligible combat-related disabled uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b).

(e) *Combat-Related Disability.* In this section, the term “combat-related disability” means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that:

- (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.

DoD 7000.14-R, *Financial Management Regulation*, Volume 7B, Chapter 63, dated Nov 19, 6.0 *Determination of Combat-Relatedness* (6306):

#### 6.1 *Direct Result of Armed Conflict* (630601)

6.1.1. The disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. To support a combat-related determination, it is not sufficient to only state the fact that a member incurred the disability during a period of war, in an area of armed conflict, or while participating in combat operations. There must be a definite causal relationship between the armed conflict and the resulting disability.

6.1.2. Armed conflict includes a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which servicemembers are engaged with a hostile or belligerent nation, faction, force, or with terrorists.

#### 6.2 *While Engaged in Hazardous Service* (630602)

Hazardous service is service that includes, but is not limited to, aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. A finding that a disability is the result of hazardous service requires that the injury or disease be the direct result of actions taken in the performance of such service. Travel to and from such service, or actions incidental to a normal duty status not considered hazardous, are not included.

### **AIR FORCE EVALUATION**

AFPC/DPFDF recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no indication an error or injustice occurred at the time the PEB processed the applicant's disability case. There is no conclusive evidence to support his claim that his spinal injuries incurred while on active duty were combat-related as outlined in Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System*.

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, in accordance with DoDI 1332.18, Appendix 5 to Enclosure 3, the PEB renders a final decision on whether an injury or disease that makes the servicemember unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during war. A disability is considered combat-related if it makes the servicemember unfit or contributed 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 servicemember 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 servicemember 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.

On 28 Jun 12, the IPEB found the applicant unfit for Chronic Lower Cervical Radiculopathy of C6-C7 (both left and right upper extremities) with a 60 percent compensable disability rating. The AF Form 356, Block 10E [Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense (NDAA 2008, Sec 1646)] indicated the IPEB did not consider these conditions were incurred in a combat zone or during the performance of combat-related operations as designated by the SecDef. The applicant appealed this finding to the FPEB. Through counsel, the applicant requested a summary decision correcting the AF Form 356 to reflect his injuries were incurred in a combat zone. On 3 Aug 12, the FPEB agreed with the request and issued a summary decision that reflected Block 10E as "YES." Additionally, Block 9A [Diagnosis] included the text "combat zone, not combat-related." On 15 Aug 12, the applicant agreed with the FPEB findings and recommendation as indicated by his signature on the AF Form 1180.

The applicant asserts the Air Force erred by not classifying his disability as combat-related as a direct result of armed conflict or as caused while engaged in hazardous service (aerial flight). His unfitting conditions cannot be considered combat-related as a direct result of armed conflict since they were not the direct result of hostile enemy actions. While his statement indicates the aircraft was under fire during landing operations, that aspect of his injuries is not corroborated in any other documentation. His attorney stated, "During the March 29 mission, it appeared that everything went according to plan." Other than the applicant's statement, there is no evidence the aircraft took enemy fire. However, if that aspect of the mission was corroborated through other evidence, there is no direct correlation between the reported small arms fire during landing operations and the injuries sustained. The injuries were sustained during patient loading operations. There is no evidence that indicates engagement with the enemy in close enough proximity with potential to cause physical harm; therefore, the injuries cannot be classified as combat-related as a direct result of armed conflict.

Further, the applicant's unfitting conditions cannot be considered combat-related while engaged in hazardous service (aerial flight) since the aircraft was on the ground when the injuries were sustained. The inherent hazardous service associated with aerial flight implies the aircraft is in flight, not on the ground. Once on the ground, the inherent hazardous service associated with aerial flight does not exist. Therefore, the aspect of combat-related as a result of hazardous service does not apply to the applicant's injuries.

It is also noted the applicant is requesting CRSC [sic<sup>5</sup>]. As of the date of this advisory, he has not submitted an application for CRSC. The determination for CRSC does not necessarily require combat-related designation from the PEB.

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 17 Jan 24 for comment (Exhibit D) but has received no response.

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<sup>5</sup> The applicant did not request CRSC in his application to the AFBCMR; however, in counsel's brief, he contends the applicant's erroneous records are an injustice because he cannot receive CRSC benefits if they are not corrected.

## 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 AFPC/DPFDF and finds a preponderance of the evidence does not substantiate the applicant's contentions. The application of standard criteria for combat-related as a direct result of armed conflict and while engaged in hazardous service, as explained in the advisory opinion, and executed by the FPEB, follows guidance outlined in 10 USC § 1413a, DoDI 1332.18, and 7000.14-R, Volume 7B, Chapter 63. The circumstances by which the applicant sustained his unfitting injuries do not meet these criteria. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by 10 USC § 1552, 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 DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2023-02651 in Executive Session on 23 May 24 and 30 May 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 2 Aug 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDF, dated 12 Jan 24.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 17 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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Board Operations Manager, AFBCMR