



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02714

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His narrative reason for separation of "Disability, Severance Pay, Non-Combat" be changed to "Secretarial Authority" with corresponding separation code correction.
2. His reentry (RE) code of "4K" which denotes airman is pending evaluation by Medical Evaluation Board/Physical Evaluation Board (MEB/PEB) be changed to a RE code in the "1" series to allow for reenlistment/reentry into the service.
3. In the alternative, he be medically reevaluated and given a medical retirement (additional request via the applicant's response at Exhibit E).

APPLICANT'S CONTENTIONS

His chain of command and the PEB erred by finding his unfitting condition of lumbago (degenerative disc disease) as permanent and stable instead of temporary which should have prompted him being placed on the Temporary Disability Retired List (TDRL) instead of being discharged with severance pay (DWSP). The PEB failed to accurately assess his disability percent rating or the stability of his condition. He provided evidence to the board showing his condition did not interfere with his job and his performance evaluation found he met or exceeded expectations. Due to the unstable nature of his disease, the Air Force failed to provide treatment for his pain and recovery opportunities to better his condition. He agreed with the findings of the Formal Physical Evaluation Board (FPEB) however, under remarks he indicated he conceded he was unfit for duty but disagreed with the percent rating and requested a permanent retirement. Within months of discharge his condition greatly improved after seeing an off-base physical therapist. Had he been properly placed on the TDRL he would have been retained and continued serving in the Air Force after being afforded the time to receive proper therapy and treatment, which later was shown to have improved his condition.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force staff sergeant (E-5).

AFBCMR Docket Number BC-2023-02714

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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 15 Mar 11, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for lumbago requiring narcotics.

On 13 Apr 11, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of lumbago with a disability compensation rating of 20 percent with a recommendation of “DWSP.”

On 27 Apr 11, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings and disposition of the board and requested a formal hearing. In the applicant’s contention, he conceded he was unfit for duty but requested his back condition be rated at a 30 percent disabling under Veterans Affairs Schedule for Rating Disabilities (VASRD) codes 5237 at 20 percent and 8520 for radiculopathy at 10 percent.

On 17 Jun 11, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of lumbago (degenerative disc disease) with radiation posterior right lower extremity to distally to posterior mid-calf with a disability compensation rating of 20 percent with a recommendation of “DWSP.” The board noted his lumbago condition was more appropriately rated at 20 percent, diagnostic code 5243; however, did not find any indication of radiculopathy.

On 17 Jun 11, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant agreed with the findings and disposition of the board.

On 23 Oct 11, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged in the grade of staff sergeant (E-5) after serving eight years, five months, and four days of active duty. He was discharged, with a narrative reason for separation “Disability, Severance Pay, Non-Combat.”

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

APPLICABLE AUTHORITY/GUIDANCE

Per Air Force Instruction (AFI) 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*, paragraph 5.12, RE codes determine whether or not airmen may reenlist, or enlist in a military service at a later time. They are annotated on military discharge documents and document the airman’s RE code at the time of discharge.

Per Department of the Air Force Manual (DAFMAN) 36-2032, *Military Recruiting and Accession*, paragraph 3.4.1, for enlistment waiver authority, the AETC/SG (or appropriate Regular Air Force major command Surgeon General), ANG Command Surgeon (NGB/SG), or AFRC Command Surgeon (AFRC/SG), as appropriate, is the authority to waive physical standards for enlistment in accordance with AFI 48-123, *Medical Examinations and Standards*. Per paragraph 3.7.1.1, the

applicant's ability to enlist is determined by reviewing prior service reenlistment eligibility code and other factors. Individual components will do a service eligibility determination to determine applicant's eligibility. Per paragraph 3.7.2, a waiver is a formal request to consider the suitability for service of an applicant who because of inappropriate conduct or morals violations, dependency status, current or past medical conditions may not be qualified to serve. Upon the completion of a thorough examination using a "whole person" review, the applicant may be granted a waiver if the applicant has displayed sufficient mitigating circumstances that clearly justify waiver consideration. For medical conditions, this may require a new physical examination with appropriate medical evaluation to determine medical qualification to enter the Air Force per Department of Defense Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, and AFI 48-123.

AIR FORCE EVALUATION

AFPC/DPFDD recommends denying the application finding no evidence of an error or injustice during Disability Evaluation System (DES) processing. The overall compensable disability rating of 20 percent resulted in his DWSP and a therefore did not require the PEB to make a permanency or stability determination which is required for disability retirements. However, AFPC/DPFDD did find an administrative error in his RE code, Block 27 on his DD Form 214 which needs to be corrected to read "2Q" to accurately reflect his disability discharge which will be administratively corrected.

The Air Force and the DVA disability systems operate under separate laws. Under the Air Force system Title 10, U.S.C., the PEB must determine whether an airman's medical condition renders 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 (discharge with severance pay, placement on the temporary disability retired list, or permanent retirement) and is not subject to change after the service member has separated. Under the DVA system (Title 38, U.S.C), the member may be evaluated over the years and their rating may be increased or decreased based on changes in the member's medical condition at the current time. However, a higher rating by the DVA based on new and/or current exams conducted after discharge from service does not warrant a change in the total compensable rating awarded at the time of the member's separation.

In this case the PEB correctly applied the 20 percent rating in accordance with the VASRD since a range of motion (ROM) of 45 degrees of forward flexion falls between 30-60 degrees. Under the DES, the overall disability rating determines whether a member is DWSP or retired. A disability rating of 20 percent or less will result in the member receiving DWSP regardless of permanence or stability of the condition and a rating of 30 percent or higher will result in the member being retired. In accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, dated 2 Feb 06, in effect at the time of disability processing, paragraph 3.24 states the PEB determines the permanence of the impairment and classifies it as either "Permanent" or "May Be Permanent." Furthermore, paragraph 3.24.1. further explains the use of the TDRL stating when the PEB finds a disability may be permanent in character, but not stable

in degree, and the member otherwise qualifies for disability retirement, the Air Force places the member on the TDRL. The TDRL is a way to further observe unfit members whose disability has not stabilized and for whom the PEB cannot accurately assess the degree of severity, percent of disability, or ultimate disposition. The applicant agreed with the FPEB findings and did not seek further appeal to the Secretary of the Air Force Personnel Counsel for an increase to his disability rating and possible retirement; therefore, he was subsequently DWSP and his DD Form 214 correctly lists his narrative reason for separation as "Disability, Severance Pay, Non-Combat." However, Block 27 incorrectly lists his RE code as "4K" and in accordance with AFI 36-2606, Table 5.5, RE code "4K" is reserved for airmen pending evaluation by the MEB/PEB. Upon completion of PEB processing airmen who have been found unfit and are medically retired or discharged should have the RE Code changed to "2Q" in accordance with Table 5.3.

Furthermore, upon review of the applicant's DVA records it was discovered on 31 Jul 13 the DVA initially service connected his degenerative disc disease but awarded 0 percent for this condition retroactive to the day following his separation from the Air Force. This decision was based upon DVA examinations performed following separation whereas previously mentioned the PEB based its rating decision upon examinations made prior to separation. Additionally, DVA's ratings were not taken into consideration under the Legacy DES, but if they were, under the current Integrated DES, the PEB would have assigned a 0 percent compensable disability rating, and his final disposition would have still resulted in a DWSP. DVA records also disclose he has filed several appeals for a rating increase for this condition throughout the years, but the rating remained constant until a rating decision dated 18 Feb 22 awarded a 40 percent rating effective 20 Oct 21, the date the DVA received his intent to file a claim. This decision was based on a new examination dated 2 Dec 21, which indicated his back condition had worsened, and his forward flexion had decreased to 30 degrees or less. This also seems to contradict his claim as part of current application to the AFBCMR claiming his condition no longer exists and confirms he is still unfit for reentry.

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 19 Apr 24 for comment (Exhibit D) and the applicant replied on 16 Jan 25. In his response, through counsel, the applicant contends the advisory opinion does not discuss his placement on the TDRL as this would have allowed him enough time to recover and return to duty. He was injured just enough so he could not return to duty but not enough for a medical retirement. His career was unjustly stripped away without adequate compensation. His conditions have worsened in the years since his separation as he struggles to find adequate treatment for his conditions. This would not have happened had he been receiving proper treatment while remaining on active duty.

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 AFPC/DPFDD and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board finds the applicant was properly processed through the DES. His medical condition of lumbago was correctly determined to be unfitting at a 20 percent rating. He was properly assessed at the 20 percent rating in accordance with the VASRD since his ROM of 45 degrees of forward flexion fell between 30-60 degrees. The Board noted the applicant's contention his condition was unstable at the time which should have prompted his placement on the TDRL. However, he was DWSP with a 20 percent rating and not medically retired; therefore, he was not eligible to be placed on the TDRL. Placement or continuation of TDRL status is justified only when the disability of one or more conditions reaches the minimum 30 percent rating and the conditions are considered unstable. The preponderance of evidence does not support that the applicant's medical condition met the minimum 30 percent rating requirement; therefore, removing the stability of his condition from the decision. Furthermore, the Board noted the applicant's DVA disability ratings; however, a higher rating by the DVA, based on new and/or current examinations conducted after discharge from service, does not warrant a change in the total compensable rating awarded at the time of the member's separation. The DVA is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length of time transpired since the date of discharge. Lastly, the Board notes an administrative error in his RE code was corrected to "2Q" to accurately reflect his disability discharge; however, they do not find the applicant's RE code of "2Q" should be changed to allow the applicant to reenlist. This RE code annotated on his DD Form 214 represents the condition under which he was separated and is not subject to change unless an error was made in the original annotation. This decision does not preclude the applicant from pursuing a medical waiver through recruiting services for reentry into the military as outlined in DAFMAN 36-2032. Each component can waive the RE code and enlist an individual if they determine the needs of the component outweigh the reason for the RE code condition/risks; the AFBCMR is not the reenlistment waiver authority. Therefore, the Board recommends against correcting the applicant's record. The Board also noted 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)*. 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-2023-02714 in Executive Session on 23 May 24 and 28 Jan 25:

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Panel Chair

, 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 7 Jul 21.

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

Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 16 Apr 24.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 19 Apr 24.

Exhibit E: Applicant's Response, dated 16 Jan 25.

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.

2/4/2025

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Board Operations Manager, AFBCMR
Signed by: USAF