



Work-Product

## UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02907

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COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

His official military personnel record be amended to reflect a disability retirement.

### APPLICANT'S CONTENTIONS

His DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects he was granted retirement with a Separation Code SFK and Reentry Code 2Q, with a narrative reason for separation of disability. He was not present, nor did the Air Force request his presence, when he was discharged from active duty. He was led to believe he was granted a full retirement due to being injured on active duty. He has now discovered this is not the case. This was not explained to him when he was discharged.

Under military separations, he should receive his full retirement benefits to which he is entitled. He is not receiving his pension or TRICARE benefits. Since being retired from the Air Force, the Department of Veterans Affairs (DVA) has deemed his injuries severe enough to consider him unemployable. He recently discovered this information due to a letter he received about his entitlement to concurrent pay. According to the letter, he should be receiving DVA compensation along with his military retirement.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is an honorably discharged Air Force senior airman (E-4).

On 23 Jan 02, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, the Informal Physical Evaluation Board (IPEB) found the applicant unfit due to physical disability, and recommended temporary retirement, with a 40 percent compensable percentage for the following diagnosis:

Category I – Unfitting Conditions Which are Compensable and Ratable:

- Chronic low back pain status post laminectomy of L4-L5 disc; Veterans Affairs Schedule for Rating Disabilities (VASRD) Code 5293.

On 29 Jan 02, 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 demanded a formal hearing of the case.

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On 22 Feb 02, according to AF Form 356, the Formal Physical Evaluation Board (FPEB) found the applicant unfit due to physical disability, and recommended temporary retirement, with a 40 percent compensable percentage for the following diagnosis:

Category I – Unfitting Conditions Which are Compensable and Ratable:

- Chronic low back pain status post laminectomy of L4-L5 disc; VASRD Code 5293.

On 22 Feb 02, according to AF Form 1180, the applicant did not agree with the findings and recommended disposition of the FPEB and desired to submit a rebuttal.

On 1 May 02, according to DD Form 214, the applicant was furnished an honorable discharge, with a Narrative Reason for Separation: Disability, Temporary, Separation Code: SFK [Disability, Temporary; LDES]; and a Reentry Code: 2Q [Personnel medically retired or discharged].

On 2 May 02, according to Special Order Number [Work-Product], dated 27 Mar 02, the applicant was placed on the Temporary Disability Retired List (TDRL), in the pay grade of senior airman, with a compensable percentage for physical disability of 40 percent.

According to Special Order Number [Work-Product], dated 16 Sep 03, the applicant was scheduled for a TDRL periodic examination on 8-9 Oct 03.

On 18 Dec 03, according to AF Form 356, the IPEB found the applicant unfit due to physical disability, and recommended Disability with Severance Pay (DWSP), with a 20 percent compensable percentage for the following diagnosis:

Category I – Unfitting Conditions Which are Compensable and Ratable:

- Chronic low back pain status post laminectomy of L4-L5, disectomy, improved; VASRD Code 5243.

On 17 Feb 04, according to the applicant's letter to the FPEB, he waived his election for a formal hearing, for the purpose of concurring with the IPEB's recommendations and findings.

According to an AFPC/DPPDS letter to the applicant, dated 1 Mar 04, he was notified the Office of the Secretary of the Air Force (SecAF) directed his removal from the TDRL and discharge with entitlement to severance pay, effective 21 Mar 04.

On 21 Mar 04, according to Special Order Number [Work-Product], dated 1 Mar 04, the applicant was removed from the TDRL and discharged in the grade of senior airman (E-4) by reason of physical disability with entitlement to disability severance pay.

According to a DVA letter to the applicant, dated 31 Jul 17, provided by the applicant, his combined service-connected evaluation is 70 percent; however, he is being paid at the 100 percent rate because he is unemployable due to his service-connected disabilities.

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

## AIR FORCE EVALUATION

AFPC/DPFDC recommends denying the application. Based on the documentation provided by the applicant, analysis of the facts, and the IPEB full review, there is no evidence an error or injustice occurred during the processing of the applicant's medical case.

The applicant was placed on the TDRL, effective 2 May 02, with a compensable percentage for physical disability of 40 percent, and he was later moved from the TDRL to DWSP with a compensable percentage for physical disability of 20 percent.

The applicant was placed on the TDRL by the IPEB on 2 Jan 02 with a disability rating of 40 percent with a diagnosis of chronic low back pain status post laminectomy of L4-L5 disc. He non-concurred with the IPEB's assessment and requested an FPEB hearing stating he should be placed on the TDRL with a disability rating of 100 percent based on unemployability. The FPEB non-concurred with the applicant's request on 22 Feb 02 and upheld the IPEB's decision to place the applicant on the TDRL with a disability rating of 40 percent.

The applicant was seen for his TDRL re-evaluation on 4 Dec 03 at Wright-Paterson Air Force Base. At this examination, he was found to have mild to moderate lower back pain. He denied any bowel or bladder changes, or any weakness. He endorsed having some muscle spasms requiring occasional use of Flexeril. The rest of his neurological exam was essentially normal. Based on this information, the IPEB found the applicant unfit for continued military service on 18 Dec 03 (with a corrected copy of the AF Form 356, dated 3 Mar 04) and recommended DWSP at 20 percent. The applicant initially non-concurred with the IPEB's recommendation and requested an FPEB hearing on 15 Jan 03; however, he subsequently waived this request and accepted the IPEB's decision on 17 Feb 04.

Based on the documentation presented by the applicant, there is no evidence to find the PEB erred in discharging him with a disability rating of 20 percent. His condition appeared to improve after being placed on the TDRL. His TDRL exam did not show any neurological deficits, to include lower extremity radiculopathy. His forward flexion was documented to be 60 degrees by an examination from a civilian medical provider, dated 12 Dec 01, which properly led to an IPEB rating at 20 percent under VASRD code 5243. A higher rating is not warranted based on this data. Since the applicant did not provide any new evidence to contradict the findings of the PEB, his request to be granted a permanent retirement is denied.

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 21 Feb 24 for comment (Exhibit D) but has received no response.

## **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/DPFDC and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant was provided due process regarding the 18 Dec 03 IPEB and, on 17 Feb 04, concurred with the findings and recommended disposition, choosing to waive his right to a formal hearing. As a result, he was notified by an AFPC/DPPDS letter, dated 1 Mar 04, of his removal from the TDRL and discharge with entitlement to severance pay by direction of the SecAF. 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 (DAFI) 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.

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 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-2023-02907 in Executive Session on 11 Jun 24:

Work-Product	Panel Chair
Work-Product	, Panel Member
Work-Product	Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atch, dated 29 Aug 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDC, dated 7 Feb 24.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Feb 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.

7/2/2024

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