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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03357

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COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

He is entitled to a higher disability rating and believes he should have been retired from the military instead of medically boarded with a 10 percent rating in 2010. He believes the decision to medically board him was not just and prompt, and his military records do not accurately reflect the severity of his disability. At the time of his medical board, he was suffering from a number of service-connected disabilities, including mental health issues to include bipolar disorder, chronic hip, back, tinnitus, migraines, and more. His disabilities eventually became too severe, and he was forced to request a medical board. He believes the medical board did not adequately consider his medical records when making their decision. As a result of the medical board's decision, he was forced to leave the military with a 10 percent disability rating. This disability rating is inadequate to compensate him for the severity of his disabilities. He was not aware of the possibility to file for a correction in records until recently speaking with legal counsel.

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 28 Apr 09, according to AF Form 469, *Duty Limiting Condition Report*, the applicant was placed on duty and mobility restrictions and referred for a Medical Evaluation Board (MEB).

On 21 Dec 09, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with multi-level DDD [Degenerative Disc Disease] non-surgical and referred to the informal Physical Evaluation Board (IPEB).

On 13 Jan 10, according to an *Impartial Review Request*, the applicant acknowledged reviewing the contents of the MEB and Narrative Summary (NARSUM) and did not request an impartial review of his MEB.

On 27 Apr 10, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, the applicant was found unfit because of physical disability and diagnosed with:

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- Category I – Unfitting Conditions Which Are Compensable and Ratable:
 - Lumbar Degenerative Disc Disease, Veterans Affairs Schedule for Rating Disabilities (VASRD) Code: 5243, with a disability rating of 10 percent

The condition was incurred while entitled to receive basic pay, was in the line of duty, and not combat-related. The IPEB recommended discharge with severance pay.

On 29 Apr 10, according to AF Form 1180, *Action on Informal Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the findings and recommended disposition of the IPEB and waived the right to a formal PEB hearing.

On 3 May 10, according to an AFPC/DPSD memorandum, Subject: Physical Evaluation, the Secretary of the Air Force directed the applicant be separated from active service for physical disability under the provisions of Title 10, United States Code § 1203 (10 USC § 1203), with severance pay computed under Section 1212 of this title.

On 28 Jul 10, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was furnished an honorable discharge with Narrative Reason for Separation: Disability, Severance Pay, and credited with 6 years, 10 months, and 19 days active service.

On 29 Sep 10, according to Department of Veterans Affairs (DVA) Rating Decision, the applicant was granted service-connection for: lumbar spine degenerative disc disease, evaluated at 10 percent, effective 29 Jul 10; bilateral tinnitus, evaluated at 10 percent, effective 29 Jul 10; and right hip trochanteric bursitis; evaluated at 0 percent, effective 29 Jul 10.

On 5 Jun 14, according to DVA Rating Decision, the applicant was granted service-connection for chronic migraines, evaluated at 0 percent, effective 5 Apr 13. Service-connection for anxiety was denied.

On 5 Jul 16, according to DVA Rating Decision, evaluation of the applicant's chronic migraines, rated at 0 percent disabling, was increased to 10 percent, effective 26 Apr 16.

On 18 Dec 16, according to DVA Rating Decision, the applicant was granted service-connection for bipolar disorder II with unspecified depression, evaluated at 50 percent, effective 15 Aug 16.

On 9 Jul 20, according to DVA Decision Letter, provided by the applicant, his combined rating evaluation was 100 percent, effective 25 Jun 20.

On 5 Oct 23, according to DVA Summary of Benefits Letter, provided by the applicant, his combined service-connected evaluation is 100 percent, effective 1 Dec 22. He was considered totally and permanently disabled due solely to his service-connected disabilities, effective 25 Jun 20.

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

AIR FORCE EVALUATION

AFPC/DPFDD recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice during Disability Evaluation System (DES) processing. The records show the IPEB correctly applied the VASRD by assigning a 10 percent rating for his unfitting lumbar DDD during DES processing. There is

no evidence the applicant's other DVA service-connected disabilities were either diagnosed or rose to the levels of being considered unfitting conditions for DES purposed at the time of disability processing.

The Air Force and the DVA disability systems operate under separate laws. Under the Air Force system (10 USC), 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 (38 USC), 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.

On 21 Dec 09, an MEB found the applicant potentially unfit for multi-level DDD non-surgical. The accompanying NARSUM indicates he had a nine-year history of low back pain with an initial injury occurring at age 15, and therefore, the condition existed prior to service. Injuries or illnesses that are determined to have existed prior to service are not normally compensable under the DES; however, it was determined his military service worsened this condition making it compensable for DES purposes. The NARSUM indicated the applicant was currently performing administrative work and was not able to perform his primary duties as an aircraft mechanic. As part of the MEB process, his medical records were screened for any other potentially unfitting physical or mental health conditions. No other potentially unfitting conditions were identified by the MEB for PEB consideration, and on 13 Jan 10, he concurred with the MEB findings.

On 27 Apr 10, the IPEB found the applicant unfit for lumbar degenerative disc disease with a 10 percent compensable disability rating and recommended discharge with severance pay. The applicant agreed with the IPEB findings on 29 Apr 10 and waived his right to a formal PEB hearing to potentially request additional unfitting conditions during DES processing. He was subsequently discharged with severance pay on 28 Jul 10.

It is further noted the applicant was processed under the older Legacy DES in which the PEB and DVA performed independent assessments of his medical conditions and could therefore, assign different ratings for his PEB-rated unfitting condition. A review of his DVA records indicates his initial DVA Rating Decision, dated 29 Sep 10 reflects the DVA also awarded a 10 percent rating for his PEB unfitting condition of lumbar DDD. This rating decision confirms the IPEB correctly applied the VASRD during DES processing based on the applicant's condition at that time. This initial rating also reflects the DVA service-connected and rated tinnitus at 10%. Right hip bursitis was rated at 0% due to a full range of motion without objective evidence of painful motion, and there is no mention of bipolar disorder or migraines. He was assigned an initial DVA rating of 30 percent for all service-connected conditions, which has no effect on his DES assigned rating as mentioned above.

The applicant has filed multiple DVA claims throughout the years and the first mentions of migraines, or a mental health condition, were contained in a 5 Jun 14 (four years after separation) rating decision in which the DVA service-connected his migraines but assigned a 0 percent rating. His claim for service-connection of anxiety was denied because there was no evidence the claimed condition existed and did not occur or was caused by service. A 5 Jul 16 rating decision shows the DVA increased his rating for migraines to 10 percent, effective 26 Apr 16 (six years after

separation). Finally, a 28 Dec 16 rating decision shows the DVA assigned a 50 percent rating for bipolar disorder II with unspecified depression, effective 15 Aug 16 (the date his claim was received). The DVA determined this condition was secondary to his lumbar DDD.

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/DPFDD and finds a preponderance of the evidence does not substantiate the applicant's contentions. The only condition diagnosed and considered to be unfitting at the time of the applicant's DES processing was lumbar DDD, which was appropriately rated, using the VASRD, at 10 percent. This rating was later confirmed by the DVA upon their independent evaluation of the condition. While the applicant subsequently submitted claims to the DVA requesting service-connection for additional conditions, the only condition diagnosed and evaluated for potential unfitness was the lumbar DDD. The applicant had the opportunity to review the MEB and NARSUM and concurred with the findings. He did not, at that time, request additional consideration for any other condition. Once referred to the IPEB, the applicant's condition of lumbar DDD was found unfitting and rated at 10 percent compensable, with a recommendation for discharge with severance pay. The applicant again agreed with the findings and did not request further evaluation.

While the DVA can, under Title 38, evaluate a service member over the years, increasing and/or decreasing ratings based on changes in the service member's medical condition, the Air Force, under Title 10, must determine whether an airman's medical condition renders them unfit for continued military service and apply the disability rating best associated with the level of disability at the time of DES processing. This rating determines final disposition and is not subject to change after separation. 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 (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. Therefore, the Board finds the application untimely and recommends against correcting the applicant's records.

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, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-03357 in Executive Session on 17 Jul 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 5 Oct 23.

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

Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 9 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.

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