



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03411

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. He be given a medical retirement for his medical conditions of anxiety, depression, and irritable bowel syndrome (IBS) at a 70 percent rating.
2. In the alternative, his medical conditions be found in line of duty (ILOD), or a line of duty (LOD) investigation be conducted, and he be processed through the Disability Evaluation System (DES).

APPLICANT'S CONTENTIONS

He was on active-duty orders deployed to Work-Prod... when he was diagnosed with an E-Coli infection and continued suffering from digestive distress after the initial infection cleared. He listed the digestive problems on his post-deployment medical health screenings; however, he did not have a firm diagnosis or treatment plan at the time and was released from active duty and was told to seek care with the Department of Veterans Affairs (DVA). He was not given Medical Continuation (MEDCON) orders for his unresolved issue, nor was he processed for a LOD determination despite his need for ongoing treatment. Even though his condition was not as severe as it later became since 2017, it did impact his ability to perform his duties and under these circumstances, he should have been considered for MEDCON. His condition became unfitting in 2021 but he was returned to duty with an assignment limitation code (ALC-3) which prevented him from deploying or really doing anything other than local Unit Training Assemblies (UTA) and Annual Trainings (AT). He was not properly referred to a Medical Evaluation Board (MEB) for his IBS and his secondary condition of Major Depressive Disorder (MDD) but instead was allowed to continue to serve to achieve a 20-year Reserve retirement. His request for a LOD determination or investigation was unjustifiably denied when the Air Force misinterpreted the DoD policy regarding the "180-day rule" whereas a LOD investigation must be completed within 180 days after a qualified duty status. His case should have been considered under special circumstances justifying a LOD investigation after the 180-day point but instead, his request for a LOD investigation was cancelled stating the Air Force did not have the authority to waive the DoD 180-day requirement which is outlined in the email correspondence from Major A----- on 5 Mar 22. This email stated it was asked if any special circumstances were present as the Surgeon General (SG) can approve processing of a LOD if it is for latent onset; however, no explanation was provided, thus cancelling his LOD per DoDI.

AFBCMR Docket Number BC-2023-03411

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Controlled by: SAF/MRB
CUI Categories: Work-Product
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

His condition was reported during his deployment and in his post-deployment health assessments; however, at the time, he was not given the diagnosis of IBS until well after the 180-day point. His IBS and MDD was service-connected by the DVA and if he were properly processed through the DES, he would have been medically retired with a 70 percent rating.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force Reserve (AFR) technical sergeant (E-6) awaiting retired pay at age 60.

On 29 Oct 10, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged after serving five months and eight days of active duty for this period. He was discharged, with a narrative reason for separation of "Completion of Required Active Service" due to his participation in Operation [REDACTED] while deployed to Kuwait.

On 20 Feb 17, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged after serving 5 months and 19 days of active duty for this period. He was discharged, with a narrative reason for separation of "Release due to Demobilization" due to his participation in Operation [REDACTED]

On 23 Jun 21, a Report of Medical Evaluation, provided by the applicant, indicates he was found fit and was returned to duty with an ALC which restricted him to Reserve participation in UTAs and AT at home station. He was not authorized to perform duty assignments away from home station or under field conditions or perform man-days or attend formal training. It was further noted he should not occupy a mobility position.

Dated 27 Jun 22, Reserve Order [REDACTED] indicates the applicant was assigned to the Retired Reserve section and placed on the Retired Reserve List (RRL) effective 12 Sep 22.

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

APPLICABLE AUTHORITY/GUIDANCE

Per policy memorandum from SAF/MR, dated 9 Dec 11, *Eligibility for Medical Continuation (MEDCON)*: The Air Reserve Component (ARC) member will be eligible for MEDCON orders when an injury, illness, or disease is incurred or aggravated while serving on active duty and that condition renders the member unable to perform military duties. The finding of "unable to perform military duties" shall be predicated on a medical evaluation by a credentialed military health care provider who determines the member has an unresolved health condition requiring treatment or affecting performance and which renders the member unable to meet accession, mobility,

retention, or general fitness for duty standards as set forth in AFI 48-123, *Medical Examinations and Standards*.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. The Psychological Advisor concludes the applicant was not unfitting and his mental health conditions did not significantly impact his ability to perform the duties of his office, grade, rank, or rating from a psychological perspective. Therefore, the applicant does not warrant a referral to the Integrated Disability System (DES) for his mental health conditions, based on his improvement and ability to perform his duties.

While an MEB Narrative on 17 Mar 21 noted an ILOD based on generalized anxiety disorder and MDD, the examiner specifically noted these mental health conditions were not unfitting at that time and the applicant would need to undergo mental health treatment, to be able to determine if his mental health condition was unfitting. Being diagnosed with a mental health condition and receiving mental health treatment does not automatically render a condition as unfitting. More information is required to determine unfitness. Following his MEB evaluation the applicant was seen for mental health treatment. His records show improvement in his psychological symptoms throughout his time in the military and post-service. His diagnosis of MDD even changed to being in partial remission while he was still in service as well as post-service.

The examiner completing the MEB narrative recommending mental health treatment before determining fitness for duty from a psychological perspective. It is evident from his mental health encounters during his service and after discharge, the applicant benefited from this treatment, and remained fit for duty from a psychological perspective. Additional evidence can be gleaned from his performance evaluations where he continued to meet performance expectations through 30 Nov 20. There is no evidence a duty-limiting profile was ever initiated for psychological reasons. Counsel appears to contend his Post-Deployment Health Assessment (PDHA) and Post-Deployment Health Reassessment (PDHRA) indicate a worsening of his mental health condition. After reviewing these documents, it is noted the applicant denied any depressive and Post-Traumatic Stress Disorder (PTSD) symptoms. Additionally, while the applicant initially stated his health was somewhat worse after his deployment, he later changed that and indicated it was the same as before deployment.

While counsel noted the applicant is 50 percent service-connected for MDD, it should be noted 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 the time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of laws, Title 38, U.S.C., 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 time

transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary (improve or worsen) over the lifetime of the veteran. In the applicant's case, there is insufficient evidence to suggest he was unfit for service during his military service from a psychological perspective.

The complete advisory opinion is at Exhibit C.

The AFBCMR Medical Advisor recommends denying the application finding insufficient evidence to support the requested change to the applicant's service records to correct an alleged error or an injustice that may have resulted in retaining him on continued military duty with an ALC rather than granting a medical separation or retirement for his IBS. In this case, the preponderance of the available evidence appears to indicate the applicant was not unfit to continue military service due to his IBS and was appropriately placed into a limited assignment status in accordance with Air Force policy, rather than medically separated or retired.

With respect to the potential unfitness of the applicant for continued military service due to his IBS, per the AFI 48-123, *Medical Examinations and Standards*, and the *Medical Standards Directory* Section I54, IBS that results in frequent medical appointments, need for ongoing specialty follow-up, or frequent missed duty time is a disqualifying diagnosis necessitating evaluation for retention. Available evidence indicates the applicant's case was appropriately submitted to an MEB and underwent an Initial Review in Lieu Of (IRILO) in accordance with regulations, which returned him to duty with an ALC, per the AFRC/SG memorandum of 23 Jun 21. He presented no evidence, nor could any be found in the available records, indicating this evaluation was conducted improperly or had resulted in an unjust conclusion. Namely, there were no indications even at the time of his eventual retirement in 2022, he was unable to still productively carry out his duties, albeit with the mobility restrictions imposed by the ALC-C3, as demonstrated by the satisfactory performance reports and provider notes.

Both the mental health conditions and the LOD determination are outside the scope of this advisory. However, it must be noted, the applicant's IBS was likely post-infectious in its etiology and related to the medical issues he experienced during his deployment to [REDACTED] in 2016, and it was not diagnosed until well past the 180-day reporting period mandated for the initiation of LOD determinations. This would lend support to the applicant's argument an LOD determination may have been warranted as an exception to policy, although any such determination would be rendered moot at this point, since he is already receiving DVA compensation for this condition. It should be noted the applicant submitted documents from the DVA indicating a service connection and disability ratings for his IBS and mental health conditions. However, a finding by the DVA which indicates the applicant's conditions were service connected and compensable does not in itself constitute evidence that these conditions would or should have made him eligible for a medical separation or retirement under the DES.

DoDI 1332.38, *Physical Disability Evaluation*, paragraph E3.P3.2.1, states a Service member shall be considered unfit when the evidence establishes the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties)

to include duties during a remaining period of Reserve obligation. Although the previous instruction may have since been set aside, key aspects of the policy were retained under the more recent publication, DoDI 1332.18, *Disability Evaluation System*, dated 5 Aug 14, and include two additional criteria for determining unfitness, a Service member may also be considered unfit when the evidence establishes: (1) the Service member's disability represents a decided medical risk to the health of the member or to the welfare or safety of other members; or (2) the Service member's disability imposes unreasonable requirements on the military to maintain or protect the Service member. With respect to evidentiary standard for determining unfitness because of disability, under DoDI 1332.18, the Secretary of the Military Department concerned must cite objective evidence in the record, as distinguished from personal opinion, speculation, or conjecture, to determine a Service member is unfit because of disability. Additionally, with the exception of presumption of fitness cases, the Secretary of the Military Department concerned will determine fitness or unfitness for military service on the basis of the preponderance of the objective evidence in the record.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Jun 24 for comment (Exhibit E), and the applicant replied on 21 Jul 24. In his response, the applicant contends through counsel, he was unfit for continued service due to his mental health conditions. The Air Force's failure to provide sufficient treatment is not a reason to ignore the severity of his conditions and their unfitting nature. The mental health advisory opinion recommends denying his request due to insufficient evidence to support a medical retirement from a psychological perspective; however, he reported moderately severe levels of depression and anxiety on 9 Apr 20 and was rated by the DVA with a 50 percent disability rating on 3 Mar 21. The MEB Narrative Summary (NARSUM) found his extended period of treatment was insufficient to determine whether he was unfit; however, specific types of treatment are not required in order to deem someone unfit for service. If this is a requirement, it should be mandatory the Air Force provide such services. He declined services for alcohol use not mental health services as he continued to seek care. If he would have undergone a complete MEB in 2021-2022, the board would have found his symptoms severe and interfered with his ability to perform his duties.

He was reporting symptoms of severe depression for years, and when he finally sought treatment in 2020, he was found to need a fitness for duty evaluation. This was conducted improperly; imposing a specialized treatment requirement that is not justified by law or policy, and thus interfering with his treatment as a result. This finding was supposed to be reevaluated within six months; however, the evaluation was not conducted for this purpose. Instead, there is a mental health visit note indicating he was still experiencing significant symptoms, was drinking, and was focused on getting to retirement. By stating this, the provider never conducted a full evaluation to determine whether he was unfit for service and instead just sent him on his way.

The medical advisory opinion failed to acknowledge his declining health due to excessive sleepiness, fatigue, and the gastrointestinal symptoms and relies on the presumption of regularity

to deny his request. His unit was well aware of his duty limitations for years and were certainly aware of the restrictions associated with his ALC that precluded mobilizations, field training, schooling, and the like. While his ALC did not explicitly impose further duty restrictions, it was readily apparent he was not being asked to perform the full scope of his duties, whether because of his gastrointestinal issues, the associated fatigue, or his degraded mental health. The advisor recommends denying relief, stating he did not provide sufficient evidence to recommend overturning the original actions taken in his case, but is silent with respect to the counter-intuitive nature of these decisions, the lack of appropriate documentation to justify returning him to duty without a full MEB, or the general process of returning an unfit member to duty for three years in a row in with an ALC thus causing an improper and unjustified burden on the Air Force and his individual unit.

The applicant's complete response is at Exhibit F.

FINDINGS AND CONCLUSION

1. The application was 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 recommendations of the AFRBA Psychological Advisor and 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 or mental health conditions at the time of his discharge unfitting. The DES is not a direct option for any individual. The mere existence of a medical or mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. Even if the applicant's medical conditions were determined to be ILOD, the applicant's military duties were not severely degraded due to his medical or mental health conditions. The Board finds the applicant was properly evaluated and returned to duty with an ALC. He showed improvement in his psychological symptoms, and he was able to productively carry out his duties, albeit with the mobility restrictions imposed by the ALC-C3. The Board took note of the applicant's disability ratings from the DVA but did not find this evidence compelling to warrant relief. 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 can offer compensation. Furthermore, the Board finds the applicant was not eligible for MEDCON. He was able to perform UTAs and AT and therefore his medical condition, incurred or aggravated while serving on active duty, did not render him unable to perform his military duties, although it did impact his deployability. Therefore, the Board recommends against correcting the applicant's records.

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 evidence did not demonstrate material error or injustice, 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-2023-03411 in Executive Session on 17 Jul 24 and 30 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 1 Mar 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 9 Apr 24.
- Exhibit D: Advisory Opinion, AFBCMR Medical Advisor, dated 18 Jun 24.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Jun 24.
- Exhibit F: Applicant's Response, dated 21 Jul 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.

8/5/2024

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Board Operations Manager, AFBCMR
Signed by: USAF