

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03721

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel records be amended to reflect his disability was incurred in a combat zone during the performance of duty in combat-related operations and was a direct result of armed conflict.

APPLICANT'S CONTENTIONS

A letter from his Primary Care Manager (PCM) while serving in the Air Force, dated 2 Nov 23, indicates his disability was incurred in a combat zone during the performance of duty in combat-related operations and the disability was a result of armed conflict.

At the time of his retirement from the Air Force, the Promise to Address Comprehensive Toxins (PACT) Act was not passed. Since the passing of the PACT Act, they have opened up many benefits to service members who incurred disabilities in the line of duty overseas.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force senior airman (E-4).

On 19 Jan 16, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with degenerative processes, including but not limited to Parkinson's Disease, Parkinsonian Syndromes, Basal Ganglia Disorder, Muscular Dystrophy or other chronic myopathies, and was referred to the informal physical evaluation board (IPEB).

On 4 Feb 16, according to Department of Veterans Affairs (DVA) Disability Evaluation System (DES) Proposed Rating, for DES purposes, a temporary pre-stabilization 100 percent evaluation is proposed for Proximal Muscle Girdle Weakness with External Rotation Gait and a Pathologic Finding Positive for Type I Fiber Predominance, possible Degenerative Process; Lumbosacral Strain; and Tinnitus.

On 22 Feb 16, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Informal)*, the applicant was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Conditions:

- Proximal Muscle Girdle Weakness with External Rotation Gait and a Pathologic Finding Positive for Type I Fiber Predominance, Possible Degenerative Process, Lumbosacral Strain, and Tinnitus; Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 100 percent; Veterans Administration Schedule for Rating Disabilities (VASRD) Code: 5099-5021; Combat-Related Determination as Defined in Title 26, United States Code § 104 (26 USC 104): NO; Disability was Incurred in a Combat Zone During

the Performance of Duty in Combat-Related Operations as Designated by the Secretary of Defense (NDAA 2008, Sec 1646): NO.

The IPEB recommended temporary retirement with a combined compensable percentage of 100 percent.

On 1 Mar 16, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the findings and recommended disposition of the IPEB and waived his right to a formal PEB hearing.

On 28 May 16, 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 Temporary (Enhanced), and was credited with four years, three months, one day of active service.

On 29 May 16, according to Special Order Number XXXXX, dated 2 Mar 16, the applicant was placed on the Temporary Disability Retired List (TDRL) with a compensable percentage for physical disability of 100 percent.

On 24 Jul 17, according to DVA Rating Decision, evaluation of Spastic Dystonia, Type Uncertain (previously rated as Proximal Muscle Girdle Weakness with External Rotation Gait and Pathologic Finding of Positive for Type I Fiber Predominance, Possible Degenerative Process (PEB referred); Lumbosacral Strain; and Tinnitus), which is currently 100 percent disabling, is continued.

On 31 Aug 17, according to AF Form 356, the applicant was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Condition:

- Spastic Dystonia, Type Uncertain; Incurred While Entitled to Receive Basic Pay: YES; Line of Duty: YES; Disability Compensation Rating: 100 percent; VASRD Code: 8099-8017; Combat-Related Determination as Defined in 26 USC 104: NO; Disability was Incurred in a Combat Zone During the Performance of Duty in Combat-Related Operations as Designated by the Secretary of Defense (NDAA 2008, Sec 1646): NO.

The IPEB recommended TRDL to permanent retirement with a combined compensable percentage of 100 percent.

On 2 Nov 23, according to PCM letter, provided by the applicant, his PCM stated he had an independent lab test in 2016 which indicated high levels of Benzene, Styrene, DDE, and Diethyl Thiophosphate, which are indicative of his overseas service while being around chemicals and other toxins. She opined his disability was incurred in a combat zone during the performance of duty in combat-related operations and the disability was a result of armed conflict by environmental factors.

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 indication an error or injustice occurred at the time the PEB processed his disability case or during his TDRL re-evaluation.

This request is based on the passage of the PACT Act which expands DVA health care and benefits for veterans exposed to burn pits and other toxic substances. In support of this claim, the applicant provides a memorandum, dated 2 Nov 23, from his attending PCM during the time of disability processing who recommends approval and attributes his medical condition to a deployment to Ali Al Salem Air Base, Kuwait in 2014, and cites independent lab testing conducted in 2016 which presumably indicates exposure to toxic chemicals during this deployment.

Under 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 Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System*, Appendix 5 to Enclosure 3, the PEB renders a final decision on whether an injury or disease that makes the service member 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. A disability is considered combat-related if it makes the service member unfit or contributes 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 service member 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 service member 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 19 Jan 16, a Medical Evaluation Board found the applicant potentially unfit for degenerative processes, including but not limited to Parkinson's disease, parkinsonian syndromes, basal ganglia disorder, muscular dystrophy, or other chronic myopathies, with an approximate date of origin of Jun 13. The accompanying medical narrative summary (NARSUM), dated 24 Jun 15, written by his PCM, indicates the applicant began having bilateral anterior knee pain with activity, without obvious deformity in Jun 13 (eight months prior to deployment) which was first attributed to patellar subluxation during a softball game. Following return from deployment in Oct 14, he again complained of bilateral knee pain which was exacerbated by deployment activities. The applicant started complaining of his knees starting to buckle with running and intramural sports. He was referred to Orthopedics and was initially diagnosed with multi-

directional patellar instability. In Mar 15, he was referred to another Orthopedics specialist for possible surgery due to bilateral tibial torsion and was then diagnosed with bilateral femoral anteversion. In a 19 Jan 16, NARSUM addendum, his PCM documented the progressive worsening of this condition with a suspected cause of muscular dystrophy. A biopsy was performed which found his condition was consistent with an autoimmune disorder causing mysositis or myopathy. Additionally, testing was conducted which found no inflammatory cause for his progressive muscle weakness, and rotational deformity was found.

As part of the DES, the applicant was referred to the DVA for a Compensation and Pension evaluation and was initially diagnosed by the DVA with Proximal Muscle Girdle Weakness with External Rotational Gait and a Pathologic Finding Positive for Type I Fiber Predominance, Possible Degenerative Process; Lumbosacral Strain; and Tinnitus. The proposed rating decision, dated 4 Feb 16, indicates the DVA initially awarded a 100 percent rating for this condition because it had not yet stabilized, and future examination was required.

On 22 Feb 16, the IPEB found the applicant unfit for Proximal Muscle Girdle Weakness with External Rotational Gait and a Pathologic Finding Positive for Type I Fiber Predominance, Possible Degenerative Process; Lumbosacral Strain; and Tinnitus with a 100 percent compensable disability rating as proposed by the DVA, and he was placed on the TDRL. Block 9F of the AF Form 356 is marked "No" to show his condition was not determined as a combat-related condition since it did not meet any of the criteria listed above in accordance with DoDI 1332.18. Additionally, Block 10E was also marked "No" since the IPEB determined this condition was also not incurred in a combat zone since the onset of the condition occurred eight months prior to the applicant's deployment as previously mentioned. On 1 Mar 16, he agreed with the IPEB's findings and did not appeal to the Formal PEB to try to find this condition as combat-related or incurred in a combat zone. He was subsequently placed on the TDRL effective 29 May 16.

On 31 Aug 17, an annual TDRL re-evaluation was conducted in which the IPEB found the applicant unfit for Spastic Dystonia, Type Uncertain with a 100 percent compensable disability rating and directed removal from the TDRL and permanent disability retirement. Once again, the IPEB determined this condition was neither combat-related nor incurred in a combat zone. The board based this new diagnosis off an updated DVA rating decision, dated 24 Jul 17. In this rating decision, the DVA specified this condition is currently not captured in the DVA's VASRD and it most closely relates to Amyotrophic Lateral Sclerosis (ALS), more commonly known as Lou Gehrig's disease. ALS is a neurological disorder that affects motor neurons, the nerve cells in the brain and spinal cord that control voluntary muscle movement and breathing. Both diseases are progressive in nature and studies suggest people who have served in the military are at higher risk but there is no clear connection between military service and either disease.

Although the applicant may have experienced symptoms of this condition while deployed, medical principles indicate it is a progressive disease in nature and although not fully diagnosed, he initially experienced the onset of symptoms eight months prior to deployment. Therefore, the condition would not be considered as combat-related or incurred in a combat zone in accordance with DoDI 1332.18. Additionally, he provides no evidence to support he was directly exposed to the chemicals mentioned in his PCM's memo while deployed. Finally, the PACT Act is a DVA program designed to assist veterans with certain presumptive illnesses and has no overall bearing on a combat-related determination for DoD DES purposes. We highly encourage the applicant to contact the DVA to determine if his medical condition is one of these presumptive illnesses and to determine if it qualifies under the PACT Act. However, it is noted he has, and continues to receive, DVA disability compensation and care for this condition based on DVA disability rules.

Finally, as previously mentioned, since this condition is progressive, the applicant first started exhibiting symptoms eight months prior to his deployment. Although his PCM indicates in her 2 Nov 23 letter that his condition may be attributed to the elevated levels of chemicals and toxins found during the unprovided lab test conducted in 2016, there is no definitive connection. If a direct connection were established, this environmental exposure would be considered combat-related as being Caused by an Instrumentality of War under provision (4) above.

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 29 May 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 applicant's condition does not meet the criteria for combat-related or occurring in a combat zone in accordance with DoDI 1332.18. The applicant's medical records reflect initial onset of symptoms occurring eight months prior to deployment. Additionally, while the applicant's PCM refers to an independent lab test conducted in 2016 which indicated high levels of Benzene, Styrene, DDE, and Diethyl Thiophosphate, no evidence was submitted to support these findings and/or a definitive connection between the applicant's condition and his deployment. Finally, the passage of the PACT Act, a DVA program designed to assist veterans with certain presumptive illnesses, has no bearing on a combat-related determination for DoD DES purposes. 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 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 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-2023-03721 in Executive Session on 22 Aug 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 14 Nov 23.

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

Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 17 May 24.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 29 May 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