



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-00085

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He be given a medical retirement.

APPLICANT'S CONTENTIONS

The Air Force failed to medically retire him with a combined rating of 50 percent due to his unfitting conditions of Post-Traumatic Stress Disorder (PTSD) and spondylosis. The Air Force failed to refer him to the Disability Evaluation System (DES) for his duty-related unfit medical conditions. Furthermore, the Air Force failed to provide an explanation for why his unfitting conditions were deemed not in the line of duty (NILOD), even though both conditions were developed during his active-duty service. His records detail the existence of both conditions at the time of his discharge by his military and primary physicians and did not exist prior to his entrance into the Air Force. Per AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, and DoDI 1332.38, *Disability Evaluation System*, under the presumptions of soundness and aggravation, which presumes a service member had been in sound physical and mental condition upon entering active duty and a disease is incurred or aggravated in the line of duty unless there is competent medical evidence to overcome the presumption, the facts support a finding his spondylosis and PTSD were incurred on active duty. Additionally, liberal consideration should be applied to his petition to correct the error or injustice with his discharge and to provide him with a medical discharge/retirement with at least a 50 percent rating due to the DOD's instructions to BCMRs to give liberal consideration to service member petitions for PTSD-related changes in service records.

In in 2001, while on active duty, he developed neck pain that advanced into cervical strain and then spondylosis, diagnosed on 2 Dec 09, due to the physical demands of his job-related responsibilities which garnered him a 20 percent service-connected disability rating from the Department of Veterans Affairs (DVA) a few months later. On 16 Jun 04, he responded to a mortar attack in Work-... in which 25 personnel were wounded and three were killed. One of the victims that was killed, he personally triaged and believed the death was the result of a mistake on his part. From his traumatic experiences during his deployment, he experienced feelings of guilt, ongoing sleeping difficulties, relationship difficulties, chronic pain, abdominal distress, obsessive behaviors, and attempted to block out his memories through substance abuse. He was eventually diagnosed with PTSD from his deployment experiences in Apr 11 and would see a therapist twice

AFBCMR Docket Number BC-2024-00085

Work-Product

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

a month which led to some improvements in his avoidance and hypervigilance symptoms. His commander noted his PTSD showed his inability to focus, poor concentration, and fatigue which would endanger his medical evacuation missions. To treat his debilitating symptoms, he resorted to substance abuse. Due to his PTSD and inability to achieve addiction-free management, he was unable to continue participating on active duty and was honorably discharged in 2015. Prior to his discharge, an informal line of duty (LOD) determination into his PTSD symptoms occurred. While his unit commander recommended an in line of duty (ILOD) for his PTSD, it was ultimately determined to have existed prior to service (EPTS), LOD not applicable. He was found unfit by the Informal Physical Evaluation Board (IPEB) for his mental health condition of PTSD and physical condition of cervical and thoracolumbar spondylosis. Because his unfitting conditions were non-duty related, he was administratively discharged for physical disqualification.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force Reserve (AFR) major (O-4).

On 26 Oct 09, DD Form 2697, *Report of Medical Assessment*, indicates the applicant was found medically fit for separation although the assessment does indicate he was not worldwide qualified at the time, temporarily for another three weeks, due to a foot surgery. Relating to the applicant's petition, the report makes no indication he had any mental health concerns and only mentions he did not seek medical care for chronic muscle aches/frequent cramps/spasms with a note from the physician indicating three to four times a day, muscle cramps.

On 21 Dec 09, the applicant received an honorable discharge. His narrative reason for separation is "Competition of Required Active Service" and he was credited with 13 years, 1 month, and 14 days of total active service.

Dated 22 Jul 11, AFRC IMT 348, *Informal Line of Duty Determination*, provided by the applicant, indicates his PTSD was recommended by the medical officer and unit commander as ILOD noting he had suppressed emotions from a traumatic combat event which occurred while he was on active duty. However, all other recommendations and the final approval authority determined his PTSD EPTS-LOD not applicable.

Dated 26 Nov 13, the Fitness Determination letter, provided by the applicant, indicates he was found unfit to perform the duties of his office, grade, rank, or rating due to his medical conditions of PTSD and cervical thoracolumbar spondylosis noting he was a traditional Reservist nurse who was diagnosed with PTSD in Jun 11 following an incident while deployed and was diagnosed with cervical spondylosis and disc disease with radiculopathy and early myelopathy undergoing cervical fusion in Jun 11. It is further noted his commander indicated his condition was not compatible with the fundamental expectations of military service.

Dated 10 Feb 14, the Administrative Discharge Notification letter, provided by the applicant, indicates he was notified he was being administratively separated due to physical disqualification and advised him he was entitled to consult with military legal counsel.

Dated 24 Feb 15, Reserve Order Work-Product indicates the applicant was honorably discharged from the AFR per AFI 36-3209, *Separation and Retirement Procedures Air National Guard and Air Force Reserve Members*, paragraph 2.16 for “Physical Disqualification” effective 10 Mar 15.

Dated 5 Sep 24, the applicant’s Report of Service History indicates he has 14 years of satisfactory service.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibits E and F.

POST-SERVICE INFORMATION

On 30 Apr 24, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not he had an arrest record. In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit C). The applicant replied on 15 May 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided his resume.

The applicant’s complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental

health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie Memo, to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to paragraphs 6 and 7 of the Wilkie Memo.

On 4 Apr 24, the Under Secretary of Defense for Personnel and Readiness issued a memorandum, known as the Vazirani Memo, to military corrections boards considering cases involving both liberal consideration discharge relief requests and fitness determinations. This memorandum provides clarifying guidance regarding the application of liberal consideration in petitions requesting the correction of a military or naval record to establish eligibility for medical retirement or separation benefits pursuant to 10 U.S.C. § 1552. It is DoD policy the application of liberal consideration does not apply to fitness determinations; this is an entirely separate Military Department determination regarding whether, prior to "severance from military service," the applicant was medically fit for military service (i.e., fitness determination). While the military corrections boards are expected to apply liberal consideration to discharge relief requests seeking a change to the narrative reason for discharge where the applicant alleges combat- or military sexual trauma (MST)-related PTSD or TBI potentially contributed to the circumstances resulting in severance from military service, they should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised.

On 30 Apr 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibits C and G).

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request. A review of the available records finds the applicant's administrative separation from the AFR was appropriate. Almost all of the applicant's legal counsel's contentions were corroborated by his military and treatment records except for the informal ILOD determination. The applicant's mental health condition of PTSD was found to be EPTS-LOD not applicable, and there is no error or injustice with this finding. There is a misunderstanding with the definition of EPTS-LOD not applicable. EPTS could mean the condition existed prior to his military service with the Air Force as discussed by his legal counsel; however, EPTS could also mean the condition existed, occurred, or incurred during a prior period of military service. The latter definition is the applicant's situation. The applicant's mental health condition of PTSD was consistently reported to have developed and incurred in 2004 or specifically on 16 Jun 04 from his deployment to Iraq. He was a service member in the regular Air Force at the time of the traumatic event and not when he was a member of the AFR. This is the reason his condition was determined to be EPTS, because it was developed and incurred from his prior period of active-duty service with the regular Air Force predating his military service with the AFR. There is no evidence or records to indicate his condition of PTSD was unfitting for continued military service during his time with the regular Air Force causing early career termination. This is evidenced by not receiving any mental health conditions, diagnosis, or treatment during his active-duty service time, and he denied to his primary care manager (PCM) during his separation physical examination of having any mental health issues or concerns. He was medically cleared to separate from the regular Air Force. The applicant requested voluntary separation because he completed his active-duty requirements and believed he could best serve his family and the military by separating from active duty and going to the AFR by Palace Front and working as a civilian nurse. He did not separate from the active-duty service because his mental health condition impaired his ability to perform his military duties. He transferred to the AFR and began his service the day after he was discharged from active duty/regular Air Force according to his legal counsel's brief. In order to transfer to the AFR from active-duty service, he would need to meet the accession standards set forth by the AFR, which he apparently met standards to enter the AFR. This would further support the notion he was fit for duty when he was discharged from active-duty service and entered the AFR on 22 Dec 09.

The applicant would continue to serve, albeit satisfactorily, in the AFR without incident until he was discovered to have abused opioids at his civilian job (not on duty status). He was subsequently evaluated by DVA and military mental health care providers after this incident and he informed them he had used opioids to manage his chronic pain and to assist with sleep disturbances related to his traumatic deployment experiences. He was eventually diagnosed with PTSD and Opioid Dependence and received treatment at the DVA for these conditions. In terms of his military service with the AFR, there is no evidence or records to demonstrate his military duties with the AFR permanently aggravated his EPTS condition of PTSD, developed from his active-duty service with the regular Air Force, beyond the natural progression of the disease. His military provider did report on 2 Jun 11, more collateral information was needed from his unit/commander about his military duties and there are no records to confirm the collateral information had been obtained. Nevertheless, the applicant did describe his duties/position with the AFR to the military provider, describing his position in the AFR as command and control for air medical evacuation operations,

meaning he works from a desk to coordinate the usage of planes and crews for air medical evacuation and does not work directly with patients. He further stated he did not come into contact with, or was ever responsible for, medical supplies such as opiates (fentanyl, morphine, etc.), or needles, etc. Based on the applicant's self-report of his duties, there is no indication or evidence his military duties/service with the AFR aggravated his EPTS condition.

His informal LOD determination would have investigated whether his EPTS condition was service-aggravated. Since there was no finding of service aggravation, this would provide additional support his EPTS condition was not service aggravated. The applicant's mental health condition of PTSD was determined to be unfit by the IPEB for continued military service. In order to receive his desired ratable medical discharge/retirement for his unfitting mental health condition, he would need to meet the criteria and receive the designation of EPTS-service aggravated. His records do not support this determination. Due to this situation, he was entered into the Non-Duty Disability Evaluation System (NDDDES) instead of the regular duty DES and was determined to be physically disqualified, which was the reason for his discharge from the AFR. Therefore, there is no error or injustice identified with his EPTS-LOD not applicable determination for his mental health resulting in his administrative separation from the AFR. His request for a medical retirement for his mental health condition is not supported by his records.

For awareness, since the applicant has received service-connection for his mental health condition from the DVA; 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.

Finally, the applicant's legal counsel is requesting liberal consideration be applied to the applicant's request for a medical retirement and attached the Hagel Memorandum to his petition. However, updated clarifying guidance, the Vazirani Memorandum, published on 4 Apr 24, clearly states liberal consideration does not apply to fitness determinations or medical discharge requests. Therefore, liberal consideration is not applied to his petition. The updated clarifying guidance also instructed a bifurcate review should be performed when a mental health condition such as PTSD or TBI potentially contributed to the circumstances of discharge or dismissal to determine whether an upgrade to the discharge or change the narrative reason is appropriate. The applicant already received an honorable character of service and there is no error or injustice identified with his narrative reason for separation, so a bifurcate review is not necessary or required.

The complete advisory opinion is at Exhibit E.

The AFBCMR Medical Advisor recommends denying the application finding insufficient evidence to support the applicant's request to change his discharge outcome to reflect a medical retirement. A DVA rating is not synonymous or equivalent to the military's disability evaluation near the time-of-service discharge. Unmistakable medical knowledge of the applicant's musculoskeletal condition dictated the initial incurrence occurred prior to service and therefore, the administrative process through the NDDES was appropriate and without error or an injustice to the applicant. The process under the authority of AFI 36-3209, paragraph 2.16.3 denotes officers are to be discharged under this instructional paragraph when certain criteria is met to include when the service member is not qualified for disability separation or retirement under the provisions of AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*. The applicant met such criteria and therefore, was properly processed for separation.

Counsel cites while on deployment to [REDACTED] the applicant began experiencing chronic neck pain, which only worsened as he continued to perform his job-related responsibilities. Although there was evidence the applicant's musculoskeletal symptoms existed, were intermittent, and with varying pain levels, the statement of worsening as he continued his job related responsibilities was not in evidence as he usually was released from clinical encounters without duty limitations as well as the comment in his personal statement during the first year of his AFR duty his painful symptoms did not limit him from activity at work in his job as a nurse but it did limit him from playing sports, golf, football, flag football and it limits his racquetball. Therefore, counsel's comment lacked evidentiary credibility. Furthermore, counsel additionally stated due to the applicant's debilitating injury, he experienced other related injuries including numbness in his arms and hands, shooting pain in his entire right upper extremity, and strains when turning his head, which interfered with his military related duties and was ultimately diagnosed with cervical strain spondylosis. Counsel's use of the term injury or injuries is misleading and blatantly false, for the applicant's history never involved an actual injury, but rather simply the development of neck pain, worse upon wakening. The only notation of any injury was a single DVA encounter that described his thoracic pain in 2001 as secondary to a fall... with no further description. Counsel notes on 2 Dec 09, the applicant was finally diagnosed with spondylosis, as well as with myalgia and myositis, and segmental dysfunction of thoracic region. However, that date was incorrect; the chiropractic encounter that occurred 14 months earlier on 12 Sep 08 listed those same conditions under assessment/plan based off x-ray imaging of the cervical spine that was performed on 16 Oct 07 and of the lumbar spine which was performed on 10 Jul 08. The cervical imaging was read as multi-level spondylotic changes and the lumbar was read as multi-level mild degenerative disc disease (DDD).

The Medical Advisor finds a clear understanding of the various medical conditions and naming of the same be known. According to the National Spine and Pain Centers, Spondylosis (or spondylitic change) is an umbrella term often used to describe spine pain that comes from degenerative conditions. Some of the conditions people refer to as spondylosis include spinal stenosis, an abnormal narrowing of the spinal canal causing leg pain, degeneration from DDD, and degenerative arthritis (osteoarthritis) of the spine. It can also include cervical osteoarthritis. Spondylosis is a common, age-related condition that affects the joints and discs in your neck specifically. It frequently develops from wear and tear of the cartilage and bones in your neck. While spondylosis is common, it frequently worsens with age. Many individuals do not have

symptoms at the outset, but some experience pain or muscle spasms. If symptoms occur and worsen over time, various treatments are available. These include medications, corticosteroid injections, physical therapy, and sometimes surgery. According to the Regenerative Spine and Joint Center, the discs in your spine receive little blood flow. This means they are not able to repair themselves after an injury. Even a small tear can lead to a permanent change and chronic spinal pain. Loss of fluid in the discs makes them thinner and less able to absorb forces, leading to persistent pain in your back. The loss of fluid or tears causes the discs to slowly degenerate. You can also develop DDD after an acute injury, such as a slip-and-fall accident.

In this case, there was no direct injury cited to any area of his spine and therefore, his DDD (spondylosis and spondylitic changes) slowly developed over a prolonged period of time, whereby the known process of disc degeneration, would make the initial inciting nidus of the DDD not acutely occurring in 2008 or 2009, but rather many years earlier representing a chronic condition that existed prior to service (EPTS). Not having access to the actual record of proceedings of the NDDDES finding of unfitness, the screenshot in the Military Personnel Delivery System (MilPDS) obtained from AFPC clearly noted the proper Veterans Affairs Schedule for Rating Disabilities VASRD code of DDD, degenerative arthritis of the spine, and serves to uphold the stated prolonged development of the condition. Therefore, the Medical Advisor opines an EPTS condition, not initially incurred while in a duty status, is to be processed under the NDDDES, which was appropriately accomplished in this case.

Lastly, counsel denotes the applicant's military records be corrected as to provide a medical retirement based on the DVA's determination his spondylosis was incurred in the line of duty, and thus meriting a disability rating that would meet or possibly qualify towards a military medical retirement; however, the military's DES and the DVA operate under different statutes of the U.S.C..

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 3 Sep 24 for comment (Exhibit G), 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 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. The Board notes the medical documentation indicates the applicant's mental health condition of PTSD may have incurred while he was on active duty; however, the preponderance of medical evidence does not indicate this

condition was unfitting to the level it rendered him unable to perform the duties of his office, grade, rank, or rating prior to his separation from active duty on 21 Dec 09. Furthermore, the Board finds the nature of the applicant's spondylosis a chronic condition which slowly developed over a prolonged period of time without any indication of a specific injury which caused the condition, nor did it rise to the level of unfitting at the time of his active-duty separation. The applicant went on to serve as an AFR officer for several years before his conditions rendered him unfit to serve and the Board finds he was correctly processed through the NDDES because the preponderance of evidence does not indicate his PTSD was service aggravated by his AFR service nor does the evidence indicate his chronic back condition was service aggravated beyond the natural progression of the disease. Furthermore, the Board took note of the applicant's DVA ratings however, 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, whereas 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, based on the 4 Apr 24 memorandum from the Under Secretary of Defense for Personnel and Readiness, known as the Vazirani Memo, stating boards should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised; the Board finds the applicant's request for a medical retirement to be considered under liberal consideration is not warranted. 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 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.

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.

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-2024-00085 in Executive Session on 16 Oct 24:

Work-Product

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 Nov 23.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 30 Apr 24.
- Exhibit D: Applicant's Response, w/atchs, dated 15 May 24.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 13 Jun 24.
- Exhibit F: Advisory Opinion, AFBCMR Medical Advisor, dated 26 Aug 24.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Sep 24.
- Exhibit H: Letter, SAF/MRBC, w/atchs (Liberal Consideration Supplemental Guidance), dated 3 Sep 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.

11/7/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF