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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-00120

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. All records pertaining to her Article 15 be removed.
2. Her grade of airman first class (E-3) be restored with all backpay and allowances.
3. She be given a medical retirement at 30 percent or higher, or in the alternative, she be processed through the Disability Evaluation System (DES).

APPLICANT'S CONTENTIONS

The Article 15 she received was untrue, unjust, and inequitable. She was ordered to undergo a Behavioral Health Command Directed Evaluation (CDE); however, this order was not lawful and was not in good faith. Her command did not direct this evaluation because they were concerned for her mental wellness but rather as a punitive act of reprisal against her due to her medical issues. It was command's dislike of her and not any legitimate concern for the ordering of the CDE. She did comply with the order to complete a CDE and reported to the place and time for the evaluation, but command alleged she failed to complete the exam because she declined to answer certain questions. Under DoDI 6490.04, *Mental Health Evaluations of Members of the Military Service*, and AFI 44-172, *Medical Operations-Mental Health*, there is no requirement for a member to answer questions they believe could be problematic or incriminating. Furthermore, members are entitled to consult with legal, which she did prior to the CDE, and she was informed of her rights to remain silent and decline to answer certain questions which was her legal right.

Furthermore, she was found unfit by the Informal Physical Evaluation Board (IPEB) and she should have been medically retired. Prior to her separation, she was properly referred to the Medical Evaluation Board (MEB) which found she suffered from chronic right-sided face pain, which was incurred while entitled to basic pay. On 14 Nov 16, the IPEB found her chronic right-sided face pain rendered her unfit for duty. Instead of being placed on the Temporary Disability Retired List (TDRL) for a medical retirement, she was separated for a disability which existed prior to service (EPTS). There is no valid or legal reason why she was administratively separated via a medical retirement pursuant to the IPEB findings other than the command failed to properly process her for a medical retirement. The Department of Veterans Affairs (DVA) rated her mental health

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condition of Post-Traumatic Stress Disorder (PTSD) with major depressive disorder at 50 percent and her migraines at 30 percent indicating she should have received a medical retirement rating of at least 30 percent.

In her personal statement, the applicant explains the extensive medical treatment she underwent for her chronic right-side facial pain, headaches, and painful migraines. Due to her extensive medical problems, she was removed from regular duties and was given modified work. Her command made it known to her she would have to “suck it up” or be separated. During her recovery time from her sinus surgery, she was accused of being absent without leave (AWOL) even though the paperwork for her extension was faxed to the clinic which resulted in her taking her personal leave. During her recovery, she was entered into the DES unbeknown to her. While undergoing this process, she was brought to her commander and was told she had to undergo a CDE with mental health but was not given a clear or direct answer as to why. She hired an area defense counsel (ADC) because she was threatened by her command telling her if she appealed the medical board decision, she would receive a dishonorable discharge. Furthermore, her ADC advised her to attend the CDE but not to engage other than letting them know she felt okay mentally. She declined the interview, letting the mental health doctors know she felt intimidated, threatened, and coerced by her command. She was given an Article 15 for failing to cooperate with the CDE and was pulled from her Air Force Specialty Code (AFSC). She continued to be threatened and harassed by leadership.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 20 Feb 16, AF Form 286A, *Personnel Reliability Program (PRP) Permanent Disqualification or Decertification*, indicates the applicant was permanently disqualified from the Air Force Nuclear Weapons PRP. It is noted, she was not medically recommended due to a sensitive situation for which the applicant’s sensitive issues remained unresolved with no apparent closure. Because of this, her commander lost confidence in her abilities to perform her duties.

On 19 Sep 16, AF Form 590, *Withdrawal/Reinstatement of Authority to Bear Firearms*, indicates the applicant was determined to be unable to carry a concealed firearm under the Leosa Act.

On 3 Oct 16, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the IPEB for chronic right-sided face pain. This form indicates the condition incurred while entitled to basic pay, was not a condition that EPTS, and was permanently aggravated by service.

On 25 Oct 16, AF Form 2096, *Classification-the-Job Training Action*, indicates the applicant was removed from her Primary Air Force Specialty Code (PAFSC) 3P031 (Security Police). It is noted she may be ineligible to reenlist/extend unless she is selected for retraining prior to her date of separation.

Dated 14 Nov 16, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant's unfit medical condition of chronic right-sided face pain found in the line of duty (LOD) or proximate result of performing duty was awaiting DVA ratings.

On 2 Dec 16, AF Form 3070A, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for failure to obey a lawful order, to complete a mental health CDE on or about 17 Oct 16 and 9 Nov 16. She received a reduction in grade to airman basic (E-1) with a new date of rank of 2 Dec 16, and forfeiture of \$783.00 in pay for two months, suspended through 31 May 17, at which time will be remitted, unless sooner vacated.

On 13 Jan 17, the DVA proposed a disability rating for her service-connected medical condition of migraines, claimed as right-side face pain, of 30 percent. It is noted the diagnosis of migraines instead of a diagnosis of chronic right-sided face pain was given due to the non-existent diagnosis for the right-side facial pain. Right side facial pain is a general symptom that can be due to any number of conditions, including migraine headaches. The claim of chronic right-side face pain is being sympathetically read as a claim for migraine headaches. The condition is being evaluated as migraine headaches (referred as chronic right-side face pain) rather than separately denying the facial pain.

On 17 Jan 17, AF Form 356 indicates the applicant was found unfit due to her medical condition of chronic right-sided face pain (DVA rated as migraines) with a recommendation of "Discharge Under Other Than Chapter 61, Title 10 U.S.C. (EPTS)." It is noted her medical condition EPTS and was determined not to have been permanently aggravated by her military service. Clinical notes indicate she was initially seen for chronic pain that began in 2011 and was thought to be due to wisdom teeth, which were removed in 2014, before she joined the military. She had additional surgery in 2016 but continued to have significant pain. She was treated with multiple medical and surgical therapies without significant improvement.

On 23 Jan 17, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant agreed with the findings and recommended disposition of the IPEB and waived her rights to a formal hearing. She also indicates she did not request a one-time reconsideration of the disability rating for the conditions found unfitting.

On 25 Feb 17, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged in the grade of airman basic (E-1) after serving 2 years, 1 month, and 20 days of active duty. She was discharged, with a narrative reason for separation of "Disability, Existed Prior to Service, PEB (Enhanced)."

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

AIR FORCE EVALUATION

AFPC/DPFDD recommends denying the applicant's request for a medical retirement finding no indication an error or injustice occurred at the time the IPEB processed her disability case. Although the applicant had a medical condition that ultimately resulted in her discharge from service, the IPEB determined this condition originated approximately four years prior to entry and therefore existed prior to service which made it non-compensable under the disability evaluation system. Furthermore, the non-judicial punishment she received had no bearing on this decision and if the AFBCMR determines this action should be set-aside, she would still not be entitled to disability compensation and a disability retirement. Upon completion of disability processing, she had been demoted to airman basic and since she was not entitled to disability benefits under 10 U.S.C. Chapter 61, an enlisted grade determination was not required in accordance with 10 U.S.C. Section 1212. There is no indication the IPEB was aware of a potentially disqualifying mental health condition, nor whether she had been formally diagnosed, during disability processing.

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 8 Jul 24 for comment (Exhibit D), and the applicant replied on 12 Jul 24. In her response, the applicant contends, through counsel, the AFPC advisor's opinion her unfit medical condition was pre-existing and not exacerbated by service is demonstrably false. Both the MEB and the IPEB found her unfit medical condition incurred while in the service and was permanently service aggravated. In her original filing, her IPEB is dated 14 Nov 16; however, the advisory opinion contains evidence of another IPEB dated 17 Jan 17. There is no provided reason for the second IPEB and she does not accept the legitimacy of that document. Furthermore, the advisor opined there was no indication the PEB was aware of a potentially disqualifying mental health condition; however, she presented evidence she was medically unfit due to PTSD.

The applicant's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds there is insufficient evidence to support a permanent medical retirement or to be inserted into the DES for evaluation. The applicant's record provides evidence the commander initiated a non-emergency CDE in good faith. Her Article 15 and demotion appear to be solely based on her refusal to complete the CDE; however, there is nothing in the regulation that states she must complete the CDE.

While counsel contends the applicant presented evidence, she was medically unfit for service due to PTSD, there is insufficient evidence to support the applicant was not fit for duty during her service and at discharge from a psychological perspective. She was not diagnosed with any mental health condition while in service. She was cleared for duty from a behavioral health perspective in 2015. There were concerns noted by her family advocacy encounters, presumably due to alleged spousal abuse, but the applicant declined services. Family advocacy never diagnosed the applicant with any mental health condition. An initial intake encounter dated 7 Sep 16 noted low-level stress

(2-3/10), no anxiety (0/10), no depression (0/10), and no anger (0/10). It also noted she was under no acute stress and did not have a history of negative life events. While the applicant declined to proceed with a CDE, a mental health provider spoke to the applicant on 17 Nov 16 and noted her mental status as within normal limits, with no immediate concerns and no apparent distress. The applicant indicated on her self-declaration (2023), her ADC stated she should attend the CDE and let them know she was and felt okay mentally. On 13 Jan 17, one month before military separation, the DES proposed rating did not note any mental health condition. Additionally, the applicant did promote while in service and met expectations on her performance evaluation. Therefore, the Psychological Advisor finds there is insufficient evidence to support the applicant had a mental health condition that impacted her ability to perform the duties of her office, grade, rank, and rating from a psychological perspective.

The applicant was service-connected for PTSD with an original effective date of 27 Apr 18, over a year after her military discharge. 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. Again, there is insufficient evidence the applicant had a mental health condition during her time in service or it caused her to be unfit for service from a psychological perspective.

Counsel contends the CDE was unlawful in that the commander did not act in good faith in ordering the applicant to undergo a non-emergency CDE. DoDI 6490.04 notes referral for a CDE of a Service member to a mental healthcare provider (MHP) for a non-emergency mental health evaluation (MHE) may be initiated only by a commander or supervisor as defined in the Glossary. Such evaluations may be for a variety of concerns, including fitness for duty, occupational requirements, safety issues, significant changes in performance, or behavior changes that may be attributable to possible mental status changes. The applicant's record provides evidence the commander initiated a non-emergency CDE in good faith. In an encounter dated 11 Oct 16, the provider discussed the reasons for the CDE and reviewed the applicant's medical records, and concluded the CDE was appropriate. It noted the applicant was referred to the mental health clinic (MHC) for non-emergency CDE given concerns related to continuous duty restrictions and stress reactions described as more confrontational at times. The provider discussed the above issues/concerns with the applicant's leadership and determined a CDE to be appropriate. Based on the applicant's records, the Psychological Advisor concurs the CDE was ordered in good faith. However, counsel also contends the applicant received an Article 15 and demotion for failing to follow a lawful order, refusing to complete a CDE. DoDI 6490.04 notes commanders and supervisors who in good faith believe a subordinate Service member may require a MHE are authorized to direct an evaluation under this instruction or take other actions consistent with the

procedures in Enclosure 3. In these circumstances, a command-directed MHE has the same status as any other military order. The Psychological advisor finds the applicant did comply with the order to present herself for the CDE. While she did not actively participate in the evaluation, she arrived at the CDE on two separate occasions. She declined the evaluation both times and wished to speak to her ADC before the second encounter. She was contacted again on 8 Nov 16, and the provider confirmed she does not want to participate with the CDE process. The Psychological Advisor notes while a service member can be ordered to attend a CDE, there is no policy in place that compels a service member to cooperate and answer questions against their will. Service members have the right to refuse medical treatment when that service is not life-threatening. In this case, the CDE was for non-emergency purposes, and the applicant refused to complete the evaluation, which is within her rights. Her Article 15 and demotion appear to be solely based on her refusal to complete the CDE; however, there is nothing in the regulation that states she must complete the CDE.

The complete advisory opinion is at Exhibit F.

AFPC/DPFDD recommends denying the applicant's request for a medical retirement finding no error in the processing of her disability case. The unfit AF Form 356, dated 14 Nov 16, presented by counsel was for mandatory actions under the IDES and the applicant's use but was not the official board decision which was made on 17 Jan 2017. Under the Integrated DES, once the IPEB determines a member has an unfitting condition, an AF Form 356 is prepared to document that decision and request ratings from the DVA because under the IDES, the PEB must utilize the Veterans Affairs Schedule for Rating Disabilities (VASRD) codes and appropriate ratings, if applicable, assigned by the DVA. These rating decisions are also provided to the Physical Evaluation Liaison Officer (PEBLO) to brief the member on both the IPEB's decision and their overall DVA rating for all claimed conditions.

The DVA determined her right face pain may have been caused by migraines; however, based on her medical records the IPEB determined the root cause of the condition began in 2011 prior to her wisdom teeth extraction and prior to service entry. Additionally, the medical narrative summary (NARSUM) prepared prior to the MEB does not list migraines in her pertinent past medical history nor is it listed as a claimed condition for her DVA medical examinations. The only mention of migraines was contained in clinical notes dated 9 and 14 Mar 16 from an off-base Ear, Nose, and Throat specialist in which she reported having a history of migraines, which affected her forehead and the rest of her head. However, it is unclear whether she had been officially diagnosed with migraines and according to the NARSUM she had been non-compliant by not making referrals with recommended specialists and not trying medications recommended by her primary care manager, specialist, and medical group leadership.

The complete advisory opinion is at Exhibit G.

AF/JAJI recommends denying the applicant's request to remove her NJP and restore her grade to airman first class (E-3) finding insufficient evidence to demonstrate a legal error or injustice occurred in regard to the NJP. At the time the mental health CDE was ordered, the applicant's commander had concerns about her fitness for duty as she was dealing with a lot of pain and

changes to what she could do duty wise because of the pain. In addition, when the commander spoke with the mental health professionals after the applicant's first-time reporting and declining to go through the process, mental health stated a CDE was still appropriate. As such, a reasonable fact finder would find the order of the non-emergency mental health CDE was in good faith.

The Psychological Advisor states there is no duty to complete the evaluation once the applicant reported to mental health. Neither DoDI 6490.04 nor AFI 44-172 state a service member is required to complete the evaluation or even what completing an evaluation would be. The Psychological Advisor came to the conclusion the applicant had no requirement to complete the mental health CDE in part because it was a non-emergency CDE and because the provider who talked with the applicant noted she was within normal limits with no immediate concerns, noting the applicant was in no apparent distress. From a behavioral health perspective, no change in arming status. However, from a legal standpoint, the applicant was ordered to mental health for the purposes of undergoing a CDE. While the applicant did go to mental health three times, she declined to answer any of the CDE questions and prevented the mental health professionals from doing an evaluation, as laid out in DoDI 6490.04, Enclosure 3, and the CDE was not conducted. DoDI 6490.04 and AFI 44.172 have protections in place that indicate statements made during a CDE will remain confidential with significant restraints on the information disclosed to the commander. Much like the Rules for Court Martial 706 sanity boards with similar protections, the CDE order could be interpreted as one where the patient is compelled to submit to evaluation by a provider. As such, the NJP given for failure to obey an order when the applicant did not complete a CDE is not, on its face, an abuse of discretion, nor is it arbitrary or capricious.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 16 Sep 24 for comment (Exhibit I), and the applicant replied on 20 Sep 24. In her response, the applicant contends, through counsel, she disagrees with the Psychological Advisor's assertion her unfit medical condition was both preexisting and not exacerbated by service and further disagrees with assertion she was directed to participate in the CDE in good faith which is directly contradicted by the evidence and argument contained in the original filing. However, she does agree with the Psychological Advisor and disagrees with the legal advisory. She had no obligation to answer questions or otherwise complete the CDE. There is no obligation in any regulation to complete a CDE and the legal advisory opinion cites no provision suggesting such an obligation; therefore, her Article 15 and demotion action should be reversed. As to the advisory opinion from AFPC/DPFDD, even if her condition was preexisting, it is compensable if it was aggravated by service as outlined in DoDI 1332.18, *Disability Evaluation System*, which evidence shows that was submitted in her original filing.

The applicant's complete response is at Exhibit J.

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 the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions regarding a medical retirement. The Board does not find the applicant's mental health condition, to include PTSD, unfitting during her time in the service. The mere existence of a mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. Even though the applicant was directed to undergo a MHE, there is no evidence to suggest her military duties were degraded due to a mental health condition. She was removed from her AFSC because her leadership lost confidence in her abilities to perform her duties because of an unresolved sensitive issue. A Service member shall be considered unfit when the evidence establishes the member, due to physical or mental health disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. Furthermore, a rating by the DVA, based on new and/or current exams conducted after discharge from service, does not warrant a change to the applicant's separation. 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. On 17 Jan 17, the IPEB found her unfitting medical condition of chronic right-sided facial pain, rated by the DVA as migraines, as to have EPTS to which the Board agrees as it appears this chronic pain began before her enlistment into the service. The Board notes the AF Form 356, dated 14 Nov 16, which was presented by counsel as the IPEB decision to find her condition as unfit which qualified her for a medical retirement; however, this was not a decision by the IPEB, but was simply the request to the DVA to determine the rating for her potentially unfitting condition. Additionally, the Board did not find the applicant's medical condition warranted placement on the TDRL. Placement or continuation of TDRL status is justified only when the disability of one or more conditions reaches the minimum 30 percent rating and the conditions are considered unstable. The preponderance of evidence does not support the applicant's medical condition qualified her for a medical retirement; therefore, removing the stability of her condition from the decision. Furthermore, the Board does not find her condition was permanently aggravated due to her military duties and therefore, finds her discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Additionally, except for counsel's contention her command reprised against her because they disliked her and ordered her to undergo a CDE, the Board finds no evidence the applicant was a victim of reprisal. It is the applicant's responsibility to provide evidence to support her claim. A mental health CDE is not used as a punitive tool but is used as a way for command to support or assist a Service member's treatment with possible duty restrictions and/or possible implications for the safety of self or others. As to the issue of her NJP, Article 15 and demotion action, the Board concurs with the rationale and recommendation of AF/JAJI whereas the applicant refused to answer any of the questions which prevented the mental health professionals from doing an evaluation; therefore, the issuance of her NJP for failing to comply with the order was not an abuse of authority and was well within the commander's rights. Therefore, the Board finds the

application untimely and recommends against correcting the applicant's records. Lastly, the Board 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)*. 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 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-2024-00120 in Executive Session on 16 Oct 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 18 Dec 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 12 Jun 24.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 8 Jul 24.
- Exhibit E: Applicant's Response, dated 12 Jul 24.
- Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 6 Aug 24.
- Exhibit G: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 12 Aug 24.
- Exhibit H: Advisory Opinion, AF/JAJI, dated 13 Sep 24.
- Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 16 Sep 24.
- Exhibit J: Applicant's Response, dated 20 Sep 24.

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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

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Board Operations Manager, AFBCMR
Signed by: USAF

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