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UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: BC-2024-04091

COUNSEL: [redacted]

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His discharge with severance pay (DWSP) for his somatoform disorder rated at 10 percent be changed to a medical retirement with a 50 percent disability rating.

APPLICANT'S CONTENTIONS

After his 2002 separation from the Air Force, the Department of Veterans Affairs (DVA) reviewed his condition using the Veterans Affairs Schedule for Rating Disabilities (VASRD) and assigned him a 50 percent disability rating for somatoform disorder, effective 7 Nov 00. The Physical Disability Board of Review (PDBR) incorrectly upheld the Physical Evaluation Board's (PEB) 10 percent rating decision by ignoring relevant facts, failing to apply the required law, and making several unsupported speculations. He continued to experience episodes of pain and an inability to breathe, characterized as panic attacks, the DVA found his somatoform disorder a serious impairment in social, occupational functioning, and the exam on which the PEB based its decision indicated he experienced no change in symptoms during his placement on the Temporary Disability Retired List (TDRL).

After being placed on the TDRL, he continued to receive treatment in [redacted]. However, shortly after his separation from the Air Force, he and his family relocated to Michigan due to financial hardship, resulting in a fifteen-month gap in his medical care. Regardless of whether he was in continual treatment, or not, his condition regularly disrupted his daily life and at times rendered him wholly disabled. As a result of his symptoms, he reported being afraid to leave home or drive a car, and as a result, was unable to take on a more demanding and higher-paying job in line with his skills and educational background and was instead forced to attempt operating a small internet business from his home which ultimately proved unsuccessful due to his disability. Somatoform-related pain affected all aspects of his daily life and even required his hospitalization in late 2003. In Feb 02, he underwent a periodic physical evaluation, as required by his TDRL status, the results of which concluded his somatoform disorder had not improved and remained unchanged since 2000. The exam further indicated he had complaints of pain attacks with multiple somatic issues that included chest, head and back pain. The narrative summary (NARSUM) also noted he had become isolated for fear of a somatic attack in public and he was unable to find a job. In addition,

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it was noted he had an anxious and mildly dysphoric mood. On 18 Jul 02, his somatoform disorder was reconsidered by the PEB which determined his condition merited only a 10 percent rating, reasoning, had he pursued mental health treatment, his social and industrial adaptability impairment would be described as mild, despite the TDRL examiner noting definite impairment. The PEB also questioned his occupational impairment, noting he was able to complete activities of daily living, such that home/self-employment could be a viable option. Three months before his TDRL removal, he presented to the emergency room (ER) with chest pain so severe it caused him to double over reporting dizziness, shaking, and blacking out with the inability to see for 30 seconds and was ultimately discharged with medication for anxiety. Despite this, the PEB separated him with a 10 percent rating.

He was originally rated by the DVA for his somatoform disorder at zero percent because he missed his medical appointment. However, the DVA conducted an exam on 3 Dec 02, where he reported continued somatic symptoms of various frequencies, self-isolation, unemployment, and a frequent anxious mood. At the exam, a Global Assessment of Functioning (GAF) scale score of 45 was recorded, indicating serious symptoms or serious impairment in social, occupational functioning. He was awarded a 50 percent rating, effective 7 Nov 00 determining his symptoms demonstrated occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect, circumstantial, circumlocutory, or stereotyped speech, panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; and difficulty in establishing and maintaining effective work and social relationships.

The PDBR evaluated his case and determined no change was warranted, cherry-picking the record and ignoring his somatic symptoms which were so severe he required treatment at the ER and focused instead on the fact he left the hospital almost symptom free and further stated there was no record of frequency of the attacks occurring once a week or more but is in clear contradiction to the record of evidence. As part of the PDBR's review, per DoDI 6040.44, *Physical Disability Board of Review (PDBR),* Enclosure 3, the provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the PDBR to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. Thus, in accordance with DODI 6040.44, the PDBR should not have considered the PEB's 10 percent rating. Without the 10 percent rating, all that was left for the PDBR to consider was the 50 percent rating awarded by the DVA, the symptoms disclosed during his periodic examination and his DVA examination, and the fact the periodic examination found there had been no change to his symptoms since his placement on the TDRL which should have rendered a 50 percent disability rating. This exam was conducted before he was removed from the TDRL and properly applied the correct standard, which required the PDBR to resolve doubt in favor of the member per 38 C.F.R. Section 4.3.

The PDBR's decision was also based on speculation, what they felt his condition would have been if he were undergoing treatment. However, this assumption is based on incorrect facts. Following his placement on the TDRL he did require hospitalization and medical treatment for his disorder. With regard to treatment, he saw [redacted] at [redacted] Medical Center at [redacted]

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Air Force Base until Jun 01. There was a gap from Jun 01 until Sep 02, due to his needing to move following his separation from the military, but once he moved back home to Michigan and was able to establish care, he began regularly seeking behavioral health treatment.

The board further concluded, although he was unemployed, he could perform activities of daily living and was able to work from home. However, the VASRD does not require a member be wholly unable to work to assign a 30 percent rating. Moreover, the use of the term "such as" in 38 C.F.R. Section 4.130 demonstrates the symptoms that are listed are not intended to constitute an exhaustive list but rather are to serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating (Mauerhan v. Principi, 16 Vet. App. 436 (2002)).

The PDBR's decision repeatedly minimized or rejected evidence that undermines its conclusion without any sound reason for doing so. The PDBR indicates there was no evidence of disturbance of thinking, suicidal ideation, problems with memory or concentration, or chronic sleep impairment, without consideration of the fact his GAF score of 45 indicated serious symptoms in social, occupational functioning. The PDBR also failed to reconcile, the DVA determined he suffered from flattened affect; circumstantial, circumlocutory or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; short and long term memory impairment (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment and abstract thinking; motivation and mood disturbances; difficulty in establishing and maintaining effective work and social relationships. The PDBR failed to address all of this contradictory evidence or respond to his arguments which renders its decision arbitrary and capricious.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air National Guard (ANG) major (O-4).

On 23 May 00, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for somatoform disorder, not otherwise specified (NOS), treated without improvement.

On 7 Jun 00, a letter from ANG/SGPA indicates the applicant was unable to perform the duties of his position and it was recommended he be found unfit and separated from the ANG.

On 28 Jun 00, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of somatoform disorder, definite social and industrial adaptability impairment with a disability compensation rating of 30 percent with a recommendation of "Temporary Retirement."

[redacted]

On 20 Jul 00, 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 his rights to a formal hearing.

Dated 27 Sep 00, Special Order [redacted] indicates the applicant was relieved from assignment and placed on the TDRL in the grade of major with a compensable percentage for physical disability of 30 percent, effective 7 Nov 00.

On 6 Nov 00, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged in the grade of major (O-4) after serving six years, one month, and six of active duty for this period. He was discharged, with a narrative reason for separation of "Mandatory Retirement required by Law due to Temporary Physical Disability."

On 4 Feb 01, the applicant acknowledged his responsibilities while on the TDRL by reporting and completing the required TDRL periodic physical examination on the scheduled date and time and to provide the TDRL physician copies of all medical records since his last evaluation.

On 22 Mar 02, the applicant was scheduled for his mental health examination.

On 25 Apr 02, AF Form 356 indicates the applicant was found unfit due to his medical condition of somatoform disorder, NOS, definite social and industrial adaptability impairment with a disability compensation rating of 10 percent with a recommendation of "DWSP." It was noted his medical condition was essentially unchanged since being placed on the TDRL; however, the board opined if the applicant would have complied with the prescribed medical treatment, he would best be described as mild social and industrial adaptability impairment.

On 24 May 02, the applicant non-concurred with the recommended findings and requested an appearance before the formal PEB and further indicated he would need his wife to travel with him as he had difficulty traveling by himself.

On 18 Jul 02, AF Form 356, *Formal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of somatoform disorder, NOS, definite social and industrial adaptability impairment with a disability compensation rating of 10 percent with a recommendation of "DWSP." It was noted the applicant had not worked since Nov 00 since being placed on the TDRL; however, the applicant stated he was able to complete activities of daily living and indicated home/self-employment could be a viable option. He further testified his first appointment since being placed on the TDRL was in May 02 with a family practice provider which he was currently being seen on a monthly basis but was not being seen by a mental health provider. He stated he did not seek care earlier because he was not satisfied with his primary care provider and was waiting until he moved. The board opined, he would have greatly benefited from care during this period as he could have requested a different provider and further opined, if he would have pursued this option, his social and industrial adaptability impairment would best be described as mild.

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On 18 Jul 02, AF Form 1180 indicates the applicant disagreed with the findings and recommended disposition of the Formal Physical Evaluation Board (FPEB) and submitted a rebuttal. In his rebuttal, he stated the board did not accurately assess the severity of his current condition and his testimony and written statements were either misunderstood or taken out of context. He goes on to outline the violations of TDRL procedures per AFI 36-3212, *Physical Evaluation fir Retention, Retirement, and Separation,* which caused an inaccurate periodic exam and further states the board's remarks misrepresented the evidence and testimony presented and led to inaccurate conclusions regarding his reasons for not seeking medical care from Nov 00 to Nov 01 and his ability for home/self-employment. He did not seek further care as he was told by three different providers no further recommendation could be made on how to treat his condition, and he was having financial hardship which led to his move closer to family. He also made mention of the rejection of his requests for witnesses and the conduct of the medical representation on the board.

On 11 Feb 02, the DVA proposed a disability rating for his service-connected medical condition somatoform disorder at 0 percent, effective 7 Nov 00 noting the severity of his condition could not be determined due to the applicant failing to report to the DVA for a medical examination on 22 Jan 02 in Baltimore, Maryland. The applicant submitted a notice of disagreement stating he moved out of the area in Aug 01 and advised the DVA on several occasions of this move requesting his exam be rescheduled in Michigan.

On 29 Aug 02, the Secretary of the Air Force Personnel Counsel (SAFPC) directed the applicant be DWSP at a 10 percent disability rating. The board noted the applicant's reevaluation indicated he had not taken any psychiatric medications and had not received any further psychiatric treatment since the Medical Evaluation Board (MEB) evaluation. The board further acknowledged the applicant's reasons for the delay in treatment but opined this did not account for the total lapse in follow-up care stating if the applicant would have sought and received appropriate treatment his condition would more likely have significantly improved which he could have received through the DVA.

Dated 6 Sep 02, the applicant was advised, since he had over 20 years of satisfactory service per Title 10 U.S.C. Section 12732, he could be transferred to the Inactive Status List, Reserve Section (ISLRS) for retirement eligibility under Title 10 U.S.C. Chapter 67.

On 15 Nov 02, the applicant elected to be DWSP with the understanding he would forfeit all rights to receive retired pay under Title 10 U.S.C. Chapter 1223 at age 60.

Dated 20 Nov 02, Special Order [redacted] indicates the applicant was removed from the TDRL and DWSP, effective 10 Dec 02.

On 2 Oct 18, the applicant and his legal counsel petitioned the PDBR for an increase in his disability rating from 10 percent to 50 percent for his unfit mental health condition of somatoform disorder.

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On 7 Feb 21, his petition was adjudicated by the PDBR, which included a review from a medical professional, which found insufficient evidence to support his request. The board considered the TDRL NARSUM examination performed on 20 Mar 02, completed nine months prior to TDRL removal, the ER visit from 18 Sep 02, three months before TDRL removal, and the Compensation and Pension (C&P) examination performed on 3 Dec 02 by the DVA, completed one week prior to his removal from the TDRL. Based on this evidence, the board determined, at the time of TDRL removal, he met the 10 percent rating for occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress. The board found no evidence of a traumatic event or stressor casing the unfit mental health condition to justify a 50 percent rating and found no record of frequency of panic attacks, occurring once a week or more, and no indication he was unable to work to justify a 30 percent rating.

On 22 Oct 24, the United States District Court for the District of [redacted], case number 8:[redacted], remanded the AFBCMR in lieu of the PDBR due to the latter being disbanded to vacate the PDBR's decision and conduct further proceedings to determine the merits of the applicant's claims, which were previously denied by the PDBR and issue a new decision. The AFBCMR is to vacate the decision, conduct further proceedings, and issue a new final decision explaining the applicant's entitlement to medical retirement pursuant to 10 U.S.C. Section 1201, DoDI 1332.38, *Physical Disability Evaluation*, and other statutory and regulatory guidance.

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

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.

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. Section 1552. It is DoD policy the application of

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liberal consideration does not apply to fitness determinations; this is an entirely separate Military Department in determining 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 18 Feb 25, a copy of the liberal consideration guidance was sent to the applicant, Exhibit E.

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 an increase of his disability rating to 50 percent for somatoform disorder. There is no error or injustice identified with his 10 percent rating. His 10 percent rating closely resembles his overall functioning and the severity of his condition and symptoms by the time he was removed from the TDRL and recommends his disability rating remain unchanged at 10 percent for somatoform disorder (or somatization disorder), VASRD Code 9421.

A comprehensive summary and timeline of the applicant's case history have been provided in this advisory for review and consideration. It has been clearly established by numerous boards including the IPEB, FPEB, and SAFPC, the applicant's mental health condition of somatoform disorder was unfit for continued military service. The divergence of opinions lies with the final percentage the applicant received from these boards and the DVA. All of these boards had determined his mental health condition, symptoms, and the degree of impairment of his functioning warranted a 10 percent disability rating whereas the DVA assigned him a 50 percent rating for the same condition. To begin the discussion of his ratings, it is important to recognize the applicant was not processed through the Integrated Disability Evaluation (IDES) but through the Military Disability Evaluation System (MDES), now known as the Legacy Disability Evaluation System. The MDES was the system that was in effect at the time he was in service and undergoing the medical discharge process. The IDES process was the result of National Defense Authorization Act (NDAA) 2008, which was referenced by his previous legal counsel to the PBDR. Under the IDES, the DVA is the single rating authority, and the DoD including the Air Force, implements the assigned rating from the DVA particularly when entering the TDRL. However, rating discrepancy between the DoD and DVA following removal from the TDRL may occur because the DVA may change ratings to reflect the post-service progression of the disease or injury over time while the DoD is concerned with the degree of impairment of the condition at the time of separation. Since the applicant was removed from the TDRL in 2002, which was six years before the establishment of NDAA 2008, it was impossible for the IPEB, FPEB, and SAFPC to apply a policy or process that did not exist at the time. Even when his petition was adjudicated by the PDBR in 2021, which was well after the IDES had been established, the PDBR could not

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retroactively apply the IDES process to his case because he was processed through the MDES, a different type of DES process that predated the IDES. The MDES did not require the adoption of the DVA rating as the DoD and the DVA had authority and responsibility for their own rating. The MDES did, however, use the VASRD as a guide to assign ratings.

In DoDI 1332.39, *Application of the Veterans Administration Schedule for Rating Disabilities*, originally published on 14 Nov 96, the regulation that was in effect at the time of the applicant's medical discharge processing, procedural instructions were provided for using the VASRD to assign disability ratings. Per paragraph 6.1.1, the VASRD is primarily used as a guide for evaluating disabilities resulting from all types of diseases and injuries encountered as a result of, or incident to, Military Service. Because of differences between Military Department and DVA applications of rating policies for specific cases, differences in ratings may result. Unlike the DVA, the Military Departments must first determine whether a Service member is fit to reasonably perform the duties of the member's office, grade, rank, or rating. Once a Service member is determined to be physically unfit for further Military Service, VASRD percentage ratings are applied to the unfitting condition(s). Percentages are based on the severity of the condition(s). Under the same category for procedures of rating disability, DoDI 1332.39 also addressed the conflict between two evaluations and changes in rating criteria, in paragraph 6.2, noting when the circumstances of a case are such that two percentage evaluations could be applied, the higher percentage will be assigned only if the Service member's disability more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. When, after careful consideration of all reasonably procurable and assembled data, there remains a reasonable doubt as to which rating should be applied, such doubt will be resolved in favor to the member. Per paragraph 6.3, under changes in rating criteria, members on the TDRL shall be rated under the VASRD criteria in effect at the time of their final reevaluation. The IPEB, FPEB, and SAFPC were required to follow these procedures, and there is no evidence these respective boards deviated from this set of instructions.

Moving forward with consideration of the aforementioned information provided, a de novo (anew) review of the applicant's file has been performed as directed in the court remand. When the applicant was referred to the PEB by his treating psychiatrist on 23 May 00, it was reported he was having episodes two to three times per week of right-sided pain, back pain, weakness, lightheadedness, tremor, and occasional chest pain or sharp right parietal head pain since Sep 99. The episodes would last two to eight hours and would occur more frequently during periods of stress. He stopped going to work in Oct 99 to try to get a handle on the problem. He was afraid to leave his house because of his fear of having a panic attack, unable to complete tasks such as grocery shopping or mowing the lawn without having an episode requiring, he lie down and rest. His mental status examination (MSE) was assessed and although his attitude was polite and he had no deficits with his speech, thoughts, perception, and memory, he displayed mild psychomotor agitation with constant tapping of his hand or foot, his mood was frustrated, and his affect was appropriate and reactive. His GAF was assessed to be 55 denoting he had moderate symptoms or moderate difficulties in social, occupational, and school functioning. From this evaluation, he was placed on the TDRL with a 30 percent rating by the IPEB. During his time on the TDRL from the period of 7 Nov 00 to 10 Dec 02, the applicant received two mental health evaluations via a TDRL

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re-evaluation (NARSUM) from a military provider at a military treatment facility (MTF) on 20 Mar 02, and a C&P exam from the DVA on 2 Dec 02. There were no records he received any mental health treatment for his somatoform disorder. The TDRL re-evaluation stated the applicant reported he continued to experience panic attacks with multiple somatic complaints of unknown etiology since his MEB evaluation (referral to the PEB) in May 00, the rate of the attacks remains the same and varied daily, some days the pain attacks occur only a few times and other days they occur with greater frequency, he awakes each morning feeling good until his first attack, which would occur within one hour of awakening, the attacks typically last 15-20 minutes and commonly occur when in a crowd or driving, and he had become quite isolated for fear that an attack would occur in public. He had not been able to find a job since the last evaluation but was depressed over the loss of his career and health status. Despite experiencing these continued symptoms and problems, he had not received any further psychiatric treatment since the MEB evaluation and was not taking any medications. He remained married and his relationship was good. The examiner opined his somatoform disorder had not improved since the last evaluation, he remained symptomatic, his condition was unchanged from May 00, and he most likely would continue having episodes of pain/panic attacks.

The IPEB re-adjudicated his case on 25 Apr 02 using this TDRL re-evaluation because it was the only available record he had at the time and reduced his rating to 10 percent citing, if he would comply with prescribed medical treatment, his social and industrial adaptability impairment would be described as mild. The FPEB concurred with the IPEB's decision on 18 Jul 02 and maintained his reduced rating for the same reason and added he was able to complete activities of daily living and testified before the FPEB, home/self-employment could be a viable option for him. The applicant disputed both of the IPEB's and FPEB's decisions and explained in his rebuttal to the FPEB he saw his three doctors up until Nov 00 and all advised him, they had no further recommendation on how to treat his condition. He was especially discouraged by his PCP informing him he would have to learn and live with his condition. He took their advice and tried to adapt and learn to live with his condition as a reason he did not receive continued treatment. He also discussed having financial hardship, housing issues, and difficulties obtaining health care because of Tri-Care health insurance issues when he moved from Maryland to Michigan as other reasons, he was unable to receive treatment. His case was adjudicated one last time before he was removed from the TDRL by SAFPC on 29 Aug 02. The SAPFC board acknowledged his delay in receiving care was caused by his move from Maryland to Michigan in Aug 01, but the Board opined this obstacle alone did not account for the total lapse in follow-up care since his initial placement on the TDRL. SAFPC mentioned the DVA was a resource available to veterans and he could have received treatment from a DVA facility while his Tri-Care health insurance issue was resolved. SAFPC concurred with the IPEB and FPEB finding his condition could have improved if he received treatment for his mental health condition and maintained his rating at 10 percent. Following SAFPC's decision, he was directed to be removed from the TDRL on 10 Dec 02 and be DWSP.

From the information presented, the Psychological Advisor initially would not concur with the IPEB's decision to reduce his disability rating to 10 percent but would maintain his rating at 30 percent. This is because the examiner for the TDRL re-evaluation reported his condition had not

improved since his last evaluation performed in May 00, he remained symptomatic, and he most likely would continue having pain/panic attack episodes. The examiner did not state his condition had worsened but his condition was unchanged since May 00. If his condition remained the same, then a reduction of his rating would not be warranted. A reduction of the rating reflects improvement of the condition and/or reduction of the severity of the condition. Since the applicant was neither assessed to have made improvements nor had reductions in the frequency and severity of his attacks/symptoms, he should not have received a reduced rating. The IPEB opined, if he sought treatment for his condition, his condition would improve. This is speculative with no corroborating evidence or records to support this opinion but was a possibility and this opinion was also shared by the FPEB and SAFPC. The DVA shared a similar sentiment there was a likelihood of improvement in his condition. Nevertheless, the benefit of the doubt is given to the applicant, and the Psychological Advisor opines he should not have received a reduced rating from the IPEB and his rating should have been continued at 30 percent by the IPEB. The applicant made two more appeals thereafter to the FPEB and SAFPC, which prolonged his time on the TDRL. More information about his functioning, symptoms, and issues with treatment were uncovered from these appeals. It was discovered he did not receive mental health treatment because he was informed by his military providers there was nothing more they could have done to treat his condition, and he felt discouraged when his PCP advised he needed to learn how to live with his condition. These are reasonable explanations especially since he had received different types of treatment and did not receive relief. However, his psychiatrist reported in the NARSUM he had received the maximum benefit from current therapeutic modalities offered in the United States military; however, the applicant did not receive any therapeutic modalities from providers outside of the military such as in community care, the DVA, or other private care providers. As mentioned by SAFPC, he could have gone to the DVA for treatment. There is evidence he was aware of the DVA at the time as his legal counsel stated he filed a claim for service connection with the DVA on 16 Jan 01, two months after he entered the TDRL. All service members undergoing the DES are informed of DVA treatment services and resources. His psychiatrist also recommended in the NARSUM report he should continue psychotherapy with his current provider while he awaits a determination from the PEB. His psychiatrist did not identify which PEB, but he could have continued with treatment with a different provider especially since he was dissatisfied with his current provider. The examiner who performed his TDRL re-evaluation had recommended and informed him, continued long-term care would be required and stated the applicant verbalized an understanding of the recommendation. By the time he received the TDRL re-evaluation, he had been on the TDRL for 17 months, 20 months when he testified before the FPEB and 21 months when SAFPC reviewed his petition and rebuttal to SAFPC. This is a long period of time to be without mental health treatment for a supposed severe or chronic condition that interfered with his functioning on a regular basis. Additionally, his lack of mental health treatment during the TDRL period was not because he was not amenable to treatment or his mental health condition had prevented him from seeking care, i.e., he could not leave his home for doctor visits because of his panic attacks (he was able to make his various doctor appointments before he was referred to the MEB), avoided treatment out of fear of worsening his symptoms, unable to tolerate treatment, lack mental capacity to engage in treatment, etc. but because he moved from Maryland to Michigan caused by or resulting in financial, housing, and health insurance coverage

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issues. Again, as SAFPC had referenced, he could have gone to the DVA. It is accepted he tried to learn how to live and adapt to his condition on his own as he testified and contended to the FPEB and SAFPC, but if this was the reason he was not seeking care, one could reason, since he was not receiving any psychiatric treatment during his time on the TDRL, then his condition was not as severe but was possibly mild or moderate and/or he was able to manage his symptoms well enough, albeit with some difficulties, that did not require some sort of care or assistance. If his symptoms were as severe as he claimed they were to be, then he would seek care whether through an outpatient setting, residential, acute care, ER visits, hospitalization, etc. Moreover, the NARSUM report stated his attacks occur more frequently during periods of stress. The applicant had experienced numerous highly stressful situations, i.e., moving, financial problems, housing issues, being discharged from the Air Force after serving for almost 30 years, transitioning to civilian life, etc. during his time on the TDRL but no evidence he ever sought care for any of these stressors and no evidence his attacks were increased or exacerbated in response to these stressors. He sought treatment from a primary care physician (PCP) and not a mental health provider after he received the results of his reduced rating by the IPEB. When he received his TDRL re-evaluation, there was no mention of any plans to receive treatment from a medical or mental health provider. Whether he received or not is a concern, but it is not the only concern being considered. The impact of the severity of mental health condition on his overall functioning is important. He testified before the FPEB, even though he had not worked since being placed on the TDRL, he was able to complete activities of daily living, and he stated home/self-employment could be a viable option. There was no impairment in these areas of functioning caused by his mental health condition reasons discussed in this paragraph, the information presented indicated there was improvement in his condition and functioning and the 10 percent rating was appropriate based on additional information received from his appeals.

The DVA had assigned a 50 percent rating to the applicant following his C&P exam. The Psychological Advisor does not concur with the DVA's rating because there was a lot of inconsistent information provided in the C&P exam that contrasted the rationale provided by the DVA for the 50 percent rating. One week before the applicant was removed from the TDRL, the applicant received a C&P exam from the DVA on 3 Dec 02. This exam was not completed nor available when the IPEB, FPEB, and SAFPC adjudicated his case and was completed after these boards had met. Thus, these boards did not have an opportunity to review the new information. The PDBR did review and consider this C&P exam, but the Psychological Advisor will not discuss the PDBR's decision any further due to the court's remand order to set aside their decision. The C&P exam is accepted as an additional evaluation during his TDRL period for consideration of his rating. This exam report stated he tried substitute teaching in the schools in Portage, Michigan and taught about 10 days throughout this current year, he now spends his time performing home maintenance duties, compiling resumes on his computer, reading, attending movies, and doing some snow plowing. He stated he had continued to have similar episodes at various frequencies and was recently evaluated by a physician at the [redacted] Medical Center because he believed he was having a heart attack. His electrocardiogram (EKG) and chemistries were reported as normal. He was referred to mental health by his physician. His MSE was assessed, and he was reported to have been dissatisfied with his diagnosis of somatoform disorder, but his speech was of normal rate, volume, and coherent, his thoughts were organized with no hallucinations or delusions, his

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memory and concentration were intact, his mood was one of anxiousness and despair, and his affect was appropriately labile. The DVA assigned him a 50 percent rating based on the results of the C&P exam because of occupational and social impairment with reduced reliability and productivity due to such symptoms as flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete task); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships. This quoted criterion is presented verbatim from the VARSD. From the exam and at the time of the exam, the applicant did not have flattened affect, but his affect was determined to be appropriately labile, which is the opposite of flat affect. He did not have a circumstantial, circumlocutory, or stereotyped speech but his speech was of normal rate. He did not have panic attacks more than once a week but there was a reference to him being evaluated by a physician because he believed he had a heart attack, and this was one event. He reported continuing to have similar episodes at various frequencies but did not clarify the frequency or that they occurred more than once a week. There is no evidence or records he had panic attacks more than once a week around the time of his C&P exam. He did not have difficulties understanding complex commands, impairment of short- and long-term memory, impaired judgment, or impaired abstract thinking, but his thoughts were assessed as organized with no hallucinations or delusions and his memory and concentration were intact. There was no evidence he had difficulties in establishing and maintaining effective work and social relationships, but he was reported to be married and living with his wife. In his TDRL re-evaluation, he reported having a good relationship with his wife. There is no evidence or records he had any marital conflict, and his wife reported in her letter for the PEB dated 9 Jul 02, they had been happily married for 30 years. There is no evidence or records he had any disturbances of motivation, but his mood was reported to be one of anxiousness and despair. Only one and possibly two of the symptoms or issues reported in the C&P exam were listed in the 50 percent rating criteria according to the VASRD. His C&P exam also stated he tried working as a substitute teacher and worked about 10 days throughout the current year. The examiner did not clarify what tried meant but did not report he had difficulties or was unable to perform this job because of his panic attacks or mental health condition or that his mental health condition interfered with his ability to perform this job satisfactorily. There is no evidence or records he had a panic attack, anxiety, depression, etc. while performing this job. The nature of being a substitute teacher is typically not consistent or to be performed on a regular basis but on an as-needed basis. Thus, it is not unexpected he only worked for 10 days. Again, there is no evidence he was unable to perform this job because of his mental health condition and no evidence of occupational impairment. Consistent with the FPEB's report that he was able to complete activities of daily living, he was reported to spend his time performing home maintenance, compiling resumes on his computer possibly indicating he was looking for a job, reading, attending movies, and doing some snow plowing. These activities suggest he was able to function in his personal and possibly social life and no evidence or records his mental health condition interfered with his ability to perform these activities. There is no evidence or reports of social impairment in the C&P exam. For these reasons, the Psychological Advisor opined the applicant did not meet the VARSD 50 percent rating criteria and it is not certain why the DVA assigned him a 50 percent

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rating when their rationale was contradictory and inconsistent with the results presented in the C&P exam and the VARSD rating criteria.

After reviewing the information provided to the FPEB and SAFPC and the additional C&P exam, the Psychological Advisor finds he also did not meet the 30 percent rating criteria. Per the VASRD, a 30 percent rating consists of, occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events). There is no evidence or records he had any occupational and social impairment, decreased efficiency in work, suspiciousness, chronic sleep impairment, or mild memory loss such as forgetting names, directions, or recent events. He was reported to have sleep problems from his pain during his ER visit but no indication it was chronic sleep impairment. He had anxiety (anxiousness) and depressed mood (despair) and may have panic attacks weekly or less often, but these were only a few of the symptoms listed in the 30 percent rating. The majority of the symptoms or problems listed in the 30 percent rating criteria, he was not reported to have or experience.

The Psychological Advisor had previously stated he had warranted a 30 percent following his TDRL re-evaluation because that evaluation stated his condition was unchanged since he was referred to the MEB/PEB in May 00. Additional information from his appeals and from the more recent C&P exam all occurring within his time on the TDRL indicated his condition had indeed changed. As a reminder when he entered the TDRL with a 30 percent rating, he had panic attacks or episodes two to three times per week, his episodes would last two to eight hours, he was afraid to leave his house for fear of having an attack, he was unable to complete tasks such as grocery shopping or mowing the lawn without having an episode, and he had mild psychomotor agitation. During his TDRL re-evaluation, he reported continuing to experience panic attacks with multiple somatic complaints, the rate of the attacks remained the same, some days the pain attacks occurred a few times, his attacks would last 15-30 minutes and commonly occurred in a crowd or driving, and he had become isolated for fear that an attack would occur in public. None of these symptoms or problems were reported in his C&P exam but the contrary. In the C&P exam, there was no report his panic attacks were as frequent as they were reported in the NARSUM or TDRL re-evaluation, no report he was unable to leave his house because of fear of having panic but in fact, he was able to leave the house to work as a substitute teacher, go to the movies, and perform some snow plowing. There is also no evidence or records from the C&P exam he had a panic attack or was afraid of having an attack when performing these tasks outside the home or had panic attacks in a crowd, in public, or when driving. There is no report he had become isolated because of his fear of having an attack. There were apparent changes in his overall functioning among the NARSUM, TDRL re-evaluation, and C&P exam reports and it appeared his overall functioning and condition were improving. Since there were noticeable improvements in his functioning across these evaluations from the time he first entered the TDRL until he was removed from the TDRL, the original 30 percent rating does not truly reflect his functioning. There was a change or reduction in the frequency and severity of his condition and symptoms, so a reduced rating would

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be warranted. It is acknowledged his C&P exam reported he had a GAF of 45 indicating he had serious symptoms or serious impairment with his social, occupational or school functioning whereas the NARSUM and TDRL re-evaluation both assessed his GAF as 55 indicating moderate symptoms or moderate difficulty with his social, occupational, or school functioning. His symptoms were reported to be more severe or serious in the NARSUM and TDRL re-evaluation versus the C&P exam. The GAF is a subjective rating from the examiner; however, his GAF of 45 in the C&P exam was not consistent with the definition of that GAF score/level. The Diagnostic and Statistical Manual of Mentel Disorders, Fifth Edition, text Revision (DSM-IV and/or DSM-IV-TR) that was used and in effect at the time of his evaluations defined serious symptoms as suicidal ideation, severe obsessional rituals, frequent shoplifting, etc. There is no evidence he had any of these issues. There is also no evidence he had serious impairments in his social, occupational, or school functioning as again, he was able to engage in activities inside and outside of his home without significant issues or any hindrance from his mental health condition in the C&P exam.

A 10 percent rating in accordance with the VASRD entails, occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication. The applicant's symptoms as reported in the C&P exam were mild and transient. He continued to have attacks, but they were not severe enough to impact or interfere with his occupational and social functioning. The reason he was not able to obtain steady employment was not reported in his C&P exam, but no evidence or reports was caused by his mental health condition in the report. There is no evidence he had any decreased work efficiency, and his C&P examiner provided no opinion or assessment on his ability to work. During times of stress, his attacks may be exacerbated or appear, but it appeared he was able to control them because he did not need or was not receiving any type of mental health intervention for assistance. There was no mention of any medication usage in the C&P exam, but his ER records from 19 Sep 02 reported he was taking medications of Prevacid and Zocor and used Motrin to control his chronic pain. There was no report of any issue with his use of Motrin so it could be assumed his symptom was controlled by medication. Based on the presented information from his C&P exam, his symptoms and functioning best resemble the criteria of a 10 percent rating.

The conclusion of this 10 percent rating is based on the procedure outlined in DoDI 1332.39 that percentages are based on the severity of the condition and when two evaluations result in two percentages, the higher percentage will be assigned only if the service member's disability more nearly approximates the criteria for that rating. The higher rating of 50 percent did not demonstrate his disability nearly approximates 50 percent because he did not meet or have most of the symptoms or problems listed in the 50 percent criteria. His disability nearly approximates the 10 percent rating. His C&P exam supersedes his TDRL reevaluation because it was the most recent evaluation during his TDRL period. To address the differences in his evaluation results, the differences were mostly due to actual improvements in his condition and symptoms. However, we are also reminded of recognized reasons for disparities and variances in diagnostic impressions within the mental health profession; some are based upon variances in clinical presentation at a given time, different disclosures during a subsequent interview, clinical bias between equally

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competent clinicians, or legitimate differences due to new observations made over the longer period of care.

For awareness of the differences between the military's and DVA's rating system, 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. It is recognized the applicant's legal counsel had submitted C&P exams and DVA Rating Decision letters completed after he was removed from the TDRL and discharged from the Air Force. Those exams reflected his functioning at the time of those evaluations and not during the time he was on the TDRL. Those subsequent exams were used to potentially adjust his rating over time as delineated in Title 38 and not his rating from the Air Force.

Finally, liberal consideration is not applied to the applicant's request for an increase in disability rating because the updated clarifying guidance, the Vazirani Memorandum, published in Apr 24, clearly states liberal consideration does not apply to fitness determinations, which includes medical discharge, disability, retirement requests, and rating increases. 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 contributed to the circumstances of discharge or dismissal to determine whether an upgrade to the discharge or change in 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 C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 14 Feb 25 for comment (Exhibit D), and the applicant replied on 13 Mar 25. In his response, the applicant contends, through counsel, the opinion incorrectly states there was no evidence of frequent panic attacks to justify a 30 percent rating; however, the very evidence the opinion relies upon is contradictory. The re-evaluation report from 20 Mar 02 states he continued to experience panic attacks with multiple somatic complaints with the rate remaining the same with some days occurring with great frequency. The Board cannot ignore this favorable evidence he experienced at least weekly, if not daily somatoform disorder symptoms. Given his panic attacks remained unchanged from the time

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he was placed on the TDRL, the evidence strongly suggest he should have been retired at 30 percent disabled. Furthermore, the opinion misstates the purpose of the TDRL by opining the rating discrepancy between the DoD and the DVA following removal from the TDRL may occur because the DVA may change ratings to reflect the post-service progression over time while the DoD is concerned with the degree of impairment at the time of separation improperly claiming the DoD rating at the time of removal from the TDRL does not consider condition progression. The purpose of the TDRL is to further observe unfit members whose disability has not stabilized and for which the PEB cannot accurately assess the degree of severity or final disposition. As such, a condition may improve or deteriorate during the TDRL period, accounting for the progression. The opinion further goes on to misapply the VASRD rating by speculating how his condition might have improved with treatment and ignores applicable law which prohibits requiring a member to meet all listed symptoms for a rating. *Mauerhan v. Principi,* 16 Vet. App. 436 (2002) establishes the "such as" language in VASRD Section 4.130 means the listed symptoms are illustrative, not exhaustive. His C&P exam properly supports a 50 percent rating due to his severe anxiety and despair, physical pain attacks (the opinion fails to discuss these attacks), and occupational and social impairment beyond transient symptoms and the opinion failed to consider his personal statement as legitimate evidence. The applicant stated he has lived with this illness with many bad days and a few good days and has had attacks daily lasting anywhere from two hours to all day and night leaving him mostly home bound which aligns with occupational and social impairment. Lastly, the PDBR mandated DVA exams within one year of discharge however, this agency was disbanded, and the advisory opinion does not address whether this mandate applies to the AFBCMR, but it should in the interest of justice.

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 recommendation of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant's long lapses in treatment and his explanation for these lapses and agrees the PEB's and PDBR's decisions were based on speculation, which stating had the applicant pursued mental health treatment, his social and industrial adaptability impairment would have been described as mild and further agrees the PEB's and PDRB's decisions should have concluded, since the applicant's condition was unchanged since being placed on the TDRL as noted in re-evaluation exam dated 20 Mar 02, he should have been permanently retired with a 30 percent disability. However, the C&P exam conducted right before the applicant was removed from the TDRL shows the applicant's improvement and more aligns with a 10 percent rating. In this, the DVA awarded the applicant a 50 percent rating, but the Board does not find the reasoning aligns properly with a 50 percent rating under VASRD code 9421. His condition more closely

[redacted]

resembled a 10 percent rating for his overall functioning and the severity of his condition and symptoms by the time he was removed from the TDRL as indicated in the 2 Dec 02 exam. This last exam before being removed from the TDRL did not report his panic attacks were as frequent as they were reported in the earlier exam and did not report he was unable to leave his house because of fear of having panic attacks. It was noted he was able to leave the house to work as a substitute teacher, go to the movies, and perform some snow plowing with no evidence he had panic attacks or was afraid of having an attack when performing these tasks outside the home or had panic attacks in a crowd, in public, or when driving. Based on this last exam, the Board finds his overall functioning and condition were improving hence a reduced rating from the initial 30 percent is warranted. He had occupational and social impairment due to mild or transient symptoms as he continued to have attacks, but they were not severe enough to impact or interfere with his occupational and social functioning. Based on the presented information from his C&P exam, his symptoms and functioning best resemble the criteria of a 10 percent rating. Additionally, at the time of the applicant's re-evaluation, he was processed under the legacy DES, and the IDES was not implemented until the National Defense Authorization Act (NDAA) of 2008. The policy to apply DVA ratings to members being removed from the TDRL was not yet in effect and the boards at the time could make their own independent decision outside the DVA using the VASRD as a guide to assign ratings. Furthermore, the applicant contends, through counsel, doubt should be resolved in favor of the applicant; however, DoDI 1332.39 addresses this stating when the circumstances of a case are such that two percentage evaluations could be applied, the higher percentage will be assigned only if the Service member's disability more nearly approximates the criteria for that rating to which this Board determines his condition more closely aligns to the lower rating. Lastly, the applicant's counsel cites the following case, Mauerhan v. Principi, 16 Vet. App. 436 (2002). This case involved an appeal to the DVA whereas the court opined the use of the term "such as" (in section 4.130) demonstrates that the symptoms after that phrase are not intended to constitute an exhaustive list but rather are to serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating. However, the DoD and the DVA operate under a different set of laws whereas the DVA under Title 38 U.S.C. can 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 to which the DoD operates, under Title 10 U.S.C.. Meaning the DVA and the DoD have different standards when determining disability compensation. Counsel further cited the case *Keltner v. United States*, 165 Fed. Cl. 484, 492 (2023) explaining the purpose of the TDRL and the Board did consider the progression of his disease while assigned to the TDRL and finds his condition improved. Therefore, the Board recommends against correcting the applicant's records.

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

[redacted]

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-2024-04091 in Executive Session on 1 May 25:

[redacted], Panel Chair
[redacted], Panel Member
[redacted], Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 6 Dec 24.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 13 Feb 25.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 14 Feb 25.
Exhibit E: Letter (Liberal Consideration), SAF/MRBC to Applicant, dated 18 Feb 25.
Exhibit F: Applicant's Response, w/atch, dated 13 Mar 25.

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.

6/6/2025

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Board Operations Manager, AFBCMR
Signed by: USAF