RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

OCT 23 [illegible]

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 97-02715

COUNSEL: [redacted]

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

1. His records be corrected to show that he was medically separated on 1 September 1997.

2. He be presented to a Physical Evaluation Board (PEB) for a disability determination.

3. He receive payment for Aviator Continuation Pay (ACP) bonus previously recouped.

APPLICANT CONTENDS THAT:

He was unfit for continued military service at the time of his separation and should have been processed through the Air Force Disability Evaluation System.

The applicant's counsel states that the applicant was never presented to a Medical Evaluation Board (MEB) for his unfitting condition, instead he was found medically unfit to maintain flight status and was required to seek voluntary separation. Had the applicant met an MEB, found unfit and medically separated as should have been done, he would have received either separation pay or retirement and any recoupment of bonus would have been waived.

The applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

On 7 February 1988, the applicant was commissioned a second lieutenant and entered extended active duty.

On 1 November 1996, the applicant was found medically disqualified for flying class II duties because of migraine headaches.

On April 1997, the applicant requested separation from active duty by exception to policy due to his medical disqualification from flying.

The applicant was honorably discharged on 1 September 1997, under the provisions of AFI 36-3207 (Miscellaneous/General Reason). He completed 9 years, 6 months, and 25 days of active service.

AIR FORCE EVALUATION:

The Chief, Medical Consultant, BCMR, reviewed this application and states that the applicant was a pilot who developed migraine headaches which were diagnosed in September 1996 for which he was removed from flying duties. Consideration of a flying waiver was mentioned if he remained headache-free off medications for one year, but he continued to have some headaches as evidenced in his medical records and from a note written by his wife who observed two of these 2-3 hour events at the end of June and early July 1997. In the records available for review, a concise breakdown of the applicant's options was addressed to him on 4 April 1997 which presented the possibility of a separation for miscellaneous reasons under exception to policy along with other options to remain on active duty in other than flying positions. This letter very specifically spelled out that a separation for miscellaneous reasons would not be a medical separation. The applicant opted for the voluntary separation which then occurred 5 months later and which required recoupment of his unearned bonus moneys.

The Chief, Medical Consultant, BCMR, states that the applicant and his counsel feel that since the applicant has the diagnosis of migraine headaches that disqualified him for flying that he should have been presented to the disability evaluation system for a medical discharge or retirement, citing the Department of Veterans Affairs (DVA) VASRD as showing the diagnosis being 30% compensable for his alleged frequency and severity of headaches. However, they fail to recognize that migraines, while disqualifying him from flying duty are not disqualifying for continued military duty in other capacities per the same authority unless they last for several consecutive days and are unrelieved by treatment, neither criteria of which are met by his particular headaches. Having a non-unfitting condition, he was not eligible for consideration under the disability evaluation system and had no right to a medical separation.

The Chief, Medical Consultant, BCMR, notes that the reason the applicant could be declared fit for duty by the Air Force and later be considered for service-connected disability by the DVA lies in understanding the differences between Title 10, USC, and Title 38, USC. Title 10, USC, Chapter 61, is the federal statute that charges the Service Secretaries with maintaining a fit and

vital force. For an individual to be unfit there must be a medical condition so severe that it prevents performance of work commensurate with rank and experience. As noted above, the applicant did not have a disqualifying condition for other than flying duties. Congress very wisely recognized that a person can acquire physical conditions which, although not unfitting at the time of separation, may later progress in severity and alter the individual's life style and future employability. With this in mind, Title 38, USC, which governs the DVA compensation system, was written to allow awarding compensation for conditions that are not unfitting for military service. This is the reason why an individual can be found fit for military duty and later receive a compensation rating from the DVA for a service-connected, but military non-unfitting condition. Therefore, they recommend denial of the applicant's request

A complete copy of the Air Force evaluation is attached at Exhibit C.

The Chief, Physical Disability Division, AFPC/DPPD, reviewed this application and states that the medical aspects of the case are fully explained by the Medical Consultant and they agree with the advisory. On 1 November 1996, the applicant was found medically disqualified for flying duties because of his headaches. Had the applicant been referred to the physical disability evaluation system at that time, the Informal Physical Evaluation Board (IPEB) would have recommended his return to duty. Based on medical evidence provided, his condition was not serious enough to render him unfit for further military service under the provisions of disability law and policy and his utilization in a different career field appeared appropriate. The applicant has not submitted any documentation to show that he was unfit due to a physical disability under the provisions of Title 10, USC at the time of his voluntary discharge from active duty. Therefore, they recommend denial *of* his request.

A complete copy of the Air Force evaluation is attached at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant's counsel reviewed the Air Force evaluations and states that the Medical Consultant's view that migraines must last for several consecutive days and are unrelieved by treatment is simply not the law. The law is contained in DoD Directive 1332.18 and DoD Instruction 1332.38 which indicates headaches, migraine, tension, vascular, cluster types - when manifested by documented frequent incapacitating attacks. Counsel contends the Medical Consultant is trying to define migraine disability at the 50% rating standard under VA Diagnostic Code 8100, and completely ignores the fact that there are other lesser unfitting categories. Furthermore, the DoD

Instruction 1339.39 defines prostrating as when the member must stop what he or she is doing and seek medical attention, and that the number of prostrating attacks per time period (day, week, month) should be recorded by a neurologist for diagnostic confirmation. Nowhere is it written that the migraine must last for several days and be refractory to medication. The applicant's records are replete with examples of prostrating migraines. Furthermore, the applicant's acknowledgment that he was not being discharged medically is a nonsequitur since those responsible to tell him that he had a right to a medical discharge, failed to do so.

The applicant's complete response is attached at Exhibit F.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After thoroughly reviewing the evidence of record and noting the applicant's contentions, we are not persuaded that the applicant was unfit for continued military service at the time of his separation. The applicant's counsel contends the applicant should have been presented to a Medical Evaluation Board (MEB) based on his unfitting condition (migraines). We disagree. Although the applicant's condition disqualified him from flying duty, it did not render him unfit for continued military duty. To the contrary, the applicant could have continued military duty in other capacities. Although counsel contends the applicant's migraines did not need to last for several days and be refractory to medication, they did need to be so severe that they rendered the applicant unfit to perform the duties of his office, rank, grade or rating in accordance with DoD Directive 1332.18. In the applicant's case, he had one prostrating migraine attack in June 1997 and one in July 1997; however, he did not have prostrating migraine attacks averaging one in 2 months over the last several months. As such, at the time of his separation, he did not meet the criteria for disability processing. It appears the applicant believes the DVA's decision **to** award him a 30% disability rating for frequency and severity of headaches, substantiates that he should have been processed through the Disability Evaluation System (DES) prior to his separation. However, we note that although the Air Force is required to rate disabilities in accordance with the VA Schedule for Rating Disabilities, the DVA operates under a totally separate system with a different statutory basis. In this respect, we note that the DVA rates for any and all service connected conditions, to the degree they interfere with future employability, without consideration of

fitness. Whereas the Air Force rates a member's disability at the time of separation. In the applicant's case, he did not have a disqualifying condition for other than flying duties. Therefore, in the absence of evidence to the contrary, we find no compelling basis to recommend granting the relief sought in this application.

4. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

~~THE BOARD DETERMINES THAT~~:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 20 August 1998, under the provisions of AFI 36-2603:

Mr. David W. Mulgrew, Panel Chair
Mr. Jackson A. Hauslein, Member
Mr. Terry A. Yonkers, Member
Mr. Phillip E. Horton, Examiner (without vote)

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 6 Sep 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, BCMR Medical Consultant, dated 20 Nov 97.
Exhibit D. Letter, AFPC/DPPD, dated 5 Jan 98.
Exhibit E. Letter, SAF/MIBR, dated 18 Jan 98.
Exhibit F. Letter, Counsel, dated 18 Feb 98.

DAVID W. MULGREW
Panel Chair