

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

[REDACTED]
[REDACTED]

DOCKET NO: 97-02934

COUNSEL: None

MAY 29 1998

HEARING DESIRED: No

Applicant requests that his two DD Forms 214 (Report of Transfer or Discharge) and his two DD Forms 424 (Certification of Information for Retirement Pay) be amended to show that his disability, for which he was permanently retired, was a combat-related injury so that his 3 years, 5 months and 23 days of military service time can be credited toward his Civil Service Retirement. Applicant's submission is at Exhibit A.

The appropriate Air Force office evaluated applicant's request and provided an advisory opinion to the Board recommending the application be denied (Exhibit C). The advisory opinion was forwarded to the applicant for review and response (Exhibit D). Applicant's response to the advisory opinion is at Exhibit E.

After careful consideration of applicant's request and the available evidence of record, we find insufficient evidence of error or injustice to warrant corrective action. The facts and opinions stated in the advisory opinion appear to be based on the evidence of record and have not been sufficiently rebutted by applicant. Absent persuasive evidence applicant was denied rights to which entitled, appropriate regulations were not followed, or appropriate standards were not applied, we find no basis to disturb the existing record.

Accordingly, applicant's request is denied.

The Board staff is directed to inform applicant of this decision. Applicant should also be informed that this decision is final and will only be reconsidered upon the presentation of new relevant evidence which was not reasonably available at the time the application was filed.

Members of the Board Mr. Thomas S. Markiewicz, Mr. David W. Mulgrew, and Mr. Henry Romo, Jr. considered this application in Executive Session on 10 April 1998 in accordance with the provisions of Air Force Instruction 36-2603, and the governing statute, 10, U.S.C. 1552.


Panel Chair

Exhibits:

- A. Applicant's DD Form 149
- B. Available Master Personnel Records
- C. Advisory Opinion
- D. AFBCMR Ltr Forwarding Advisory Opinion
- E. Applicant's Response

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE, TEXAS

5 Nov 59

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/DPPD
550 C Street West, Ste 6
Randolph AFB TX 78150-4708

SUBJECT: Application for Correction of Military Records [REDACTED]

REQUESTED ACTION: Applicant requests **correction** of his retirement orders (both temporary and permanent) and all resulting forms to reflect that his disability was combat related and in line of duty during a period of war in order to obtain credit for military service towards a Federal Civil Service retirement.

FACTS: The applicant was placed on the Temporary Disability Retired List (TDRL) effective ~~5 Feb 58~~ with a compensable rating of 100 percent due to diagnoses of tuberculosis, pulmonary, and schizophrenic reaction. acute. after serving 3 years, 5 months and 23 days on active duty. He was reevaluated in June 59 and permanently retired for disability with a compensable rating of 80 percent effective 31 Jul 59.

DISCUSSION: The purpose of the military disability system is to maintain a fit and vital force by separating members who are unable to perform the duties of the grade, office, rank or rating. Those members who are separated or retired by reason of physical disability may be eligible, for certain disability compensations. Eligibility for disability processing is established by a Medical Evaluation Board (MEB) when the board finds that the member may not be qualified for continued military service. The decision to conduct an MEB is made by the medical treatment facility providing care to the member.

Applicant served in Korea beginning on 9 Mar 55 and in Japan on 19 Jan 56. While serving in Japan and undergoing a routine examination, it was discovered that the applicant had pulmonary tuberculosis. In May 57, while on convalescent leave from an Army hospital, the symptoms of his schizophrenic reaction began to surface. Subsequently his MEB was convened and he was placed on the TDRL.

Applicant believes his disability should be rated as combat-related because his illness took place under conditions simulating war, including training exercises such as maneuvers during a period of war. He states, "This veteran's illness was incurred while serving in a extra-hazardous service area or combat zone to protect that zone against aggression by an enemy of the United States."

DoDI 1332.38, Nov 14, 1996, Part 5, has clearly defined the criteria for determining whether or not a member's condition was "combat-related", caused by an "instrumentality of war", and/or the result of "armed conflict" and the type of benefits that may be obtainable, as follows:

A. Administrative Determinations for Purposes of Employment under Federal Civil Service. Physical disability evaluation shall include a recommendation or final decision and supporting documentation on whether the injury or disease that make the member unfit or that contributes to unfitness was incurred in combat with an enemy of the United States; or was the result of armed conflict; or was caused by an instrumentality or war during a period of war, (These determinations pertain to whether a military retiree later employed under Federal Civil Service is entitled to the following

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benefits: credit of military service towards a Federal Civil Service retirement under 5 U.S.C. 8332, retention preference under 5 U.S.C. 3502, exemption from the dual compensation provisions of 5 U.S.C. 5532, and credit of military service for Civil Service annual leave accrual under 5 U.S.C. 6303.)

1. Injured in Combat with an Enemy of the United States (5 U.S.C. 8332). The physical disability is a disease or injury incurred in line of duty in combat with an enemy of the United States as defined by the U. S. State Department.

2. Armed Conflict (5 U.S.C. 3502, 5532, 6303). The physical disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. The fact that a member may have incurred a disability during a period of war or in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

3. Instrumentality of War During a Period of War (5 U.S.C. 3502, 5532, 6303, 8332). The injury or disease is caused by an instrumentality of war and incurred in the line of duty during a period of war as defined in 38 U.S.C. 101 and 302 U.S.C. Instrumentality of War. A vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence of the injury. It may also be a vehicle, vessel, or device not designed primarily for Military service if use of or occurrence involving such a vehicle, vessel, or device subjects the individual to a hazard peculiar to Military Service. This use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits. There must be a direct causal relationship between the use of the instrumentality of war and the disability, and the disability must be incurred incident to a hazard or risk to the service. Applicable periods are: ..Korea - The period beginning 27 June 1950 and ending 31 January 1955

B. Determinations for Federal Tax Benefits. Physical disability evaluation shall include a determination and supporting documentation on whether the member's physical disability compensation is excluded from Federal gross income under 26 U.S.C. 104....

1. Status. On 24 Sep 75 the individual was member of the Armed Forces....

2. Combat-related. This standard covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat-related if it makes the member unfit or contributes to unfitness and was incurred under any of the circumstances listed in B.2.a. through B.2.d., below.

a. As a direct result of armed conflict....(same as above).

b. While engaged in hazardous service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

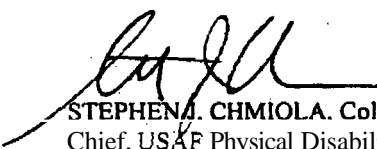
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c. Under conditions simulating war. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat ~~mining~~, repelling, and negotiation of combat confidence and obstacle courses. It does not include physical training and activities, such as callisthenics and jogging or formation running and supervised sports.

d. Caused by an instrumentality of war. Incurred during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accident involving a military combat vehicle, injury, or sickness caused by fumes, gases, or explosion of military ordinance, vehicles, or material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sport activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

After a thorough review of the applicant's case file, we found no errors or irregularities. His disability case was correctly processed, his condition appropriately rated, and he was afforded all rights to which he was entitled under department directives and law. Neither his pneumonia nor schizophrenia qualify under the above provisions of Administrative Determinations for the Purpose of Employment with Federal Civil Service. His illness was not incurred in combat with the enemy, due to armed conflict, or caused by an instrumentality of war. Further, he started his tour in Korea after the official end of the war on 31 Jan 55.

appears to apply to Civil Service benefits. It applies only to the federal tax benefits. This portion does not apply to the member as his Air Force retirement payment is non-taxable since he retired before 25 Sep 75 nor do we believe he qualifies under the criteria set forth.


STEPHEN J. CHMIOLA, Col. USAF
Chief, USAF Physical Disability Division
Dir of Pers Prog Mgt

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