

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-00154 OCT 09 1998

COUNSEL: [REDACTED]

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

1. He be rerated separately for the disease Multiple Sclerosis, all disabling conditions, **and** Meniere's Disease.
2. His disability retirement be increased.

APPLICANT CONTENDS THAT:

The 24 July 1996 medical board did not have all the facts present at the time of the board. Additional medical addendum and tests scheduled prior to the board were not received and reviewed by the board prior to rendering a determination.

In support of the appeal, applicant submits his request for Disabled American Veterans (DAV) assistance; unemployment filing; DD Form 214, Certificate of Release or Discharge from Active Duty; Defense Finance and Accounting Service (DFAS) Military Leave and Earnings Statement; invoice from private attorney; Department of Veterans Affairs (VA) letter; application for compensation or pension, with attachments; medical records and test results; Findings and Recommendations of Physical Evaluation Boards; Letters of Exception with documentation; VA Title 38 - Pensions, Bonuses, and Veterans' Relief; Meniere's Disease document from the Internet; Part 4 - Schedule for Rating Disabilities document from the Internet; Air Force Instruction 36-3212, Physical Evaluation for Retention, Retirement, and Separation; Medical Board Report; and DD Form 214 (from previous enlistment).

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

On 28 May 1996, a Medical Evaluation Board (MEB) convened at [REDACTED] AFB and referred the applicant's case to a Physical Evaluation Board (PEB) for a diagnosis of Multiple Sclerosis.

On 7 June 1996, the Informal PEB (IPEB) found the applicant unfit for continued military duty for 'Multiple Sclerosis with Fecal and Urinary Incontinence and Disequilibrium Associated with Major Depressive Disorder' and 'recommended that he be temporarily retired with a 50 percent disability rating. (Tab 1)

On 3 July 1996, the applicant did not concur with the IPEB findings. On 22 July 1996, with the assistance of an appointed military council, applicant presented his case before the Formal PEB (FPEB).

On 24 July 1996, the FPEB recommended permanent retirement with a 60 percent disability rating. (Tab 1) Applicant did not agree with the findings and recommended disposition of the FPEB.

On 14 August 1996, the Secretary of the Air Force Personnel Council (SAFPC) confirmed the findings and recommendations of the FPEB and directed his permanent retirement with a 60 percent disability rating.

Applicant was permanently retired effective 17 September 1996, in the grade of major, under the provisions of AFI 36-3203 (Mandatory Retirement Resulting from Permanent Physical Disability). He had completed 20 years, 6 months and 23 days of total active military service.

On 23 July 1997, the Veterans Administration (VA) evaluated applicant's disabilities, effective 18 September 1996, as fecal incontinence at 30 percent; multiple sclerosis at 30 percent; urinary incontinence at 40 percent; degenerative disc disease lumbar spine at 20 percent; tinnitus at 10 percent; depression at 10 percent; patella femoral pain syndrome, right knee at 10 percent, and patella femoral pain syndrome, left knee at 10 percent. On 3 October 1997, the VA reevaluated applicant's disabilities of Multiple Sclerosis now rated with left lower extremity weakness at 20 percent; right lower extremity weakness at 20 percent; and adjustment disorder with depressed mood and major depressive disorder increased to 70 percent.

AIR FORCE EVALUATION:

The Chief, Physical Disability Division, AFPC/DPPD, reviewed this application and states that a full review of all medical documentation was accomplished. It is clear that based on all available medical evidence, both the FPEB and the SAFPC found the member unfit and based his disability rating of 60 percent on his

unfitting residual condition (i.e., voiding dysfunction/incontinence, requiring use of absorbent materials which must be changed more than four times a day). Neither board found his long standing disequilibrium nor his mild psychological residual symptoms sufficiently serious to be unfitting or compensable. In accordance with current rating guidelines, since the rating from the unfitting residuals exceeded that for his primary condition of Multiple Sclerosis (60 versus 50 percent), the board appropriately awarded the higher of the two ratings, in the best interest of the member. The Air Force and Department of Veterans Affairs (DVA) disability systems operate under separate laws. Under the Air Force system (Title 10, USC), Physical Evaluation Boards must determine if a member's medical condition renders them unfit for duty. The fact that a person may have a medical condition does not mean that the condition is unfitting for continued military service. To be unfitting, the condition must be such that it alone precludes the member from fulfilling the purpose for which he is employed. If the board renders a finding of unfit, the law provides appropriate compensation due to the premature termination of their career. Further, it must be noted that USAF disability boards must rate disabilities based upon the member's condition at the time of evaluation; in essence a snapshot of their condition at that time. Under Title 38, the DVA may rate any service-connected condition based upon future employability or reevaluate based on changes in the severity of a condition. This often results in different ratings by the two agencies. The applicant has not submitted any material or documentation to reflect he was inappropriately rated or processed under the military disability evaluation system. He was granted all rights to which he was entitled under disability law and departmental policy and the disability boards utilized all available documentation to arrive at a just decision. They recommend denial of applicant's request.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the advisory opinion and states during the FPEB, counsel's position was that U.S.C. and Exhibit 1, provides the member be rated for each disability and disabling condition. Counsel requested that the member also be rated for Meniere's Disease based on individual's documented history. Filed within the minutes of the Board was the fact that he was scheduled for an electrocochleography (ECOG) test that would confirm or deny the existence of Meniere's. He disagreed with the FPEB's opinion. He felt that the FPEB failed to separately rate the disease Multiple Sclerosis, all disabling conditions, and failed to request an immediate ECOG test prior to rendering the FPEB's opinion. Months after Walter Reed Army Medical Center (WRAMC) completed the ECOG test, he was diagnosed with Meniere's Disease. He was placed on strict medical treatment and restrictions. He

disagrees with the findings of the FPEB and the SAFPC and their combined rating of 60 percent. He and counsel believe that he was inappropriately rated and processed based on possible errors in the record. His submission of facts indicate that there may exist errors in the listing of the disabilities and disabling conditions, and in the rating of those disabilities and disabling conditions.

Applicant's complete response, with attachments, is attached at Exhibit D.

ADDITIONAL AIR FORCE ADVISORY:

The Chief, BCMR Medical Consultant reviewed this application and states that this case has previously been extensively reviewed up through, and including, the Secretary of the Air Force Personnel Council with approval of the recommended disability found at the time of his Physical Evaluation Board. The initial award of 50 percent was increased upon further review that then included the need for wear of protective devices for his incontinence problems, adding the additional 10 percent that was felt to be fair and equitable for the degree of his problems. The current request for additional disability rating for (a) Meniere's Syndrome - 90 percent; (b) Rectum, Impairment of Control - 60 percent; Neurogenic Bladder - 60 percent; Multiple Sclerosis - 30 percent; and Major Depression - 20 percent, all of which clearly can be attributed to a single disease process, Multiple Sclerosis. While it is most unfortunate that the applicant developed his underlying disease in the first place, it is not permissible to pyramid disabilities that are related to the basic disease process in determining the degree of resulting disability as his counsel would suggest. The Veterans Administration Schedule for Rating Disabilities (VASRD) is specific in this regard stating: "The evaluation of the same disability under various diagnoses is to be avoided...." and "...the evaluation of the same manifestation under different diagnoses (is) to be avoided." Once a determination is made, namely that the individual is unfit, the degree of disability is based upon the member's condition at the time of permanent disposition and not upon possible future events. The VA compensation system is governed under Title 38, USC which recognizes that a medical condition may alter an individual's lifestyle and future employability. Under Title 38 the ratings awarded by the VA are often at variance with those awarded by the Air Force under Title 10. Evidence of record establishes beyond all reasonable doubt that the applicant was properly diagnosed, found unfit, and appropriately rated. The BCMR Medical Consultant is of the opinion that no change in the records is warranted and the application should be denied.

A complete copy of the evaluation is attached at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the advisory opinion and states he disagrees with the medical consultant. He is of the opinion that a change in the records and increase in the application rating is justified. He contends the disorders existed prior to both the IPEB and FPEB. His medical record shows history symptoms and incidence of Meniere's Disease back to the spring of 1992. Extensive workups by both WRAMC Neurology and Ear, Nose and Throat (ENT) considered it disequilibrium. The IPEB, dated 21 July 1995, diagnosed Chronic disequilibrium, possibly secondary to Demyelinating disease. His condition continued to worsen and he was placed on a diet and medicines similar to that for the treatment of Meniere's. Despite the diet and medicines, his condition continued to worsen similar to those symptoms for Meniere's. On 12 July 1996, WRAMC ENT requested an ECOG test be performed (within 1 week) and prior to the member's departure for the FPEB. On 17 July 1996, WRAMC ENT submitted an emergency request for an ECOG test to rule out Meniere's. The ECOG was never performed prior to his departure to the FPEB. At the FPEB on 24 July 1996, his legal representative presented in the minutes of the FPEB, the request for ECOG to confirm or rule out the existence of Meniere's Disease versus Multiple Sclerosis. The FPEB noted the request but never scheduled the ECOG be performed while the member was present for the FPEB at Randolph AFB. Upon return to assignment WRAMC ENT again requested the ECOG. On 23 September 1996, ECOG test results were abnormal. On 25 September 1996, WRAMC evaluated the ECOG results diagnoses "Prob. Meniere's AB given ECOG" patient was put on restrictive diet and started on Maxide. On 29 January 1997, he continued to have severe attacks with hearing loss and falls. Diagnosis "C/W Meneire's" continued Maxide, take Meclizine, and yearly audios. He forwarded his medical brief medical history to the National Multiple Sclerosis Society (NMMS) along with the following question: "Is Meniere's a primary/secondary condition of Multiple Sclerosis? Or, A disease separate of Multiple Sclerosis?" NMMS response was that "Meniere's Disease and MS are two separate diseases." The VASRD does not state that "it is not permissible to pyramid disabilities that are related to the basic disease process." The VASRD verbatim quote should be "The evaluation of the same disability under various diagnoses is to be avoided." The VASRD subpart also quotes "Disability from injuries to the muscles, nerves, and joints of an extremity may overlap to a great extent, so that special rules are included in the appropriate bodily system for their evaluation." VASRD, Part 4, subpart 4.1, provides for the rating of diseases and injuries, and residual conditions at the time of separation from service.

He is not asking that any disease or condition that occurred after separation be rated. He is asking that those diseases, injuries and conditions in existence at the time of separation be appropriately rated.

Applicant's complete response, with attachments, is attached at Exhibit G.

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 documentation submitted with this application, the Board is of the opinion that the applicant was properly diagnosed, found unfit and rated accordingly. In regard to the applicant's contention that the Formal Physical Evaluation Board (FPEB) did not consider additional medical addendum and tests scheduled prior to the 24 July 1996 Board, it appears that even though the electrocochleography (ECOG) was not considered by the FPEB, they did consider the applicant's symptoms of chronic disequilibrium and found it not unfitting and, therefore, not ratable or compensable. The ECOG test indicates that his symptoms of long standing disequilibrium were compatible with, but not diagnosed as, Meniere's Disease, which can be treated and is not considered an unfitting condition. The Board is of the opinion that the applicant was afforded all rights he was entitled under the disability law and departmental policy. We note that the applicant was rated based on his condition at the time of his disability evaluation. The Air Force is required to rate disabilities in accordance with the VA Schedule for Rating Disabilities while the VA operates under a totally separate system with a different statutory basis. In this respect, we note that the VA 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. Therefore, in the absence of evidence to the contrary, we find no 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:~~

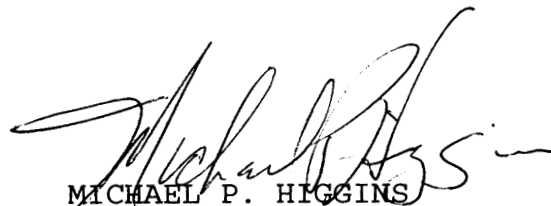
The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence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

The following members of the Board considered this application in Executive Session on **28 July 1998**, under the provisions of AFI **36-2603** :

Mr. Michael P. Higgins, Panel Chair
 Mr. Gerald B. Kauvar, Member
 Mr. Allen Beckett, Member
 Ms. Gloria J. Williams, Examiner (without vote)

The following documentary evidence was considered:

- Exhibit A. DD Form **149**, dated 30 December **1996**, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPPD, dated 10 July **1997**.
- Exhibit D. Counsel's/Applicant's Responses, dated **19 September 1997**, w/atchs.
- Exhibit E. Letter, BCMR Medical Consultant, **27 January 1998**.
- Exhibit F. Letters, AFBCMR, dated **28 July 1997** and **18 February 1998**.
- Exhibit G. Applicant's/Counsel's Responses, dated **6 April 1998**, w/atchs, and **16 April 1998**, w/atchs.


 MICHAEL P. HIGGINS
 Panel Chair

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

10 Jul 97

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/DPPD
550 C Street West Ste 06
Randolph AFB TX 78150-4708

SUBJECT: Application for Correction of Military Records [REDACTED]

REQUESTED ACTION: Applicant requests that the 60 percent disability rating received during his disability retirement be increased.

FACTS: Member received a disability retirement from the Air Force on 17 Sep 96 under the provisions of 10 USC 1201 and AFI 36-3212, after serving twenty years, six months, and twenty-four days on active duty.

On 28 May 96, a Medical Evaluation Board (MEB) convened at [REDACTED] and referred the applicant's case to the Informal Physical Evaluation Board (IPEB) for a diagnosis of Multiple Sclerosis. On 7 Jun 96 the IPEB found member unfit for continued military service for "Multiple Sclerosis with Fecal and Urinary Incontinence and Disequilibrium Associated with Major Depressive Disorder" and recommended that he be temporarily retired with a 50 percent disability rating.

The applicant disagreed with the IPEB's recommendation and with the assistance of an appointed military council presented his case before the Formal PEB (FPEB) on 22 Jul 96. The FPEB recommended permanent retirement with a 60 percent disability rating and remarked, "Medical evidence documents the diagnosis of Multiple Sclerosis and an unfitting increase in residual incontinence. Member therefore overcomes the presumption of fitness. Member's episodes of incontinence, both fecal and urinary, represent a disability in excess of the minimum rating for Multiple Sclerosis. In the opinion of the FPEB, this residual need for frequent changing of absorbent pads should not be rated separately, and is fully compensated by a rating of 60 percent for incontinence. Member's long standing disequilibrium and recent mild psychological symptoms do not in themselves constitute unfitting conditions or residuals and in the opinion of the FPEB, are neither ratable or compensable..."

The applicant again disagreed with the finding and appealed his case to the Secretary of the Air Force Personnel Council (SAFPC). Although he was offered a chance to submit a written rebuttal and/or additional documentation supporting his contention, he declined the opportunity. On 14 Aug 96, the SAFPC confirmed the findings and recommendations of the


9700154



FPEB and officials within the Office of the Secretary of the Air Force directed **his** permanent retirement with a **60** percent disability rating. Member's permanent retirement ~~was~~ effective 17 Sep 96.

DISCUSSION: A full review of all medical documentation was accomplished. It is clear that based on all available medical evidence, both the FPEB and the SAFPC found the member unfit and based his disability rating of 60 percent on his unfitting residual condition (i.e., voiding dysfunction/incontinence, requiring use of absorbent materials which must be changed more ~~than~~ four times a day). Neither board found **his** long standing disequilibrium nor his mild psychological residual symptoms sufficiently serious to be unfitting or compensable. In accordance with current rating guidelines, since the rating from the unfitting residuals exceeded that for **his** primary condition of Multiple Sclerosis (**60** versus **50** percent), the board appropriately awarded the higher of the **two** ratings, in the best interests of the member.

The Air Force and **DVA** disability systems operate under separate laws. Under the Air Force system (Title 10, **USC**) , Physical Evaluation Boards must determine if a member's medical condition renders them unfit for duty. The fact that a person may have a medical condition does not mean that the condition is unfitting for continued military service. To be unfitting, the condition must be such that it alone precludes the member **from** fulfilling the purpose for which he is employed. If the **board** renders a finding of **unfit**, the law provides appropriate compensation due to the premature termination of their career. Further it must be noted that USAF disability boards **must** rate disabilities based upon the member's condition at the time of evaluation; in essence a snapshot of their condition at that time. Under Title 38, the Department of Veterans Affairs may **rate** any service-connected condition based upon future employability or reevaluate based on changes in the severity of a condition. **This** often results in different ratings by the two agencies.

RECOMMENDATION: We recommend denial of the applicant's request. The applicant **has** not submitted any material or documentation to reflect he was inappropriately rated or processed under the military disability evaluation system. He **was** granted all rights to which he was entitled under disability law and departmental policy and the disability **boards** utilized all available documentation to arrive at a just decision.


STEPHEN J. CHMIOLA, Colonel, USAF
Chief, Physical Disability Division
Directorate of Pers Prog Management

9700154