RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2006-02261

INDEX CODE: 108.04, 124.03,

128.14

XXXXXXXXXXXXXX COUNSEL: XXXXXXXXXXXXXX

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

He be medically retired effective 2 July 2002.

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APPLICANT CONTENDS THAT:

He should have been retained on active duty (AD) and processed through the Military Disability Evaluation System (MDES) rather than being released from AD. The Air Force failed to follow Air Force Instruction (AFI) 36-3212 when they transferred him from AD, and then to the Retired Reserve List, without giving him a full medical evaluation of his injuries which were well documented. In accordance with AFI 36-3212, the first step of the MDES was initiated when it was determined that an MEB was required. The Air Force was then obligated to conduct a full evaluation of his injuries and make a determination on his disability and subsequent retirement.

In October 2001, he was notified that his Air Force Reserve (AFR) unit was being recalled to active duty for a period of 12 months. In January 2002, it was determined that he was non-deployable due to lower back pain and numbness in his leg. An AF Form 422, *Physical Profile Serial Report*, was prepared, and in February 2002, he was evaluated and referred to Neurosurgery for further evaluation. In April 2002, it was determined that he was not a candidate for surgery. He was twice reevaluated in May 2002, and the block on both Physical Profile Serial Reports for “medical defect/condition requires [Medical Evaluation Board] MEB or [Physical Evaluation Board] PEB processing” was checked. No action was taken by medical staff or personnel to follow through or schedule the required MEB, and he was released from active duty on 2 July 2002. On 12 December 2002, he was transferred to the Retired Reserve and he was honorably discharged from the AFR on 12 January 2005.

Title 10, United States Code (10 USC), Section 1201(c) states that any member of the Armed Forces entitled to basic pay who has been called or ordered to active duty for a period of more than 30 days is eligible for disability retirement. He meets this requirement as he was called to active duty on 15 October 2001 for a period of 1 year and remained on active duty until 2 July 2002, a period of 256 consecutive days. 10 USC further states that in the case of a member who would be covered by Section 1201 but for the fact the member’s disability is determined to have been incurred before the member became entitled to basic pay in the member’s current period of active duty, the disability shall be deemed to have been incurred while the member was entitled to basic pay if the member has at least 8 years of active service. He served a total of 10 years, 9 months, and 16 days of active service and, as such, his injury is considered to be “while entitled to basic pay.”

He served his country with pride and honor for over 20 years, doing everything that was asked of him and more. Even when injured and in a position to avoid yet another recall to active duty, he reported as ordered. He deserves to have the MEB that was recommended and required, and to be given the opportunity to be fully evaluated for a medical retirement.

In support of his appeal, he has provided copies of a Petition for Correction of Military Records prepared by his counsel, with 14 Attachments.

Applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

The applicant served as both an enlisted member and an officer with the Regular Air Force, from 22 August 1978 to 27 August 1980, and from 12 December 1982 to 1 May 1990, and with the AFR from 2 May 1990 to 28 December 2002. While a member of the AFR, he was recalled to active duty on 15 October 2001 in support of Operation Enduring Freedom, and served as an aircraft maintenance and munitions officer until being released from active duty on 2 July 2002. He was subsequently transferred to the Retired Reserve in the grade of major (O-4) on 28 December 2002 as he was eligible for retired pay except for attainment of age 60 (Date of Birth is 8 February 1958 – age 44 at the time), and was subsequently honorably discharged from all Air Force appointments effective 12 January 2005.

Due to the applicant’s claim that he was not provided a full medical evaluation at the time of his release from active duty in 2002, HQ AFRC returned him to duty as a personnel officer in December 2006 for the purpose of conducting Informal Line of Duty (LOD) Determinations. Informal LODs were conducted for sprains and strains of other and unspecified parts of his back, sprains and strains of his shoulder and upper arm, and late effects of musculoskeletal and connective tissue injuries. The Informal LODs were completed and found to be in the line-of-duty in August 2007. The applicant was subsequently referred to an MEB which was completed on 10 January 2008 and referred him to an IPEB which recommended returning him to duty. In May 2008, the applicant requested a formal PEB hearing.

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AIR FORCE EVALUATION:

AFPC/DPSD recommends the applicant’s case file, medical records, and related documents be reviewed by the AFBCMR to determine what actions should be taken regarding his request. On 19 December 2006, HQ AFRC/A1BL indicated that an MEB may be appropriate if an LOD determined that his chronic back condition in 2002 was either incurred or aggravated by military service. An informal LOD was conducted to determine if his back injury occurred while he was entitled to basic pay and was ruled in the line of duty. HQ AFRC/A1BL returned the applicant to duty on 20 December 2006 for the purpose of an MEB which was completed on 10 January 2008 and the findings were forwarded to them for processing through the MDES.

The applicant’s case cannot be adjudicated through the MDES. The AFBCMR did not direct that either an LOD or MEB be completed; rather, they were initiated by HQ AFRC/A1BL. Although the LOD and MEB indicate his medical condition originated in 2002, neither provide sufficient retrospective evidence as to the condition’s severity at the time he was released from service.

The AFPC/DPSD evaluation is at Exhibit B.

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ADDITIONAL AIR FORCE EVALUATION:

The AFBCMR Medical Consultant recommends denial of the applicant’s request.

The applicant was reportedly brought back on active duty by HQ AFRC/A1BL on or about 20 December 2006 for the reported purpose of convening an MEB and addressing the line of duty determinations for his medical condition(s). The MEB addressed only his back pain and his case was thereafter referred to the Informal PEB which recommended returning him to duty. The rationale for returning him to duty was based upon a determination that his medical condition “[did] not prevent [him] from reasonably performing the duties of [his] office, grade, and, or rating,” also citing his apparent successful Civil Service employment and his reported attempt to “transfer to Wright-Patterson AFB,” presumably for resumption of employment. However, since AFRC/A1BL did not have the authority to revoke his retirement or direct an MEB and subsequent adjudication by the IPEB, his case was referred to the AFBCMR for determining an appropriate disposition. The applicant has medical conditions which were found to be in the line of duty which he implicitly believes should have been the basis for his separation/retirement.

As concerns the applicant’s principal medical conditions, the record is clear that he received periodic follow-up treatment for neck pain, thumb pain, and back pain during the course of his military career, and a temporal account of each medical condition and a clinical assessment for each has been provided.

A medical diagnosis does not automatically render a service member unfit for continued military service. Additionally, service members undergoing an MEB during the 12 months preceding their projected retirement date or mandatory separation date are presumed fit. The presumption of fitness may be overcome for an acute life, limb, or vision threatening illness or injury, or other serious disorders occurring within this designated period, or if there is an acute worsening of an existing chronic disorder. It is unclear if the applicant electively and willingly took part in his transfer to the Retired Reserve or if his servicing medical treatment facility “dropped the ball” by failing to conduct his MEB or to place him in a Medical Hold status to complete the necessary evaluations. In either case, the applicant should have had the planned MEB. However, had an MEB and PEB been completed prior to his separation, the disability rating, if he had been found unfit, would have been based upon the medical evidence and demonstrated functionality present at the time of his separation. Although the subsequent 2007 MEB and IPEB reviews were reportedly not conducted under the proper authority, the clinical information gathered as a result of these reviews should be accepted as valid evidence, including the LODs.

The MDES is chartered to maintain a fit and vital fighting force by removing from military service individuals who can no longer perform the duties for which they were trained to perform. Consequently, the military has established a set of medical standards for retention and if these standards are not met, an individual is subject to undergoing an MEB. The resultant restrictions placed on an individual alerts commanders, the service member, or other health care practitioners of an existing medical condition and the protective/preventive measures that must be undertaken in order to diminish the chances of aggravating or worsening the condition and at the potential peril of the unit’s mission. The profiling system uses a numerical scheme (ranging from “1” through “4”) that inversely depicts a decreasing ability to function in a deployed environment with or without assignment limitations, with a “1” being fully capable of deployment with no restrictions on assignment, to a “4,” meaning non-deployable with severe restrictions on assignment locations. This numerical system is then applied to basic anatomic and physiologic body functions, with “P” representing general physical capabilities, to include internal organ systems. Service members who carry restrictive profiles for 12 or more months (or sooner if clinical evidence warrants), are generally destined for an MEB and subsequent referral to a PEB.

The applicant carried a “P-4” profile due to his back pain from on or about 7 February 2002 through on or about 8 November 2002, despite the fact that his efficiency reports reflected satisfactory or better duty performance. The record does not offer an explanation of the reason that an MEB was not timely completed or the applicant was not placed on Medical Hold to complete the MEB. Had he undergone an MEB prior to his transfer to the Retired Reserve, it is likely he would have been found unfit for further military service. To the contrary, if the applicant was confronted with a mandatory separation date (MSD), he likely would have been presumed fit at this point in his career under the presumption of fitness guidance outlined in DoD Instruction 1332.38; however, the record is unclear as to whether or not he was approaching an MSD.

Based collectively upon the applicant’s 2002 medical evidence and that which followed thereafter from 2003 – 2006, if he was found unfit for military service, the disability award would have likely fallen short of the 30 percent minimum threshold necessary for medical retirement eligibility. Specifically, it does not appear that his neck and right thumb ailments adversely affected his ability to perform his military duties and thus neither would have been found unfitting to warrant awarding a disability rating. On the other hand, there is sufficient evidence, based upon his reported recurrent back pain and sustained “P-4” profiles, to support a finding of unfit for his chronic back pain; however, this likely would not have exceeded 20 percent. This opinion is based upon a lack of evidence of incapacitating episodes of a sufficient duration for the preceding 12 months to warrant a higher disability rating. Additionally, there was no evidence of a sufficient reduction in range of motion of the thoracolumbar spine to warrant a higher disability rating award.

As concerns the applicant’s reported lower and upper extremity paresthesias (numbness, tingling, and pain), the record shows no objective evidence of either an upper or lower extremity radiculopathy on electrodiagnostic testing. With reference to his upper extremity symptoms, testing revealed the likely cause of his symptoms was direct pressure upon the ulnar nerve at the level below the elbow. His reported right lateral thigh numbness and tingling was attributed to an irritation of lateral femoral cutaneous nerve of the thigh, a peripheral nerve condition which would likely not have been found individually unfitting. Additionally, the mere presence of disc bulges on an MRI scan does not, in and of themselves, constitute a disability, absent a demonstrated functional impairment. On the other hand, the applicant’s recalcitrant sensory complaints, attributed to possible “radiculitis,” are troubling. Although purely sensory in nature, it can only be speculated as to the true impact this finding had upon his ability to serve.

In conclusion, directing an FPEB or redirecting a repeat MEB and subsequent PEB referrals is unlikely to produce the results (medical retirement) desired by the applicant. Although he has not requested a finding of unfit and separation with severance pay with a 20 percent disability rating due to chronic (non-surgical) back pain, this is the greatest outcome that more than likely would have occurred had he been found medically unfit for further military service at all levels of the uniformed appellate review. He may submit medical documents from the Department of Veterans Affairs, e.g., ratings for a radiculopathy, or any other disability ratings awarded within the 12 months following his separation, to facilitate a possible reconsideration of his case.

The BCMR Medical Consultant’s evaluation is at Exhibit C.

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APPLICANT'S REVIEW OF THE ADDITIONAL AIR FORCE EVALUATION:

The issue of his civilian employment has been brought up on several occasions throughout this process, and the statement “the applicant’s apparent successful Civil Service employment,” is inflammatory and misleading. His civilian employment is not the issue here and has no bearing on the issue at hand. His civilian employment consists of logistics in the management field or general administration, which is a far cry from the very physically demanding maintenance officer work he was trained to do by the Air Force. Due to the fact that he had retired and had also resigned his commission, he was brought back into the system and assigned duty as a military personnel officer in order to facilitate the MEB/PEB process. His primary Air Force Specialty was aircraft maintenance and munitions, and the decision to determine his fitness/unfitness for military service and whether or not his conditions rate a medical retirement should be based on his military specialty and position at the time he was transferred to the Retired Reserve List.

His medical condition did prevent him from performing the duties of his office, grade, and rating. The MEB/IPEB only considered the position (military personnel officer – office job) that he was brought into for the purpose of processing rather than the aircraft maintenance officer (flight-line) position he was assigned to when he was separated from active duty and subsequently placed on the Reserve Retired List. He cannot physically perform the duties for which he was trained as he is unable to walk, sit, or stand for more than 30 minutes. He has permanently lost feeling in his leg, and the condition continues to worsen, extending to his foot. He has been under continuous care since early 2001, and the Air Force has been aware of this and has provided extensive treatment. Inadequate consideration has been given to his position as an aircraft maintenance officer and the impact that these medical conditions had upon his ability to perform these duties.

The medical community did, in fact, “drop the ball” as he was released from active duty and transferred to the Reserve Retired List after it was determined that he was unfit for duty and could not perform the job for which he was trained. He was not within 12 months of an MSD or retirement date, and voluntarily retired after being separated from active duty and being advised that his medical condition made him unfit for military service. He was not on any “non-selection” list or time-in-service limitations, and if the medical community had followed-up on his condition and the recommendation of his doctors, he would have been processed through the MEB/PEB process.

The statement “Had the applicant undergone an MEB prior to his transfer to the Reserve, the BCMR Medical Consultant opines the applicant would likely have been found unfit for further service.” is the basis for his request. He had a medical condition that made him unfit for military service and, by law, was required to be processed through an MEB and possible PEB for a determination of his condition and disabilities. He had been recalled to active duty, had served on his current active duty orders for more than 30 days, and had served more than 8 years on active duty. He was not nearing any type of mandatory separation date and had no intentions of retiring at that time.

The BCMR Medical Consultant failed to consider all medical (military and civilian) and personnel records available, and is voicing his opinion of the possible outcome of the MEB/PEB process without the benefit of a board being held and a full review being conducted. The decision as to whether he should be allowed to process through the MEB/PEB process should be decided by the AFBCMR. The fit/unfit decision and disability rating should be based upon his medical records from 2002, and to include records obtained since his retirement does not provide an accurate picture of his medical condition at the time it was decided he was not fit for military service. Despite the fact that it has been stated in his discussion that he likely would have been found unfit for further military service, the BCMR Medical Consultant has twice made the point that if everything had been done according to the AFI and 10 USC, the finding would have been in his best interests and medical retirement would be appropriate. The BCMR Medical Consultant has also failed to realize the requirements of 10 USC, Section 1201(a), and failed to indicate that “the Secretary may retire the member with retired pay computed under section 1401 of this title…”

The applicant’s complete response is at Exhibit E.

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THE BOARD CONCLUDES THAT:

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

2.  The application was not timely filed; however, it is in the interest of justice to excuse the failure to timely file.

3.  Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. In this respect, the Board notes that evidence has been introduced which clearly indicates the applicant should have been evaluated by an MEB, with possible further evaluation by the MDES, prior to his release from active duty in July 2002, at which time he was serving as an aircraft maintenance and munitions officer. Although we note the applicant was returned to duty in 2006 and evaluated by an MEB and subsequent IPEB in 2008, we further note that he was returned to duty as a personnel officer while being evaluated, and we are not persuaded the recommendation of the IPEB to return him to duty took into consideration the very physically demanding maintenance and munitions officer work he was performing at the time of his release from active duty in 2002. The Board further notes the comments of the AFBCMR Medical Consultant that redirecting repeat MEB and subsequent PEB referrals is unlikely to produce the results (medical retirement) desired by the applicant. However, until a full medical review has been conducted to determine his medical condition as of the date of his release from active duty in July 2002, we are not persuaded the applicant has been given full and fair consideration. In view of the above, and in order to resolve any injustice, we recommend that his records be corrected to the extent indicated below.

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.

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THE BOARD RECOMMENDSTHAT:

Invitational travel orders be issued by competent authority to APPLICANT for the purpose of undergoing a physical examination and review by the Medical Evaluation Board (MEB), the Physical Evaluation Board (PEB) and the Formal Physical Evaluation Board (FPEB), if necessary, to determine his medical condition as of 2 July 2002; and that the results of the evaluation be forwarded to the Air Force Board for Correction of Military Records at the earliest practicable date so that all necessary and appropriate actions may be completed.

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The following members of the Board considered Docket Number BC-2006-02261 in Executive Session on 4 December 2008, under the provisions of AFI 36-2603:

Mr. Mr. Thomas S. Markiewicz, Chair

Ms. Michele M. Rachie, Member

Mr. Mark J. Novitski, Member, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 17 Jul 06, w/atchs.

Exhibit B. Letter, AFPC/DPSD, dated 23 May 08, w/atchs.

Exhibit C. Letter, AFBCMR Medical Consultant, dated

10 Aug 08.

Exhibit D. Letter, SAF/MRBR, dated 14 Aug 08.

Exhibit E. Letter, Applicant’s Counsel, dated 23 Sep 08.

THOMAS S. MARKIEWICZ

Chair

AFBCMR 2006-02261

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the AIr Force Board for Correction of Military Records and under the authority of Section 1152, Title 10, United States Code (70A Stat 116), it is directed that:

Invitational travel orders be issued by competent authority to XXXXXXXXXXXX for the purpose of undergoing a physical examination and review by the Medical Evaluation Board (MEB), the Physical Evaluation Board (PEB) and the Formal Physical Evaluation Board (FPEB), if necessary, to determine his medical condition as of July 2, 2002; and that the results of the evaluation be forwarded to the Air Force Board for Correction of Military Records at the earliest practicable date so that all necessary and appropriate actions may be completed.

JOE G. LINEBERGER

Director

Air Force Review Boards Agency