

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2011-05034
COUNSEL: TERRY M. HOFFMAN
HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His Osteoporosis be rated by the Formal Physical Evaluation Board (FPEB) so the combined rating would increase to 40 percent and entitle him to a permanent disability retirement.

APPLICANT CONTENDS THAT:

1. On 21 January 2000, he suffered an ankle injury and was subsequently diagnosed with osteoarthritis of the ankle.
2. The Physical Evaluation Board (PEB), the primary care doctor, and the FPEB responsible for identifying all unfitting medical conditions left his condition out of the report, even after being made aware of the error.

In support of his request, the applicant provides a personal statement, copies of his medical records, AF Form 422, *Physical Profile Serial Report*; and AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (PEB)*.

The applicant's complete submission, with attachments, is at Exhibit A.

STATEMENT OF FACTS:

On 9 May 2007, a Medical Evaluation Board (MEB) convened to consider the applicant for continued active duty service. The Board recommended the applicant be referred to an Informal Physical Evaluation Board (IPEB) for weekly immunotherapy, lumbar back pain, and obstructed sleep apnea (OSA).

On 7 June 2007, the IPEB reviewed the case and found the applicant unfit and recommended discharge with severance pay and a disability rating of 20 percent for anaphylactic reaction to fire ant bites and low back pain. The IPEB determined the applicant's mild OSA was a condition that can be unfitting but is not currently compensable or ratable.

On 12 June 2007, the applicant non-concurred with the findings and recommended disposition of the IPEB and requested a formal

hearing of the case. The applicant contended to the FPEB that he should be permanently retired with a disability rating of 40 percent, with an increased disability rating for right leg radiculopathy and the addition of OSA as an unfitting condition.

On 15 August 2007, the FPEB reviewed the case and found the applicant was unfit for military duties and recommended he be discharged with severance pay at a combined compensable rate of 20 percent. The board noted the applicant's Medical Narrative Summary stated his immune prognosis was poor and exposure to fire ant bites or other stinging insects may result in a life-threatening allergic reaction. With regard to his chronic back pain the board noted an 84 degree range of motion in flexion with minimal impact on the applicant's military duties within the Military Equal Opportunity (MEO) career field; thus the condition was best rated at 10 percent. In addition, according to a doctor from the Trident Medical Center, a sleep evaluation revealed the applicant had mild sleep apnea syndrome that can be controlled with nasal CPAP therapy.

On 16 August 2007, the applicant non-concurred with the findings and recommended disposition of the FPEB and requested a review of his case by the Secretary of the Air Force Personnel Council (SAFPC).

The applicant stated there were contradictions based on the findings. The compensable percentage of 20 percent was based on the assumed Military Equal Opportunity (MEO) career field to which he is not officially associated with. MEO and his primary Air Force Specialty Code (PAFSC) of 2T271 (Air Transportation Technician) rendered him unfit for duty according to his disabilities. In addition, the applicant stated his (mild sleep apnea) category II item should have been category I (sleep apnea with continuous positive airway pressure/CPAP) due to additional medical findings. The MEB met prior to his final CPAP sleep study. Findings from the study should have been considered as they validated his condition should have come under category I (sleep apnea with CPAP).

On 5 September 2007, AFPC/DPSDD requested SAFPC review the applicant's PEB proceeding and his request for a 40 percent permanent retirement.

On 12 October 2007, officials within the SAF directed the applicant be discharged and receive severance pay with a disability rating of 20 percent under the provisions of Title 10, United States Code (USC), Section 1203. The board considered the applicant's contention that he should be permanently retired with at least a 40 percent disability rating, to be achieved by an increase of his rating for back pain to 20 percent and the inclusion of a rating of 50 percent for OSA in the disability rating computation. Following a review of all available facts and evidence in the case, to include the testimony presented before the FPEB, the remarks by

the FPEB, IPEB, the service medical record, and the narrative summary of the MEB, the board concurred with the disposition recommended by the two previous boards and recommended discharge with severance pay with a combined disability rating of 20 percent.

On 23 October 2007, the applicant's unit was notified that he was found unfit for continued military service and was to be discharged with severance pay under 10 U.S.C 1203, with an effective date of 3 December 2007.

On 16 August 2011, the Physical Disability Board of Review (PDBR) reviewed the disability rating received by the applicant. After carefully reviewing the application and medical separation case file the PDBR recommended no recharacterization of separation or modification of the disability rating previously assigned.

On 1 September 2011, the applicant was notified the PDBR determined that the rating assigned at the time of final disposition of the disability evaluation system (DES) processing was appropriate. Accordingly, the board recommended no recharacterization or modification of his separation with severance pay.

The remaining relevant facts pertaining to this application are contained in the letter prepared by the appropriate office of the Air Force, which is attached at Exhibit C.

AIR FORCE EVALUATION:

HQ AFPC/DPSD recommends denial. DPSD states PEBs must determine if a member's condition renders them unfit for continued military service relating to their office, grade, rank or rating. If the board renders a finding of unfit, the law provides appropriate compensation due to permanent termination of their career. Further, it must be noted the AF Disability boards must rate disabilities based on the member's condition at the time of evaluation; in essence a snapshot of the condition at that time. 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 their military duties. It is the charge of the Department of Veterans Affairs (DVA) to pick up where the AF must, by law, leave off. 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 two agencies.

DPSD states no documentation was provided at any time during the DES processing of the applicant's case to indicate his arthritic

ankle condition was unfitting for duty. Therefore, there is no basis for which to conclude that his condition was inappropriately excluded from consideration during the DES processing of his case. Any rating changes to the applicant's condition are now under the purview of the DVA.

Additionally, the preponderance of the evidence reflects that no error or injustice occurred during the disability process or the rating applied during DES processing of the applicant's case.

The complete DPSD evaluation is at Exhibit C.

APPLICANT'S REVIEW OF THE ADDITIONAL AIR FORCE EVALUATION:

Counsel states the applicant's diagnosis of osteoarthritis of the ankle should have been included in his original MEB submitted on 9 May 2007 and considered for adjudication by the DES in addition to his other medical conditions.

Counsel states they agree no information was provided in regards to the applicant's right ankle/foot. However, AFI 48-123, *Medical Examinations and Standards*, states the medical assessment must include clear documentation of any significant medical history and/or new signs or symptoms of medical problems since the member's last medical assessment/medical condition; therefore, based on this guidance, the medical board was in violation of this policy in that they failed to indicate, cover or give any reference to the 41 medical reports regarding the applicant's ankle injury.

Counsel states there was an error due to the failure of the board to properly include the injury to the ankle/foot and the numerous medical records over the period of 2001 to 2007. On 3 January 2003, the applicant received medical treatment complaining of continuing pain in the ankle from the severe ankle sprain. Also, the applicant complained of a new issue relating to his right hip pain. His record clearly shows that the injuries were separate and not related; however, this was not included in the review.

Counsel states the failure to provide adequate testing (i.e. magnetic resonance imaging/MRI) to determine significant damage and disability to the right ankle of the applicant prevented proper disability determination. In 2007, the AF x-rayed the ankle which indicated a bone spur. In 2011, a MRI was performed which identified abnormal enhancing soft tissue extending laterally from the calcaneocuboid and talonavicular joints with osteoarthritic changes at the joints.

Counsel states the findings are not related to his back and the condition existed since the injury in January 2000.

Additionally, numerous records pertaining to the treatment of the ankle during the applicant's service was not identified as an individual injury, but overlooked by the back injury.

Counsel's complete evaluation with attachments, is at Exhibit E.

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. Insufficient relevant evidence has been presented to demonstrate the existence of an error or injustice. After a thorough review of the evidence of record and the documentation submitted in support of his appeal, we find no evidence which would lead us to believe his Osteoarthritis of the ankle rendered him unable to perform military duties commensurate with his grade and position. While counsel argues that the applicant's Osteoarthritis should have been included in the MEB, we disagree. As pointed out by DPSD, the Air Force is required to rate an individual's disability at the time of evaluation. The fact that a person may have a medical condition does not mean that the condition is unfitting. To be unfitting the condition must be such that it alone precludes the member from fulfilling his military duties. It is the charge of the DVA to pick up where the Air Force must by law, leave off. It appears that the Air Force appropriately considered the applicant's condition and whether or not the condition rendered him unfit to perform the duties of his office and grade at that time. Therefore, we agree with the opinion and recommendation of the Air Force OPR and adopt its rationale as the basis for our conclusion the applicant has not been the victim of an error or injustice. In view of the above and in the absence of evidence to the contrary, we find no basis to grant the requested relief.
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 issues 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 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 AFBCMR Docket Number BC-2011-05034 in Executive Session on 25 Sep 12, under the provisions of AFI 36-2603:

Panel Chair
Member
Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 20 Oct 11, w/atchs.
- Exhibit B. Applicant's Military Personnel Records.
- Exhibit C. Letter, AFPC/DPSD, dated 8 Feb 12.
- Exhibit D. Letter, SAF/MRBR, dated 23 Mar 12.
- Exhibit E. Letter, Applicant's Counsel, dated 19 Apr 12, w/atchs.

Panel Chair