

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-00570

COUNSEL:

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His official records be corrected to show that he was medically retired due to a Service connected disability.

APPLICANT CONTENDS THAT:

His discharge was improper because, per Air Force Regulations, he is totally disabled, yet he was denied an evaluation by a Medical Evaluation Board (MEB) or Physical Evaluation Board (PEB) that would have resulted in his being retired for medical reasons. He felt pressured by his leadership into retiring before his medical issues were resolved. He requested a full evaluation by the Office of the Inspector General and a full congressional intervention, but nothing was done in regard to an MEB.

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

STATEMENT OF FACTS:

The applicant initially entered the U.S. Army on 2 Mar 88, separated on 25 Feb 94, and entered the Puerto Rico Army National Guard (ARNG) on 6 Dec 94.

The applicant transferred to the Puerto Rico Air National Guard (PRANG) on 2 Mar 99.

On 16 Sep 08, the applicant received a DA Form 2173, *Statement of Medical Examination and Duty Status*, recommending that his "Moderate Sleep Apnea" be considered in the line of duty. This form was never completed/signed.

The applicant voluntarily retired on 30 Apr 11, was furnished an Honorable Discharge Certificate, and was credited with 20 years 15 days of active service.

The remaining relevant facts pertaining to this application are described in the letter prepared by the Air Force office of primary responsibility, which is included at Exhibit C.

AIR FORCE EVALUATION:

The AFBCMR Medical Consultant recommends denial, indicating there is no evidence of an error or injustice. The applicant was indeed evaluated and treated for a number of medical ailments, most if not all of which were addressed either surgically [hernia repairs, uvuloplasty] or medically [physical therapy, pain modulating medications] through specialty consultations and counseling; however, none of these conditions was considered duty-limiting to the extent [in duration, severity, or impact upon the performance of duties] that warranted a medical reason for release from military service. Although the applicant raised the question as to whether the threshold for conducting an MEB was met and/or later ignored, what is very clear from the record is the applicant received timely evaluations and referrals for all of his presented medical complaints. Among those conditions, the single one the record indicates may have warranted MEB action is the case of Obstructive Sleep Apnea (OSA). However, it should be noted that at or about the time of the applicant's release from military service attitudes regarding fitness for duty for individuals with OSA who required Continuous Positive Airway Pressure (CPAP) had changed dramatically to the extent that the condition was/and is no longer considered career-ending; and in the applicant's case would likely have resulted in retention with a waiver or an assignment limitation code. Although first diagnosed with OSA while on active orders in 2008, this does not automatically establish a condition with or permanent aggravation by military service; regardless if serving during a period of 31 days or more at the time of diagnosis. Again, no evidence is provided to indicate either the applicant's OSA or his diabetes was found to be in the line of duty. Addressing the applicant's implicit desire for medical separation/retirement, the military DES, established to maintain a fit and vital force, can by law, under Title 10, United States Code (U.S.C.), only offer compensation for those service incurred [or permanently aggravated] diseases or injuries which specifically rendered a member *unfit* for continued active service and were the cause for career termination; and then only for the degree of impairment present at the time of separation and not based upon future occurrences. Department of Defense Instruction (DoDI), *Physical Disability Evaluation*, paragraph E3.P3.2.1., reads: "A Service member shall be considered *unfit* when the evidence establishes that the member, due to physical disability, is *unable* to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties) to include duties during a remaining period of Reserve obligation." In the case under review, it could not be established that the applicant was unable to reasonably perform his military duties

due to one or more medical conditions during his military service. Moreover, under paragraph E3.P3.3.3., it states: "If the evidence establishes that the Service member adequately performed his or her duties until the time the Service member was referred for physical evaluation; the member may be considered *fit* for duty even though medical evidence indicates questionable physical ability to continue to perform duties." Further, paragraph E3.P3.3.4. states: "Regardless of the presence of illness or injury, inadequate performance of duty, by itself, shall not be considered as evidence of unfitness due to physical disability unless it is established that there is a cause and effect relationship between the two factors." The Medical Consultant found no medical condition that established (or should have established) a cause and effect relationship with the termination of the applicant's service or was an alternative reason for his release from military service. Finally, although the applicant was evaluated and treated for a number of episodic illnesses or injuries during his military service, none were shown to have interfered with his military service to the extent or duration that warranted placement on Medical Hold or for an MEB and processing through the DES. The applicant has not met the burden of proof that warrants the desired change of the record.

A complete copy of the complete Medical Consultant's evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to the applicant on 8 Jan 13 for review and comment within 30 days. As of this date, no response has been received by this office (Exhibit D).

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. We took notice of the applicant's complete submission in judging the merits of the case; however, we agree with the opinion and recommendation of the AFBCMR Medical Consultant and adopt his rationale as the basis for our conclusion the applicant has not been the victim of an error of injustice. Therefore, in the absence an evidence establishing an unfitting medical condition

prior to his retirement, 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 issues involved. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified the evidence presented did not demonstrate the existence of material error or injustice; the application was denied without a personal appearance; and 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-2012-00570 in Executive Session on 20 Feb 13, under the provisions of AFI 36-2603:

Panel Chair
Member
Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 5 Jan 12, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFBCMR Medical Consultant, dated 4 Jan 13.
- Exhibit D. Letter, SAF/MRBC, dated 8 Jan 13.

Panel Chair