

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-01729

FEB 19 1999

COUNSEL: NONE

HEARING DESIRED: NO

[REDACTED]

Applicant requests that his records be corrected to reflect that he was medically retired rather than discharged with severance pay. 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). As of this date, no response has been received by this office.

Pursuant to the Board's request, the BCMR Medical Consultant evaluated the applicant's request and provided an additional advisory opinion to the Board recommending that the applicant's request be denied (Exhibit E). The additional advisory opinion was forwarded to the applicant for review and response (Exhibit F). As of this date, no response has been received by this office.

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 opinions appear to be based on the evidence of record and have not been 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. Robert W. Zook, and Mr. David W. Mulgrew considered this application on 15 Apr 97 and 14 Oct 98 in accordance with the provisions of Air

Force Instruction 36-2603 and the governing statute, 10 U.S.C..
1552.



THOMAS S. MARKIEWICZ
Panel Chair

Exhibits :

- A. Applicant's DD Form 149
- B. Available Master Personnel Records
- C. Advisory Opinion
- D. SAF/MIBR Ltr Forwarding Advisory Opinion
- E. Additional Advisory Opinion
- F. AFBCMR Ltr Forwarding Advisory Opinion

FC 96-01729

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

3 Jan 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 his Discharge With Severance Pay (DWSP) separation be changed to a medical retirement with full benefits.

FACTS: On 11 Nov 93, applicant was DWSP by reason of physical disability following two years, 10 months and 14 days of active service.

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 their grade, office, rank or rating. Those members who are separated or retired by reason of physical disability may be eligible, if otherwise qualified, for certain disability compensations. Eligibility for disability processing is established by a Medical Evaluation Board (MEB) when that 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 health care to the member.

On 3 Mar 92, a MEB questioned the applicant's fitness for continued military service and referred his case to a Physical Evaluation Board (PEB) with a diagnosis of "Reflex Sympathetic Dystrophy Syndrome (RSDS) of the right lower extremity, ambulatory with aid of a cane, interfering with ability to perform duties. S/P 13 Dec 91 implantation of a dorsal column stimulator." On 20 Mar 92, the Informal PEB found him to be unfit for continued military service, but that his condition had not stabilized to a degree of permanence. The board, therefore, recommended that he be placed on the Temporary Disability Retired List (TDRL). The board noted that both of the applicant's legs were affected by the RSDS and rated him accordingly (bilateral ratings of 20 percent for each leg). The board recommended a compensable percentage rating of 40 percent and no other medical conditions were listed. The applicant concurred with these findings on 13 Apr 92 and on 7 May 92, officials within the office of the Secretary of the Air Force directed that he be placed on the TDRL with a compensable percentage of 40 percent.

On 18 Aug 93, the applicant's first, and only, TDRL reevaluation (physical examination), the Doctor noted several items: First, that the applicant could walk for up to five miles, but not run at all; Second, that he hardly required the use of a cane and he was able to perform all basic activities of daily living; and third, that the applicant had to be careful lifting objects because he develops lower back pain and that he should avoid twisting and turning motions. On 9 Sep 93, based upon this medical summary, the Informal PEB recommended that the applicant be removed from the TDRL and discharged with severance pay at a 20 percent compensable rating.

The applicant nonconcurred with these findings, and on 5 Oct 93 submitted a letter of rebuttal. The applicant wrote that the examining Doctor stated that the applicant's condition was "unchanged", yet the Informal PEB recommended a change in compensable percentage from 40 percent down to 20 percent. The applicant also stated that the PEB only rated the problem with his knees and disregarded the back and overall physical difficulties resulting from RSDS. Officials within the office of the Secretary of the Air Force reviewed the case file and directed that the applicant be discharged with severance pay and given a 20 percent compensable rating.

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We carefully reviewed the **AFBCMR** case file and found no **error** or injustice to merit a change to the records. The Doctor's statement in **the** TDRL reevaluation summary **was** not inferring that the condition had not changed, but that there were no changes to the physical makeup of the lower extremities (i.e., no swelling; no atrophy of muscle mass) that would result in an increase to the compensable percentage. The exact quote was, "For the last year, the patient has been quite stable without significant swelling or changes in the lower extremities, but with intermittent bouts of pain." An increase in compensable percentage to **60** percent would have required the condition to be considered, "Severe, with marked muscular atrophy" in accordance with the **VA** Schedule for Rating Disabilities. The references to the applicant's physical ability to perform daily functions and walk for distances up to five miles, however, indicated to the PEB that the condition had become less disabling, more consistent with the requirements for a 20 percent rating. The requirement for a **20** percent rating is that the severity of the condition be "moderate", which again, is what the medical summary indicates. The other medical conditions the applicant listed were not unfitting at the time of his disability processing and therefore were appropriately not rated.

The applicant includes in his argument that the Department of Veterans Affairs (DVA) rated him **60** percent disabled in contrast to the service rating of **20** percent. Again, the additional conditions that the DVA granted to be service-connected were not unfitting at the time of his disability processing. The disability laws of Title 10, **USC** require the military services to rate disabilities based on their current condition, at the time of disability processing. To be ratable, the condition must be unfitting. The mere existence of a medical condition does not make it unfitting. Under Title 38, the DVA may rate based upon future employability. This, plus the fact that the DVA may perform evaluations at a later point in time, often results in different ratings by the two agencies.

RECOMMENDATION: We recommend denial of the applicant's request. The material submitted by the applicant does not show he was improperly rated at the time of his processing. The RSDS **was** the only unfitting condition and it had clearly stabilized and was appropriately rated based on the TDRL reevaluation summary. All available evidence supports a **20** percent compensable rating in accordance with the VA Schedule for Rating Disabilities.



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



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