

JUL 24 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-02626

COUNSEL: None

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

Her retirement orders be amended to indicate she was injured in the line of duty (LOD) as a direct result of and during a period of war; she be placed on the Temporary Disability Retirement List (TDRL) [presumably] as of 19 January 1991; she be given a DD Form 214 to show all military service completed [14 Jan 91 - 7 Feb 95] to include medical retirement at 30%.

APPLICANT CONTENDS THAT:

Administrative oversight resulted in errors on the DD Form 214 she received. Her retirement orders fail to indicate service-connected injury and she has not been issued a DD Form 214 to indicate completed military service and medical discharge [sic]. She should have been placed on the TDRL at the time of injury rather than being made to report for duty.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant reenlisted in the Air Force Reserve on 16 May 1986 for a period of six years.

She was ordered to active duty in direct support of Operation Desert Storm/Desert Shield (ODS/S) with a report date of 15 January 1991 and a release date of 18 January 1991. She was injured on 18 January 1991 while downloading a C-130. She sustained a right pelvic ramus fracture and was admitted to the Strategic Hospital, [redacted]. Although her active duty during this period was less than 90 consecutive days, it was in support of ODS/S. Therefore, she was issued a DD Form 214 for the period 14-18 January 1991, which reflects that she was released from active duty on 18 January 1991 due to demobilization. She was released from the hospital on 28 January 1991.

Apparently applicant was again ordered to active duty for a period of 60 days beginning 28 January 1991 (this tour was not in support of ODS/S). However, on 28 January 1991, she was found

not medically qualified for mobility or worldwide duty and placed on restricted profile for two months for right pelvis fracture. On 8 February 1991, an LOD determination found her injury on 18 January 1991 to be in the LOD. She was again released from active duty on 11 February 1991.

She was placed on restricted profile (*no lifting over 10 lbs, no running/jumping/aerobics---may perform duty at home station only*) on 22 April 1991 for medical evaluation to determine worldwide duty status; at this time applicant was found not medically qualified for worldwide duty. She received a similar profile on 6 June 1992. On 28 October 1992, she received a "no restrictions" profile and was found to be world-wide qualified. Also on 28 October 1992, her 16 May 1986 reenlistment was extended for the second time to complete medical evaluation/determination. She again received restricted profiles (*no lifting over 10 lbs, no running/jumping/aerobics---may perform duty at home station only*) on 25 July 1993 and 6 April 1994. However, apparently, she was able to participate in the Reserves during these periods since her Service History/Point Credit Summary reflects that she earned sufficient points for her retirement/retention (R/R) years ending 900303, 910303, 920303, 930303 and 940303 to be satisfactory years of Federal Service.

On 13 July 1994, she was placed on a "no duty" profile until 12 July 1995 pending medical board action due to healed fracture right interior superior pubic rami. She was found not worldwide qualified and was not authorized to participate in the Reserves for pay or points.

On 19 September 1994, her 16 May 1986 reenlistment was extended for the eighth time, for a total of 35 months, in order to complete the medical evaluation.

On 2 February 1995, she was notified that she was physically unfit for further military service and placed on the Permanent Disability Retired List (PDRL) with a disability rating of 30%

Per Special Orders No. ACD-0682, dated 18 January 1995, applicant was permanently retired effective 8 February 1995 in the grade of staff sergeant with a 30% disability. The orders indicated that her disability **was** not received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in LOD during a period of war. She had 20 years, 11 months, and 28 days of Federal Military Service. She was not on active duty at the time.

Pursuant to the AFBCMR Staff's request for an additional Air Force evaluation, applicant's case was forwarded to the Secretary of the Air Force Personnel Council (SAFPC). Based on their determination, applicant's retirement order, SO ACD-0682, was administratively amended by SO ACD-344, dated 6 January 1998, to reflect that her disability **was** received in the LOD as a direct result of armed conflict or caused by an instrumentality of war

and incurred in the LOD during a period of war. Applicant was so notified by the Chief, Disability Operation Branch, HQ AFPC/DPPDS, on 6 January 1998.

She currently has a rating of 10% from the Department of Veterans Affairs (DVA) for "condition of the skeletal system."

AIR FORCE EVALUATION:

The Chief, Management Support Office, HQ ARPC/DRSS, reviewed this appeal and states that normally a member must serve a minimum of 90 consecutive days of active duty before a DD Form 214 is authorized. However, for those ordered to active duty in support of ODS/S, only one day was required for a DD Form 214. Therefore, the applicant was issued a DD Form 214 for the 15-18 January 1991 period because it was in direct support of ODS/S. She was ordered to active duty for a period of 60 days effective 28 January 1991, but this tour was not in support of ODS/S. Therefore, a DD Form 214 was not authorized. While there were other training periods between 11 February 1991 and her retirement on 8 February 1995, none were of sufficient types or lengths to authorize another DD Form 214. Disapproval is recommended.

A complete copy of the Air Force evaluation, with attachments, is at Exhibit C.

The Chief, Physical Disability Division, HQ AFPC/DPPD, also reviewed this application and indicates that, regarding "instrumentality of war" issues, the intent of the law was to appropriately compensate personnel who are injured or whose careers are otherwise cut short when they incur injuries while engaged in activities preparing for war or under conditions simulating war. The underlying principle of granting disability benefits based upon an "instrumentality of war" was the recognition that operating, handling or even being in proximity to an instrumentality of war is an additional hazard of military life. Policy guidance indicated that there must be a definitive causal relationship between the injury caused by the instrumentality and the unfitting condition that leads to the member's retirement or separation. An injury need not be unfitting at the time of its occurrence but if it progresses to the point of unfitness, then it is deemed to have been caused by an instrumentality of war. Applicant's records substantiate that the injury was incurred in the LOD and that the injury was sustained while she was performing a wartime function. The Chief recommends that the applicant's request for correction to her retirement orders, SO ACD-0682, be granted.

A complete copy of the Air Force evaluation is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant reviewed the evaluations and contends that a DD Form 214 reflecting her injury will afford her treatment at military hospitals as well as more understanding treatment at Department of Veterans Affairs (DVA) facilities. Her appeal for more than 10% [presumably with the Department of Veterans Affairs] was denied as non-service connected. The military retirement orders just aren't acceptable to all of the VA "experts" that she has consulted. Since the injury she received while on active duty in 1991 caused her to be permanently retired for disability in 1995, she should have been placed on the TDRL in 1991 and not ordered to participate while disabled. She believes her placement first on active duty on 28 January 1991 and subsequently on the Retired Reserve List in 1995 was inadvertent. She instead should have been put on medical hold in 1991, placed on the TDRL and issued a DD Form 214 showing a medical retirement at 30%.

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

ADDITIONAL AIR FORCE EVALUATION:

The Chief, Physical Disability Division, HQ AFPC/DPPD, again reviewed this appeal and states that the applicant's file does not support her request for placement on the TDRL in 1991. There is no evidence or documentation to support an unfit finding prior to January 1995, when officials within the Office of the Secretary of the Air Force directed her permanent disability retirement. The applicant perhaps still questions the validity of her retirement orders due to a lack of fund cite and signature of the issuing official. The Chief assures her that the orders in question are valid, complete and in accordance with governing directives. The format used to create her disability retirement order is used for all disability retirements. The Chief reaffirms his original recommendation that her retirement orders reflect that her disability was received in LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war [*This has been done administratively --- See Statement of Facts above.*]. However, no further correction is justified.

A complete copy of the additional Air Force evaluation, with attachments, is at Exhibit G.

The Deputy Director, Directorate of Customer Assistance, HQ ARPC/DR, states that since the applicant was not on active duty status at the time she was retired on 7 February 1995, a DD Form 214 is not authorized. The Deputy Director concurs with HQ AFPC/DPPD's recommendation regarding the "instrumentality of war" issue.

A complete copy of the additional Air Force evaluation is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATIONS:

Applicant provided two responses, reiterating that she needs a DD Form 214 that includes the dates 14 January 1991 to her retirement of 7 February 1995. She wants any time of non-participation to be reflected as time lost per Physical Evaluation Board. The injury took place while she was on active duty. The active duty doctors thought she should have been "boarded." She should have been placed on the TDRL and given a DD Form 214 and then placed on the PDRL. The DVA doesn't understand why this was not accomplished. A new DD Form 214 would facilitate her conversion of disability rating with the DVA as she is appealing for a higher rating.

Applicant's complete responses, with attachments, are at Exhibit J.

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. Applicant's request to have her 18 January 1995 retirement order reflect that her disability was received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war was administratively accomplished on 6 January 1998, and she was so notified by HQ AFPC/DPPDS. Therefore, the only matters remaining for this Board's consideration pertain to her request for placement on the TDRL as of 19 January 1991 and issuance of a new DD Form 214 covering the period from 14 January 1991 until her retirement on 7 February 1995. After a thorough review of the evidence of record and applicant's submission, and subsequent to the administrative corrections made to her retirement orders, we are not persuaded that she remains the victim of either an error or an injustice. Her contentions are duly noted, but we must conclude that the available documentation does not support an unfit finding prior to January 1995, when officials within the Office of the Secretary of the Air Force directed her permanent disability retirement. Since she was not on active duty status at the time she was retired on 7 February 1995, and we are not persuaded that she should have been, a DD Form 214 is not warranted. We therefore agree with the recommendations of the Air

Force and adopt the rationale expressed as the basis for our decision that, with respect to the TDRL and DD Form 214 issues, the applicant has failed to sustain her burden of having suffered either an error or an injustice. In view of the above and absent persuasive evidence to the contrary, we find no compelling basis to recommend granting the relief sought

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 14 April 1998, under the provisions of AFI 36-2603:

Mr. Benedict A. Kausal IV, Panel Chair
Mr. Richard A. Peterson, Member
Mr. Terry Yonkers, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 15 Apr 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ ARPC/DRSS, dated 15 May 97, w/atchs.
- Exhibit D. Letter, HQ AFPC/DPPD, dated 18 Feb 97
- Exhibit E. Letter, AFBCMR, dated 2 Jun 97.
- Exhibit F. Applicant's Response, dated 7 Jun 97,
w/atchs.
- Exhibit G. Letter, HQ AFPC/DPPD, dated 29 Oct 97.
- Exhibit H. Letter, HQ ARCP/DR, dated 23 Dec 97, w/atchs.
- Exhibit I. Letter, AFBCMR, dated 3 Feb 98.
- Exhibit J. Letters, Applicant, dated 11 & 25 Feb 97, w/atchs.


BENEDICT A. KAUSAL IV
Panel Chair