

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 12 1999

IN THE MATTER OF:

DOCKET NUMBER: 97-01001

COUNSEL: [REDACTED]

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

1. His injuries sustained in 1978 be found in the Line of Duty (LOD), rather than not in the LOD and caused by his own misconduct.
2. He be medically retired with a 70% disability rating.

APPLICANT CONTENDS THAT:

The reasons applicant believes he has been the victim of an error and/or an injustice are contained in his complete submission, which is at Exhibit A.

STATEMENT OF FACTS:

Relevant facts pertaining to this application, extracted from the applicant's military/medical records and the LOD investigative report, are contained in the letters prepared by the appropriate offices of the Air Force. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Staff Judge Advocate', HQ AFPC/JA, reviewed this appeal and provides a detailed chronology of applicant's case as well as an extensive evaluation. The author recommends applicant's request to change his LOD finding of not in the LOD due to own misconduct should be denied. Also recommended is that an expert medical opinion be obtained to determine whether the treatment provided by Dr. O--- met the standard of care and, if not, was applicant's injury and recovery exacerbated and prolonged. If so, such aggravated injury would be in the LOD and may possibly entitle the applicant to compensation.

A copy of the complete evaluation is attached at Exhibit C.

The AFBCMR Medical Consultant also evaluated applicant's case and provides his rationale for recommending that no change in the record is warranted.

A copy of the complete evaluation is attached at Exhibit D.

The AFBCMR Medical Consultant's evaluation was returned to HQ AFPC/JA for subsequent review. However, the Senior Attorney-Advisor concluded in his addendum that there is no substantive relevant evidence that supports the applicant's request, which may be denied based on applicant's untimely application or on the merits outlined in the combined advisories.

A copy of the complete addendum to HQ AFPC/JA evaluation, with attachments, is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A complete copy of the Air Force evaluation was forwarded to the applicant and his counsel on 6 April 1997 for review and comment. Applicant provided a rebuttal which contains his rationale for finding his injuries in the LOD. He requests that he receive a disability rating of 70%.

A complete copy of applicant's response, with attachments, is at Exhibit G.

In his rebuttal, the applicant asked for certain documents "for further study." The AFBCMR Staff forwarded a letter to the applicant, advising him how to obtain copies of the requested materials.

A copy of the AFBCMR letter to the applicant is at Exhibit H.

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 to warrant granting partial relief. We have carefully reviewed the available documentation pertinent to this case and conclude the vehicular accident and the resultant initial injuries were the result of the applicant's own misconduct. However, while normally we would be reluctant to disagree with the expert opinion of the AFBCMR Medical Consultant, in our view the evidence of record suggests the applicant's condition was aggravated by misdiagnosis

and untimely treatment. The seriousness of his actual condition was not properly assessed and treated until at least a month after the accident. The Chairman of the Department of Orthopedics at the David Grant Medical Center at Travis AFB stated that ". . . if prompt recognition had taken place (within a few days), reduction of the dislocation might have been possible by traction or recumbency." According to the Associate Professor of Clinical Neurosurgery at the University of California, Los Angeles Medical Center, when the applicant first arrived at the hospital on the day of the accident, he did not have the severe spinal deformity and mal-alignment he now has. This developed after he was allowed to get up, return to work, and move around in an unrestricted way without bracing or surgical stabilization of his unstable spinal fracture. The Professor concluded that if the diagnosis of the unstable spinal fracture had been made before the applicant had been allowed to bear weight, and he had remained in good alignment, the extreme deformation of his spine would not have occurred. Further, ". . . as a result of the severe deformity of [his] spine and the placement of the Harrington rods into this spinal deformity [by the military] without re-alignment, the Harrington rod hooks caused damage to [his] spinal cord and left [him] physically deformed, neurologically injured, in pain and disabled." We are persuaded the initial inadequate diagnosis and treatment of the applicant's injury, together with the residuals of the therapy he received, exacerbated and prolonged his injury and recovery and, in accordance with AFR 35-67, paragraph 8, are in the line of duty by aggravation. Therefore, we recommend the applicant's records be corrected to the extent indicated below. His request for a disability rating of 70% was noted; however, we believe the more appropriate rating would be 60%, the rating determined by the Formal Physical Evaluation Board on 9 November 1978.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. On 1 February 1979, he was unfit to perform the duties of his office, rank, grade, or rating by reason of physical disability, incurred while he was entitled to receive basic pay; that the diagnosis in this case was status post auto accident May 1978, with fracture dislocation T-5-6, with compression of T4, with Harrington rod fixation T2-8 August 1978 with secondary residuals of medical treatment received by the member subsequent to the motor vehicle accident, VA diagnostic code 5293, rated at 60 percent; that the disability was permanent; that the disability was not due to intentional misconduct or willful neglect; that the disability was incurred in the line of duty in time of war or national emergency, and that the disability was not the direct result of armed conflict, or was caused by an instrumentality of war and incurred in line of duty during a

period of war, and that the disability was not the direct result of a combat related injury.

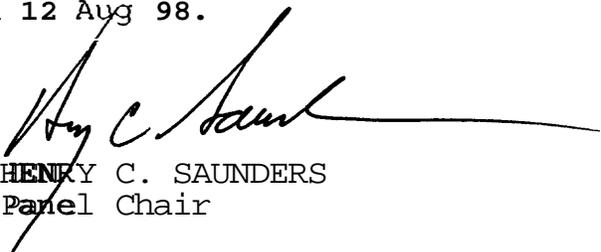
b. He was not discharged on 1 February 1979, under the provisions of Title 10, USC, Section 1207, but on 2 February 1979 his name was placed on the Permanent Disability Retired List with a compensable disability rating of 60 percent under the provisions of Title 10, USC, Section 1201.

The following members of the Board considered this application in Executive Session on 17 November 1998, under the provisions of AFI 36-2603:

Mr. Henry C. Saunders, Panel Chair
Mr. Henry Romo Jr., Member
Dr. Gerald B. Kauvar, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 23 Mar 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/JA, dated 4 Nov 97.
- Exhibit D. Letter, AFBCMR Medical Consultant, dated 12 Jan 98.
- Exhibit E. Letter, HQ AFPC/JA, dated 19 Mar 98, w/atchs.
- Exhibit F. Letter, AFBCMR, dated 6 Apr 98.
- Exhibit G. Letter, Applicant, dated 6 Jul 98, w/atchs.
- Exhibit H. Letter, AFBCMR, dated 12 Aug 98.



HENRY C. SAUNDERS
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

FEB 12 1999

Office of the Assistant Secretary
AFBCMR 97-01001

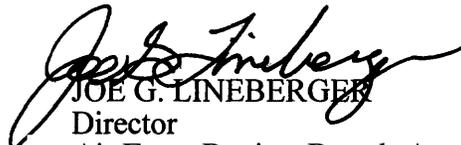
MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED], be corrected to show that:

a. On 1 February 1979, he was unfit to perform the duties of his office, rank, grade, or rating by reason of physical disability, incurred while he was entitled to receive basic pay; that the diagnosis in this case was status post auto accident May 1978, with fracture dislocation T-5-6, with compression of T4, with Harrington rod fixation T2-8 August 1978 with secondary residuals of medical treatment received by the member subsequent to the motor vehicle accident, VA diagnostic code 5293, rated at 60 percent; that the disability was permanent; that the disability was not due to intentional misconduct or willful neglect; that the disability was incurred in the line of duty in time of war or national emergency, and that the disability was not the direct result of armed conflict, or was caused by an instrumentality of war and incurred in line of duty during a period of war, and that the disability was not the direct result of a combat related injury.

b. He was not discharged on 1 February 1979, under the provisions of Title 10, USC, Section 1207, but on 2 February 1979 his name was placed on the Permanent Disability Retired List with a compensable disability rating of 60 percent under the provisions of Title 10, USC, Section 1201.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency