

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-01550

DEC 08 1998

COUNSEL: [REDACTED]

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

1. His severance pay be rescinded and his record be corrected to show he made a selection to be transferred to the Inactive Status List, Reserve Section.
2. The United States Air Force (USAF) be ordered to submit an explanation as to why it denied the line of duty (LOD) investigation report entered by the [REDACTED] Air National Guard (ANG) for the emotional condition suffered while on active duty.
3. His disability rating be adjusted to one of not less than 30 percent or he be allowed to have his reply/rebuttal considered by a PEB.

APPLICANT CONTENDS THAT:

He was discharged with a lump sum payment against his wishes and while he was medically unfit to make a decision. The Veterans Affairs (VA) awarded him a 30% disability rating for his tibia condition, and an additional 10% for his left ankle osteoarthritis. The VA found that the depression he suffers from stems from the service-connected accident and surgery he suffered while on active duty and awarded him an additional 10% disability for that specific reason. The USAF determination of 20% disability is at odds with the more recent VA determinations in that the VA is the combined disability determination of 40%. The PRANG determined that his emotional condition was in LOD, although the USAF later disapproved said finding without explanation of any sort. Ironically, the VA grants him a service-related 10% disability for his emotional condition effective 27 April 1997, but four months later the USAF denies a LOD determination for the same condition on 3 September 1997.

In support of his request, he submits the VA Compensation Decision, DD Form 214, LOD report and attachments, Memorandum of Election, and medical documentation.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant enlisted in the PRANG on 19 May 1974.

On 17 December 1994, the applicant, while on active duty under Drug Interdiction Special Order: AQ-11, dated 28 October 1994, and participating in a PRANG Sponsored athletic event running a ten kilometer race, applicant fractured the left tibia and fibula.

On 24 March 1995, an Informal LOD determination recommended that the injury was LOD.

On 6 July 1995, the approving official approved the LOD determination.

On 8 October 1996, a Medical Evaluation Board (MEB) convened at Wilford Hall Medical Center and recommended referral to an Informal Physical Evaluation Board (IPEB).

On 18 November 1996, an IPEB convened at Randolph AFB, TX and found the applicant unfit because of physical disability and disability was incurred in LOD. Diagnosis was status post December 1994 left tibio-fibular fracture with resultant non-union requiring revision ORIF with bone graft on October 1995 with residual disuse osteopenia with severe osteoarthritis of ankle and limitation of motion. Compensable percentage of 20 percent and recommendation of discharge with severance pay.

On 3 December 1996, the applicant did not agree with the findings and recommendation of the PEB informal hearing and demanded a formal hearing.

On 19 December 1996, a Formal Physical Evaluation Board (FPEB) convened at [REDACTED] AFB, [REDACTED] and found the applicant unfit because of physical disability and disability was incurred in LOD. Diagnosis was status post December 1994 left tibio-fibular fracture with resultant non-union requiring revision ORIF with bone graft on Oct 95 with residual disuse osteopenia with severe

osteoarthritis of ankle and limitation of motion. Compensable percentage of 20 percent and recommendation of discharge with severance pay.

On 19 December 1996, the applicant was notified of the recommended findings of the Formal PEB. He was informed to submit his reply/rebuttal to be received by 9 January 1997.

On 3 January 1997, the applicant requested a 30-day extension to obtain proper legal assistance since he didn't have legal assistance in [REDACTED]

On 3 January 1997, his extension request was approved in part with his rebuttal to be received by the USAF Formal PEB/DPPDF office not later than 16 January 1997.

On 22 January 1997, the Secretary of the Air Force directed that applicant be separated from active service for physical disability under the provision of 10 USC 1203, with severance pay.

On 29 January 1997, the applicant was notified that officials within the office of the Secretary of the Air Force determined that he was physically unfit for continued military service and directed he be discharged from the service with entitlement to severance pay. However, since he had over 20 years of satisfactory service, he could elect to be transferred to the Inactive Status List, Reserve Section, in lieu of being discharged with severance pay. His election had a suspense date of 28 February 1997. Applicant failed to respond to the request.

From 5 January 1997 until 21 February 1997 the applicant was treated and hospitalized at the VA Medical Center for severe depression disorder.

On 27 February 1997, HQ PRANG notified HQ AFPC/DPPDS that a new LOD would be performed for a condition recently developed. Applicant would remain in active service until adjudication of LOD.

On 11 March 1997, HQ PRANG was notified by message that since the SAF memorandum had been signed, any request for a special review was inappropriate or unauthorized and only in the most unusual circumstances would a change in medical documentation justify any medical hold action and a new MEB convened.

Applicant was discharged on 25 April 1997, in the grade of staff sergeant with a honorable discharge, under the provisions of AFI 36-3212 (Disability, Severance Pay). He had 22 years, 11 months, and 11 days of satisfactory service and received \$26,790.40 in severance pay.

On 30 April 1997, an informal LOD determination recommended LOD. On 3 September 1997, the approving authority disapproved the LOD.

On 5 November 1997, the VA evaluated applicant's disability as: Residuals left tibia and fibula fractures at 30 percent, Osteoarthritis of left ankle at 10 percent, and major depression at 10 percent, with a combined rating of 40 percent.

On 5 March 1998, the VA reevaluated applicant's disabilities as: Residuals left tibia and fibula fractures is continued at 30 percent, Osteoarthritis of left ankle is continued at 10 percent, and major depression is continued at 10 percent, and service connection for lumbar Myositis, left L5-S1 radiculopathy, central Herniated Nucleous Pulposus, degenerative joint disease is granted at 20 percent effective 20 November 1997, with a combined evaluation of 60 percent.

AIR FORCE EVALUATION:

The Chief, Physical Disability Division, AFPC/DPPD, also reviewed this application and states that on 19 December 1996, with the assistance of legal counsel, the applicant presented his case before the FPEB at Lackland AFB. The Board agreed with the findings of the IPEB, found him unfit for continued military service, and recommended his disability discharge with a 20 percent disability rating. Again, the member did not concur with the findings and advised the Board that he wanted to submit a written rebuttal to the Air Force Personnel Council. His rebuttal was suspended for 9 January 1997. He was afforded three weeks to provide his rebuttal (an additional week beyond the normal suspense). On 3 January 1997, the member requested an additional 30 days extension stating he needed the extra time because he did not have any legal assistance in Puerto Rico. The FPEB approved the request in part, extending the suspense date to 16 January 1997. The memorandum reemphasized the need for the member to contact his military counsel at the FPEB, if appropriate, for assistance in preparation of his rebuttal and included the counsel's phone and datafax numbers. Applicant did not provide a rebuttal by the suspense date and the disability case was forwarded for review and finalization in accordance with disability policy. On 22 January 1997, officials in the Office of the Secretary of the Air Force approved the findings of the

previous two boards and directed the applicant's discharge with severance pay and a 20 percent disability rating. On 29 January 1997, because the applicant was a member of the Reserves with over 20 years satisfactory service, he was offered an option to be transferred to the Inactive Status List, Reserve Section or be discharged with severance pay. The HQ AFPC/DPPDS memorandum included a suspense date of 28 February 1997 to respond with his election. Again the member failed to respond to the request. After several unsuccessful attempts to contact the member, which included contact through the ANGRC and the AGR unit in Puerto Rico, appropriate action was initiated on 26 March 1997 to discharge member with severance pay in accordance with the Secretarial determination. Discharge was effective 25 April 1997. A thorough review of the case establishes the applicant was properly found unfit for military duty and awarded an appropriate rating for his disability at the time of his discharge. Further, he was afforded all rights to which he was entitled under disability law and policy. They recommend denial of applicant's request. The applicant has not submitted any material or documentation to show that he was inappropriately found unfit, rated, or separated by reason of physical disability.

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

The Chief, Utilization, ANG/MPPU, reviewed this application and states that after a thorough review of the case and the circumstances surrounding the applicant, they recommend he be afforded the opportunity to select transfer to the Retired Reserve List. New information regarding the mental state of the applicant at the time of selection (i.e., severance pay with 20 percent disability or transfer to the Retired Reserve list) compels them to recommend relief. Although the applicant had an opportunity to respond to the FPEB, the applicant's mental state, inability to contact and hire a Spanish/English legal counselor, and physical handicap hindered the applicant to the point of indecision. The Air Force Personnel Center (AFPC) will not entertain a rebuttal to the FPEB findings since the case has been finalized by the Secretary of the Air Force. Furthermore, disability processing for the applicant's depression would not have been authorized even if the LOD in question had been received prior to his discharge. Therefore, due to the physical, emotional, and mental state of the applicant at the time of selection, they recommend the applicant be afforded an opportunity to select transfer to the Retired Reserve list awaiting retired pay at age 60, in lieu of discharge with severance and 20 percent disability. The applicant has informed the ANG HQS the severance pay check for \$26,790.40 has not been cashed, and the monies will be returned upon favorable determination by the Board.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant's counsel reviewed the advisory opinions and states that he is pleased to find out the ANG had recommended relief to the AFBCMR in regards to applicant's request that he be allowed to select transfer to the Retired Reserve List (vs. Discharge and severance pay). The applicant has not cashed his severance pay check. Please be informed that the applicant will deliver said check when and as directed; and that he will likewise sign, this Board permitting, whichever documents are necessary to effect his transfer to the Retired Reserve List.

Counsel further states, in regards to applicant's other request that he be allowed to reply/rebut the 20 percent disability rating granted by the PEB, he insists that relief is both, deserving and well-founded. Not only is the medical evidence overwhelming but the same arguments which could not be denied by LTC U--- in her 4 February 1998 advisory opinion supports applicant's request. As to the advisory opinions' - unexplained - insistence that "disability processing for the applicant's depression would not have been authorized even if the LOD in question had been received prior to the discharge," they state the following: (1) The allegation that disability processing for depression would not have been authorized cannot be considered by the Board. Basic due process demands that if an advisory opinion is going to convey to the AFBCMR the impression that there is a legal impediment for certain requested remedy, the basis in Law for the alleged, impediment must be properly cited. (2) Should the Board decide that the applicant be allowed to retire, as the advisory opinion now recommends, there is no impediment that a disability rating be reviewed and updated in the future as circumstances may require. (3) The VA decision increases applicant's combined disability without increasing his emotion condition percentage. In other words, solid evidence demonstrates that the applicant's disability should be increased by the Air Force even if it does not reconsider depression-related conditions. It is thus respectfully requested that the applicant be allowed to elect transfer to the Retired Reserve and that either his disability rating be increased to one of not **less** than 30 percent or he be allowed to have his reply/rebuttal considered by a PEB.

Applicant's complete response is attached at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Chief, Aerospace Medicine, Office of the Air Surgeon, ANG/SGP, reviewed this application and states that in response to counsel's inquiry, the applicant's chronic undifferentiated schizophrenia with depressive symptoms was a condition that the preponderance of medical evidence suggests existed prior to the

member's entry into a period of active duty in January 1997. His depression was not described as reactive, nor is schizophrenia a form of mental illness that is specifically triggered by external events. Therefore, applicant's mental condition was not specifically aggravated by the specific demands of military service - a requirement for a condition to be called "service aggravation." The tendency to schizophrenia frequently is inherited. His condition, diagnosed as chronic undifferentiated schizophrenia, supports a lengthy incubation period longer than his period of service. Chronic illnesses or diseases which are presumed to have existed prior to service (EPTS) have an incubation period that rule out a finding that they started during inactive duty training, active duty training, or tours of active duty. While his schizophrenia was rendered temporarily symptomatic while in a duty status, his chronic and underlying condition predated his orders. Therefore, his schizophrenia and depression are not compensable IAW Department of Defense Instruction 1332.38, Physical Disability Evaluation. While they fully endorse the disability compensation for his left tibia and fibular fractures, they have determined his chronic undifferentiated schizophrenia to have EPTS and not to have occurred in the line of duty.

A complete copy of their evaluation is attached at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

The applicant's counsel reviewed the advisory opinion and states that he briefly disputes the USAF's position that the applicant's emotional condition is not service-related. He complained in his previous letter that such a position was not supported by the record. The USAF now pretends to cure this shortcoming with a self-serving statement to the effect that his client's condition pre-existed entry into active duty. There is no evidence to support this statement. Although the USAF makes reference to the "preponderance of medical evidence," none is cited to contradict the Department of Veterans Affairs (DVA's) 22 October 1997 conclusion to the effect that "Service connection for major depression has been established as directly related to military service." The Board cannot neglect the uncontradicted medical evidence in the record. Speculatory remarks cannot suffice to defeat solid unbiased medical evidence. Absent expert testimony to the contrary, DVA's conclusion stands unchallenged, and the applicant's disability compensation must be adjusted accordingly. He respectfully requests the Board to dismiss the USAF's objections to the requested increase in disability rating. There is in the record a medical conclusion to the contrary proffered by physicians also trained and paid by the United States. It must be assumed that they are cognizant of the same medical theories advanced by the Air Force. And it must be accepted that they chose to disregard them as inapplicable in the applicant's case. The Government cannot go against its own acts-. Due

process requires that any decision by the Board be supported by the evidence on record. The record in this case mandates an upward adjustment in the applicant's disability compensation given his service-connected emotional condition.

Applicant's complete response is attached at Exhibit H.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting correcting the applicant's record to show he **was** transferred to the Retired Reserve List and not discharged from the PRANG for physical disability with severance pay. The Board notes that the applicant was hospitalized during the period he had the option to make the selection to be transferred to the Inactive Status List, Reserve Section or be discharged with severance pay. In addition, the applicant states that had he been able to make his selection, he would have elected to be transferred to the Inactive Status List, Reserve Section. The Air Force states that new information regarding the mental state of the applicant at the time of selection compels them to recommend relief. The Board also notes that the applicant states he has not cashed the severance pay check and the monies will be returned to the Air Force upon favorable determination by the Board on this portion of his requests. Therefore, we recommend the applicant's records be corrected to the extent indicated below.
4. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting he be allowed to reply/rebut the 20% disability rating granted by the PEB. After reviewing the evidence of record, the Board notes that the applicant did not agree with the findings and recommendations of the Formal Physical Evaluation Board (FPEB) on 19 December 1996. He was afforded three weeks to provide a rebuttal to the FPEB. The suspense date was 9 January 1997. On 3 January 1997, the applicant requested an additional 30 days extension and the request was approved in part, extending the suspense date to 16 January 1997. It was reemphasized to the applicant the need for him to contact his military counsel at the FPEB for assistance in preparation of his rebuttal and the counsel's phone and datafax numbers were included for his convenience. However, the Board notes that the applicant did not provide a rebuttal by the suspense date and on 22 January 1997, officials in the Office of the Secretary of the Air Force approved the findings of the previous two boards and directed his

discharge with severance pay and a 20 percent disability rating. Once the Secretary of the Air Force has finalized the findings of the FPEB, the determinations made are final. In regard to the applicant's request for an explanation as to why the Line of Duty (LOD) investigation report entered by the PRANG for an emotional condition suffered while on active duty was denied, the Board notes that the Air Force states that disability processing for the applicant's depression existed prior to service and would not have been authorized even if the LOD in question had been received prior to the discharge. In regard to applicant's request that his disability rating be increased to one of not less than 30%, the Board is of the opinion that the applicant was afforded all rights he was entitled under the disability law and departmental policy. We note that applicant was rated based on his condition at the time of his disability evaluation. The Air Force is required to rate disabilities in accordance with the VA Schedule for Rating Disabilities while the VA operates under a totally separate system with a different statutory basis. In this respect, we note that the VA rates for any and all service connected conditions, to the degree they interfere with future employability, without consideration of fitness. Whereas the Air Force rates a member's disability at the time of separation. In view of the above findings, we do not recommend favorable action on this portion of his application.

5. 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 issue(s) involved. Therefore, the request for a hearing is not favorably considered.

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 25 April 1997, he was not honorably discharged from the [REDACTED] Air National Guard under AFI 36-3212 (Disability, Severance Pay).

b. On 24 April 1997, his retirement from the [REDACTED] Air National Guard under the provisions of AFI 36-3212 and transfer to the Retired Reserve List effective 25 April 1997, were approved by competent authority.

The following members of the Board considered this application in Executive Session on 27 August 1998 and 27 October 1998, under the provisions of AFI 36-2603:

Mr. David W. Mulgrew, Panel Chairman
Mr. Jackson A. Hauslein, Member
Mr. Terry A. Yonkers, Member
Ms. Gloria J. Williams, Examiner (without vote)

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

- Exhibit A. DD Form 149, dated 28 May 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPPD, dated 7 Jan 98.
- Exhibit D. Letter, ANG/MPPU, dated 4 Feb 98.
- Exhibit E. Applicant's and Counsel's Responses, dated 20 Jan 98, w/atchs, 26 Feb 98, and 3 Jul 98, w/atchs.
- Exhibit F. Letter, ANG/SGP, dated 15 September 1998.
- Exhibit G. Letters, AFBCMR, dated 2 February 1998, 22 June 1998, and 7 September 1998.
- Exhibit H. Counsel's Response, dated 11 October 1998, w/atchs.


DAVID W. MULGREW
DAVID W. MULGREW
Panel Chairman



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

DEC 08 1998

AFBCMR 97-01550

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 25 April 1997, he was not honorably discharged from the [REDACTED] Air National Guard under AFI 36-3212 (Disability, Severance Pay).

b. On 24 April 1997, his retirement from the Puerto Rico Air National Guard under the provisions of AFI 36-3212 and transfer to the Retired Reserve List effective 25 April 1997, were approved by competent authority.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency