

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-01731

AUG 06 1998

COUNSEL: NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His disability rating be increased from 40% to 100%.

APPLICANT CONTENDS THAT:

The degenerative polyneuropathy of unknown etiology was not rated. It is now known to be from Agent Orange exposure.

Applicant's request and documentation associated with his retirement for disability, and subsequent ratings by the Department of Veterans Affairs (DVA), are at Exhibit A.

STATEMENT OF FACTS:

Applicant served on active duty in the Regular Air Force during the period 10 January 1964 to 9 January 1968. He was honorably released from active duty on 9 January 1968 and transferred to the Air Force Reserve. He was discharged from the Air Force Reserve on 9 January 1970. At the time of his release from active duty, he was credited with four years of active duty service.

He was in civilian status during the period 10 January 1970 through 30 April 1976.

On 1 May 1976, he enlisted in the Air National Guard (ANG), State of [REDACTED] (ANG). He had continuous participation in the [REDACTED] ANG until 7 October 1986, when he was honorably discharged from the ANG and as a Reserve of the Air Force. On 8 October 1986, he enlisted in the ANG, State of [REDACTED] (ANG). He was honorably discharged from the [REDACTED] ANG on 19 February 1988 and transferred to the Air Force Reserve. On 28 June 1988, he was transferred from the Air Force Reserve to the [REDACTED] ANG. Effective 18 January 1989, he was honorably discharged from the [REDACTED] ANG and transferred to the Air Force Reserve.

A chronology of the events surrounding the applicant's disability separation follows:

On 28 June 1992, a Medical Evaluation Board (MEB) established the diagnoses of: (1) Cervical spondylosis with radicular symptoms in right arm; (2) Degenerative polyneuropathy of unknown etiology; Non-insulin diabetes mellitus; and (4) History of mild neck trauma. The MEB referred the case to the Physical Evaluation Board (PEB).

The Informal PEB (IPEB) convened on 13 August 1992 and found the diagnosis of cervical spondylosis with radicular symptoms in the right (major) arm, associated with degenerative polyneuropathy of unknown etiology, with history of mild neck pain. Other diagnoses considered but not ratable: Non-insulin dependent diabetes mellitus. The IPEB noted that the applicant's condition rendered him unfit to fulfill the demands of military service; however, his condition was not sufficiently stable to warrant recommending final disposition at that time, and that surgery might be required if the conservative therapy did not improve his condition. The IPEB recommended a period of further treatment and evaluation and recommended applicant's name be placed on the Temporary Disability Retired List (TDRL), with a 40% compensable disability rating.

On 3 September 1992, applicant agreed with the findings and recommended disposition of the PEB. He was relieved from his organization and base of assignment on 11 September 1992, and his name was placed on the TDRL in the retired grade of technical sergeant, with a compensable disability rating of 40%. At that time, he was credited with 6 years, 10 months, and 1 day of active service for retirement, and 22 years, 5 months, and 1 day of service for basic pay.

On 2 June 1994, following applicant's TDRL reexamination, the IPEB found the diagnosis of cervical spondylosis with diminished deep tendon reflexes in right (major) upper extremity with variable weakness. Other diagnosis considered but not ratable: Type II Diabetes Mellitus with peripheral sensory/motor neuropathy. The IPEB found that the applicant was unfit because of physical disability and that the degree of impairment was permanent, and recommended permanent retirement, with a 40% compensable rating.

On 30 June 1994, applicant concurred with the recommended findings of the IPEB. On 6 July 1994, the Secretary of the Air Force directed that his name be removed from the TDRL. Effective 16 July 1994, the applicant's name was removed from the TDRL and he was retired in the grade of technical sergeant, with a compensable disability rating of 40%.

The DVA rating of 13 September 1994, diagnosed applicant's conditions as service-connected for cervical spondylosis with radicular symptoms, right arm, 20% from 25 January 1992; S/P medial meniscectomy, left knee for lateral meniscus tear, 10% from 25 January 1992; and diabetes mellitus, 10% from 25 January 1992. He was denied service-connection for trauma, left big toe; rotator cuff strain, right shoulder; bilateral sensorineural hearing loss; tinnitus; mild obstructive disease of the small airways; and rash on neck.

The DVA rating of 25 April 1997, continued the service-connected ratings for cervical spondylosis with radicular symptoms, right arm, at 20% from 25 January 1992, and status post medial meniscectomy left knee for lateral meniscus tear, at 10% from 25 January 1992. They diagnosed his conditions as service-connected for diabetes mellitus with anal pruritis, 20% from 8 February 1996; sensory neuropathy, right (major) upper extremity, 10% from 11 June 1993; sensory neuropathy, left (minor) upper extremity, 10% from 11 June 1993; sensory neuropathy, right lower extremity, 10% from 11 June 1993; sensory neuropathy, left lower extremity, 10% from 11 June 1993; for a combined rating of 60%. He was denied service-connection for the diagnoses of left great toe trauma; right shoulder rotator cuff strain, bilateral hearing loss, tinnitus, mild obstructive small airway disease, and post traumatic stress disorder.

AIR FORCE EVALUATION:

The Physical Disability Division, AFPC/DPPD, reviewed this application and recommended denial, stating the applicant has not submitted any material or documentation to show he was improperly rated at the time of his removal from the TDRL and permanent retirement by reason of physical disability.

DPPD noted applicant's claims that since the DVA has recently added Degenerative Polyneuropathy (a condition noted in the applicant's TDRL reevaluation medical summary as well as earlier entries) to its list of conditions that it will consider "presumed to be" caused by exposure to Agent Orange, that his compensable percentage for disability for which he was retired from the Air Force should be increased.

The Air Force and DVA disability systems operate under separate laws. Under the Air Force system (Title 10, USC), PEBs must determine if a member's medical condition renders the member unfit for duty. The fact that a person may have a medical condition does not mean that the condition is unfitting for continued military service. If the board renders a finding of unfit, the law provides compensation for those members whose career is cut short due to a service incurred or service-aggravated physical disability. Under the DVA system (Title 38, USC), the law provides for compensation for members based on the average impairment in earning capacity resulting from service connected diseases and/or injuries. As such, the VA over a period of years, may require reratings in accordance with a member's current physical condition. Although the two agencies use the same rating schedule, the military only rates those conditions which make a person unfit for continued military service while the DVA rates medical conditions connected to the member's military service.

At the time of his disability processing, applicant's degenerative polyneuropathy was associated with his cervical spondylosis, but not separately rated. His condition is a degenerative one, and as such has worsened, as noted in his DVA examination of 26 April 1996. As previously stated, the Air Force rates disabilities only at the time of disability processing and final disposition. The medical documentation in the case file suggests he was properly rated 40% disabled at the time of his TDRL reevaluation and permanent retirement from the service.

The complete evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

At the time of his removal from the TDRL and permanent retirement for disability, he was not knowledgeable about his medical condition enough to make a proper or informed judgment in what was being offered to him. He was not in a position physically or mentally to comprehend all that was going on.

Under separate cover, applicant provided additional DVA documents and documentation pertaining to a hearing for Social Security disability insurance benefits.

Applicant's responses, with attachments, are at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The BCMR Medical Consultant addressed the final disposition of applicant's case by action of the PEB on 2 June 1994, following a 20-month period of observation on the TDRL.

At the time of final military disposition in 1994, there was no evidence available indicating an association between Agent Orange and development of nervous system disorders. The applicant had known diabetes mellitus (DM), a condition that is frequently associated with development of peripheral neuropathies (although the time sequence from discovery of his DM made this association unlikely) and he also had known degenerative disk disease of his cervical spine which, too, could give peripheral nerve symptoms such as he was experiencing. With no evidence of a connection between his problem and his prior exposure to Agent Orange at the time of his final disposition, inference of such a connection would not have been appropriate or legitimate. The applicant, himself, provides information dating to 1996, two years after his PEB decision, that Agent Orange was then considered a possible source of such neuropathies and that nerve problems, if they developed, then might be considered a result of exposure to this defoliant.

Once an individual has been declared unfit, the Service Secretaries are required by law to rate the condition based upon the degree of disability at *the time of permanent disposition* and not on future events. However, Title 38, USC, authorizes the DVA to increase or decrease compensation ratings based upon the individual's condition at the time of future evaluations. The DVA is the agency that is tasked to reevaluate an individual's status with the 'passage of time, and appropriate adjustments can be made depending on changing circumstances. There is no evidence the applicant was improperly rated or that all available information was not utilized in making the final disability decision in 1994.

The complete evaluation is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

A copy of the additional Air Force evaluation was forwarded to the applicant on 16 April 1998 for review and comment. As of this date, no response has been received by this office.

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. We took notice of the applicant's complete submission in judging the merits of the case, including the subsequent medical evaluations and opinions provided in his behalf. However, we do not find these documents sufficiently persuasive to override the rationale expressed by the Air Force offices of primary responsibility. We therefore agree with the findings of the offices of primary responsibility and adopt their rationale as the basis for our conclusion that the applicant has failed to show that his rights to due process were violated during the disability processing, that he was improperly evaluated, or that the ratings assigned at the time of his removal from the TDRL were erroneous. In view of the foregoing, and absent evidence to the contrary, we find no basis upon which to favorably consider applicant's request
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 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 21 July 1998, under the provisions of AFI 36-2603:

Mr. David W. Mulgrew, Panel Chair
Mr. Joseph G. Diamond, Member
Mr. Terry A. Yonkers, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 21 Jun 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPPD, dated 13 Dec 96.
- Exhibit D. Letter, SAF/MIBR, dated 30 Dec 96.
- Exhibit E. Letters, Applicant, dated 5 Jan 97, w/atchs, and 10 Mar 97, w/atchs.
- Exhibit F. Letter, BCMR Medical Consultant, dated 15 Apr 98.
- Exhibit G. Letter, AFBCMR, dated 16 Apr 98.



DAVID W. MULGREW
Panel Chair