

JUL 27 1996

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-03264

[REDACTED]
[REDACTED]
COUNSEL: None

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

The Existed Prior To Service (EPTS) designation the Informal Physical Evaluation Board (IPEB) gave her condition be removed and "show [her] allegations as stated in [her] letters of 28 May 96 and 20 Jun 96 as Age Discrimination and Harassment, not 'Insensitivity of your Commander.'"

APPLICANT CONTENDS THAT:

She experienced many injustices while seeking appropriate medical care and during the evaluation board processes as indicated in her 28 May and 20 June 1996 letters. *[Applicant did not provide copies of the two letters in question, only a copy of a letter from the Chief of Staff which refers to her 28 May 1996 letter--- See Exhibit A.]* The Inspector General and the Chief of Staff whitewashed and covered up the wrongs done her. Her legal counsel at [REDACTED] AFB advised her that the Formal PEB (FPEB) she requested would possibly take one of three actions. She wanted to stay in the Air Force and have her teeth fixed but, based on what her counsel told her, felt she had no choice but to take what she was given by the IPEB. She asserts that if this matter is "not satisfactorily resolved," she will file suit in Federal Court for age discrimination, harassment, and whitewashing by the Air Force.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

During the period in question, applicant was 51 years old and a captain (Date of Rank: 30 Nov 92) assigned as an Assistant Nurse Manager, Mental Health, with the 96 Medical Operations Squadron at [REDACTED] AFB, [REDACTED]. In her Letter of Exception regarding the 15 February 1996 Medical Evaluation Board (MEB) evaluation, she raises contentions of age discrimination and states she wanted proper medical treatment; i.e., at the Mayo Clinic, not an MEB. Applicant was honorably discharged on 27 August 1996 for

disability at 20% with severance pay. She had 4 years, 10 months and 14 days of active service. She has a 50% disability rating from the Department of Veterans Affairs based on their 31 January 1997 determination.

The remaining relevant facts pertaining to this application, extracted from the applicant's military records, 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 AFBCMR Medical Consultant reviewed the appeal and states that the IPEB was correct in determining that applicant's bony atrophy-- was an EPTS condition as she had required surgical attempts to prevent further problems shortly after her arrival at her first duty station at [REDACTED] Medical Center ([REDACTED] C). Findings and recommendations for the IPEB were initially non-concurred by applicant who later withdrew her request for FPEB review and accepted separation with severance payment and a 20% disability rating. There is no evidence to support a higher rating at the time of [discharge]. Action and medical disposition in this case are proper and reflect compliance with Air Force directives which implement the law. No change in the record is warranted.

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

The Chief, Physical Disability Division, HQ AFPC/DPPD, also evaluated this case and indicates that certain physical defects or conditions, when found, require the conclusion that they must have existed before entry into military service and are referred to as EPTS. EPTS conditions include those which by their very nature (e.g., cause, time of origin, etc.) must have existed before the member's military service began. Other conditions may also be deemed EPTS if they were documented--by competent medical or dental sources before entry into service. A PEB will determine whether a physical defect or condition existed before entry into service, and the degree of service aggravation (if any) for each EPTS condition. Under the provisions of military disability law and policy, only the permanent aggravation caused by the member's service may be compensated, not the degree of natural progression which would have reasonably occurred in or out of uniform. The author concurs with the AFBCMR Medical Consultant's recommendations. No errors or irregularities were found, the case was appropriately processed and rated, and the applicant was afforded all rights to which entitled. Denial is recommended.

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

The Staff Judge Advocate, HQ AFPC/JA, also reviewed the appeal and indicates that while applicant has made allegations regarding age discrimination and harassment, she has not requested any correction of records or sought any particular relief in this regard (See Advisory Footnote 1). Accordingly, the author has not addressed these matters. Based on the author's review, the applicant's FPEB counsel rendered a very realistic opinion assessing her future in the Air Force. If her counsel had left her with a more optimistic impression, he would have been remiss in his obligations of candor to his client. Even if her counsel had somehow been in error or negligent in his legal advice, there would be no grounds for correction because "erroneous advice given by a government agent to a benefits claimant could not estop the government from denying benefits." Further, the relief sought by applicant simply does not flow from the errors/injustices she alleges. Nowhere does she make any connection between the purported errors ("whitewash," "cover-up," improper transfer, improper advice from her counsel) and her requested remedy. She says nothing now---similar to her pre-commissioning medical history---about her dental and jaw conditions (and the extent to which it existed prior to her entry into service) yet she seeks to eliminate the EPTS assessment. In connection with this silence, the author cites the equitable "clean hands" doctrine since the apparent basis for this application is equitable in nature. Under this doctrine, equitable relief will not be granted to a party who seeks to set judicial machinery in motion and obtain some remedy if such party in her prior conduct has not been fair, equitable, and completely honest as to the particular controversy in issue. Because of this silence, her complete honesty---in her application, now, and in her medical history, earlier---is seriously suspect. The author can only conclude that the applicant is silent on her preexisting jaw/dental condition because her prior medical history is extensive and disclosure of such history would not be helpful to her case. He is not sure applicant has ever completely disclosed the extent of her pre-service dental history. While she states she had no choice but to take what she had been given by the IPEB, the statement she signed [waiving her---earlier election for an FPEB] was legally effective and is a very good indication that she knew her right to have her case heard by the FPEB and intentionally relinquished it. **An** even better indication is the application she filed seeking relief from the AFBCMR. Based on the notes she took when consulting with her appointed counsel, she articulated the three possible actions the FPEB could take. She elected the option most favorable to her. While the author does not go so far as to suggest the AFBCMR reconsider the merits of the PEB with a view of increasing the EPTS percentages [**which would reduce applicant's 20% disability rating and be an adverse correction**], he emphatically suggests that this claimant has not met her difficult burden of overcoming the strong presumption that the PEB administrators discharged their duties correctly, lawfully and in good faith. Because she effectively waived her rights to an FPEB hearing based upon competent legal advice,

because she has not shown the PEB assessment to be arbitrary or capricious, and because the relief sought has no relation to the errors/injustices alleged, denial is recommended.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Complete copies of the Air Force evaluations were forwarded to the applicant on 29 December 1997 and 15 January 1998 for review and comment within 30 days. 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. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that her records should be changed. Applicant's contentions are duly noted; however, we do not find these uncorroborated assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. Applicant has provided no persuasive evidence that her medical condition was improperly rated and processed or that she was a victim of age discrimination and harassment. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain her burden that she has 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
4. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without legal counsel, would not have materially added to that understanding. 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 23 June 1998, under the provisions of AFI 36-2603:

Mr. Wayne R. Gracie, Panel Chair
Mr. Dana J. Gilmour, Member
Mr. Allen Beckett, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 29 Oct 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFBCMR Medical Consultant, dated 3 Jun 97.
- Exhibit D. Letter, HQ AFPC/DPPD, dated 19 Aug 97.
- Exhibit E. Letter, HQ AFPC/JA, dated 10 Dec 97.
- Exhibit F. Letters, AFBCMR, dated 29 Dec 97 & 15 Jan 98.

Wayne R. Gracie
WAYNE R. GRACIE
Panel Chair