



THE AIR FORCE BOARD FOR THE CORRECTION OF MILITARY RECORDS

CAPT.

PETITIONER

BRIEF FOR PETITIONER

MAY 4, 2017

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APPLICATION FOR RELIEF

Capt. USAF retired, respectfully petitions the Air Force Board for Correction of Military Records (“the Board”) to increase his 50% disability retirement based on physical disability alone to 100% disability retroactive to 1978 based on physical and psychological disabilities. Capt. [REDACTED] seeks de novo review of his case based on Defense Secretary Chuck Hagel’s September 3, 2014 guidance, Acting Defense Secretary Brad Carson’s February 24, 2016 guidance, and the newly promulgated National Defense Authorization Act for Fiscal Year 2017.

INTRODUCTION

Capt. [REDACTED] loved being a U.S. Air Force Pilot. After a decade of service, including four combat tours with missions in support of the Vietnam War in 1971, 1972, and 1973, the career he loved was cut short in a horrific military plane crash. On September 26, 1976, Capt. [REDACTED] along with 19 of his fellow airmen, flew on a KC135 Tanker airplane. The tanker fell from an altitude of 15,200 feet, caught fire, and exploded. As it crashed to the ground, it disintegrated, both wings were ripped off and the tail shattered as it collided with the surrounding trees. Capt. [REDACTED] witnessed the death of 15 of his colleagues and watched as his own body began to melt in the subsequent fire. Miraculously, once his seatbelt disintegrated in the fire, Capt. [REDACTED] was able to crawl out of the tanker before it exploded. He was one of only five survivors.

In 1977, medical science did not understand Post Traumatic Stress Disorder (PTSD). The debilitating physical burns Capt. [REDACTED] sustained on over 25% of his body were obvious, the equally debilitating mental trauma of thinking he would die, seeing his fellow airmen die, and surviving but with the tremendous loss of his former skills both professionally and socially, were not as obvious. In fact, although the military physicians who examined Capt. [REDACTED] urged the U.S. Air Force to conduct a psychological exam as part of the Physical Evaluation Board (PEB) and the Temporary Disability Retirement List (TDRL) process, and despite a Department of Defense regulation mandating such an exam, the U.S. Air Force did not even administer a single psychological assessment before determining his level of disability retirement.

Today, anyone facing a PEB who had endured even a fraction of the trauma Capt. [REDACTED] survived would receive a full psychological examination as part of the disability determination process. Given what the scientific community now knows about PTSD, Capt. [REDACTED] current struggles with PTSD, and the results from Dr. [REDACTED] [REDACTED] evaluation, the only psychological exam to assess his level of PTSD at the time of the PEB, it is clear that Capt. [REDACTED] level of PTSD in 1978 prevented him from being able to continue to perform his duties as an Air Force Officer. Thus, had Capt. [REDACTED] received a thorough psychological examination with today's understanding of PTSD, he would have been granted 100% disability based on both his physical and mental disabilities in 1978.

For almost four decades, Capt. [REDACTED] has suffered from PTSD relating to the horrific crash which ended his career. This suffering has never been fully acknowledged or compensated by the U.S. Air Force. We respectfully ask this Board to correct this error and injustice and grant Capt. [REDACTED] the 100% disability rating he deserves.

FACTS AND PROCEEDINGS

Capt. [REDACTED] is a highly decorated United States Air Force Veteran who served his country honorably for over ten years, including piloting 157 missions in support of the Vietnam War. Unfortunately, Capt. [REDACTED] Air Force career was cut short by a tragic plane crash in 1976 which left him too physically and mentally disabled to continue to serve as an Air Force pilot. In 1978, a USAF Physical Evaluation Board found Capt. [REDACTED] to be 50% disabled based only on his physical wounds.

I. Capt. [REDACTED] Proudly Served in the U.S. Military for over a Decade

Capt. [REDACTED] began his military career in the Army Reserves from 1966-1968.¹ In 1969, he joined the Air Force to become a pilot.² Between 1971 and 1973, he flew 157 missions in support of the Vietnam War out of Guam and Thailand.³ On these missions, he encountered heavy SAM fire, MiGs (Russian fighter aircrafts), AAA (Anti Aircraft Artillery), and saw many of his fellow pilots shot down.⁴

In November of 1973, Capt. [REDACTED] was sent back to the United States where he was stationed in Massachusetts and then Michigan.⁵ By this time, Capt. [REDACTED] was an accomplished pilot and was made a flight instructor, chief of training and an evaluator pilot.⁶

¹Military Records, Exh. A, Attach. 1, Army Reserves Records.

² Military Records, Exh. A, Attach. 3, Air Force Officer Military Record.

³ *Id.*; [REDACTED] Ph.D., Psychological Evaluation (Apr. 15, 2016), Exh. B, p. 2. [hereinafter "Dr. [REDACTED] Evaluation"]

⁴ Dr. [REDACTED] Evaluation, Exh. B, p. 2

⁵ *Id.*

⁶ *Id.*

II. While on Duty, Capt. [REDACTED] Survived a Horrific Plane Crash

On September 26, 1976, Capt. [REDACTED] was a passenger along with 19 of his fellow airmen en route to a Strategic Air Command leadership session in Omaha, Nebraska.⁷ The plane crashed from 15,200 feet killing ten passengers and all five crew members; Capt. [REDACTED] was one of the five survivors.⁸ Capt. [REDACTED] has vivid memories of the crash: the feeling of free-falling from the sky and hitting trees; the internal wires falling and combusting; the plane hitting the ground, spinning violently and breaking apart.⁹ He also remembers getting doused with jet fuel and catching fire along with his fellow passengers:

[they] were screaming and writhing in the flames, being burned beyond recognition. It was like they were melting. I tried to get out of my seatbelt but it had melted together so I couldn't get out. I could see the skin on my hands burn off, revealing the flesh, it was like my skin was rolling up my arms. I assumed this was the end.¹⁰

The flames burnt through his seatbelt, and Capt. [REDACTED] managed to escape along with four others through a crack in the fuselage.¹¹ Shortly after breaking free, the plane blew up with the rest of the 15 passengers in it. Freezing, in 38 degree temperatures, nearly naked, and with open burn wounds, one of the survivors built a camp fire in the hopes of being rescued.¹² After about four hours, firefighters found Capt. [REDACTED] and the other survivors.¹³ Even for trained first responders, the sight of the crash alone was traumatizing, as a firefighter of two years told a local reporter, "I was in a daze myself. I'd never seen anything like this.... All there was was wreckage. It was just indescribable. You couldn't tell it was an aircraft."¹⁴ After being treated for shock, the survivors were medevacked to Alpena General, a local hospital.¹⁵

⁷ Military Records, Exh. A, Attach. 2, p. 1, USAF Mishap Report on K135 Tanker Crash (Oct. 11, 1976) [hereinafter "Tanker Crash Report"].

⁸ *Id.* at 2.

⁹ Dr. [REDACTED] Evaluation, Exh. B, p. 2.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* See also, *The Alpena News* articles on crash, Exh. C.

¹³ Military Records, Exh. A, Attach. 2, Tanker Crash Report at 2; See also, *The Alpena News*, Exh. C.

¹⁴ *The Alpena News*, Exh. C, p. 5.

¹⁵ *The Alpena News*, Exh. C, p. 3; Military Records, Exh. A, Attach. 2, Tanker Crash Report, p. 2.

III. The Military Plane Crash Rendered Capt. [REDACTED] Physically Unable to Serve

At Alpena General, Capt. [REDACTED] had to be packed in ice because, as one of the doctors at Alpena explained, he was still “cooking”.¹⁶ Capt. [REDACTED] had sustained burns on over 25% of his body, including his torso, hands, arms, face and legs.¹⁷ Because his burns were too severe for Alpena General, he was put on a USAF DC 9 Nightingale and flown to the special burn unit in Brook Army Medical Center (BAMC) at Fort Sam Houston in San Antonio, Texas. Upon arrival at BAMC, he was placed in the “dying room” for three days, because of the severity of his wounds.¹⁸ There were three other men in the “dying room”, all three of them died during Capt. [REDACTED] three days in the room.¹⁹ Finally, Capt. [REDACTED] stabilized enough that the doctors believed he could survive and withstand reconstructive surgery.

Capt. [REDACTED] went through five months of intensive treatment at the BAMC which included multiple surgeries.²⁰ Due to the extent of the damage, the surgeons considered amputating both of his hands.²¹ In the end, they decided to try multiple surgeries on each hand to restore function, these included experimental surgeries in which pig skin and cadaver skin was grafted to his hands.²² In subsequent surgeries, his own skin from his legs and abdomen was used as grafts for his hands, arms, and legs.²³ Surgeons at BAMC also reconstructed his mouth and lips which had burned off.²⁴

On January 13, 1977, the Chief of Plastics Division, Dr. [REDACTED] (Army Colonel), who had overseen Capt. [REDACTED] care at [REDACTED], performed a complete medical exam and found Capt. [REDACTED] “medically unqualified” for continued service in the USAF based on his physical injuries alone.²⁵ Accordingly, on January 20, 1977, a Medical Evaluation Board

¹⁶ Dr. [REDACTED] Evaluation Exh. B, p. 3.

¹⁷ Service Treatment Records and Medical Board Processing, Exh. D, Attach 1, Clinical Record (Sept. 27, 1976) p.1-2; Attach. 2, Report of Medical Examination (Jan. 13, 1977) p. 2; Attach. 3., Medical Board Proceedings (Jan. 20, 1977) p. 1.

¹⁸ Dr. [REDACTED] Evaluation, Exh. B, p. 3.

¹⁹ Interview with Capt. [REDACTED] on Mar. 10, 2017.

²⁰ Post- Service PTSD Treatment Records [hereinafter PTSD Records], Exh. F, Attach. 1, VA Medical Records, pp. 11, 56.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Service Treatment Records and Medical Board Processing, Exh. D, Attach. 2, Report of Medical Examination (Jan. 13, 1977) p. 2

(MEB) determined that Capt. [REDACTED] was “medically unfit” for USAF service based on eight different factors all relating to the Capt. [REDACTED] physical disabilities resulting from his extensive burns.²⁶ The psychological impact on Capt. [REDACTED] from these devastating physical disabilities or from the horrific crash itself was never evaluated or considered as part of the MEB.²⁷

IV. The Military Plane Crash Rendered Capt. [REDACTED] Psychologically Unable to Serve

In addition to the well-documented physical wounds, after the crash Capt. [REDACTED] was also suffering from devastating psychological wounds. Unfortunately for Capt. [REDACTED] the American Psychiatric Association did not recognize Post Traumatic Stress Disorder (PTSD) as a possible diagnosis until 1980.²⁸ However, the records clearly indicate, and the only psychiatric evaluation to address his mental health at the time of the second PEB confirms, that he was exhibiting numerous PTSD symptoms at the time of his medical retirement from the Air Force.²⁹

He became withdrawn, even from his wife, [REDACTED] and two children, [REDACTED] who was three-years-old, and [REDACTED] who was only five-months-old. Because he had to stay at BAMC for five months of reconstructive surgeries, Capt. [REDACTED] was physically separated from his son, who stayed in [REDACTED] Ohio with his maternal grandparents.³⁰ [REDACTED] temporarily moved to San Antonio with [REDACTED] because she was still nursing her, and could not be separated.³¹ From September 1976 until December 1976, Capt. [REDACTED] had no contact with his children, [REDACTED] was in Ohio and even though [REDACTED] was in San Antonio, Capt. [REDACTED] refused to let her see him.³² “The reason why I did not want my daughter to see me at the burn ward was because I knew how bad I looked, and I did not want to scare her – I looked like some gruesome

²⁶ Service Treatment Records and Medical Board Processing, Exh. D, Attach. 3., Medical Board Proceedings (Jan. 20, 1977) p. 1.

²⁷ See Statements and Correspondence, Exh. G, Attach. 1, Affidavit of [REDACTED] [REDACTED] (Mar. 28, 2014) [hereinafter “[REDACTED] Affid.”] pp. 1-3, describing the exams that went into the MEB and PEB determinations.

²⁸ U.S. Dept. of Veteran Affairs, PTSD: National Center for PTSD, <http://www.ptsd.va.gov/professional/PTSD-overview/ptsd-overview.asp> (last visited Feb. 9, 2017).

²⁹ See Dr. [REDACTED] Evaluation, Exh. B.

³⁰ Statements and Correspondence, Exh. G, Attach. 2, Capt. [REDACTED] Emails (Apr. 6, 2017), p. 1.

³¹ *Id.*

³² *Id.*

Halloween mask.”³³ In addition to the psychological strains of physical separations and displacements, the family also was suffering financially:

The trauma to me and to my family is difficult to understand for most people. [REDACTED] had been displaced from her home and was living in rented quarters on Fort Sam Houston - that took money. She had to rent a car to be able to get herself around - that took money. All of her meals had to come from the restaurants around the Army Base. Our dog and two cats had to be kenneled while we were away - that took money. By the end of our ordeal in San Antonio, we had totally depleted our savings account and then had to rely on credit. Neither of us ever asked to have our lives changed this drastically and we were never compensated for the destruction that was forced upon us.³⁴

Although very young, the children did not escape the family turmoil. At Christmas in 1976, [REDACTED] told his grandparents that “my daddy’s burned up and I will never see him again.”³⁵ The grandparents took [REDACTED] to a doctor because he was having psychological problems related to the crash.³⁶ [REDACTED] would stand at the window in his grandparents’ house and stare out at nothing.³⁷ When his grandparents asked him what was wrong, without averting his gaze, the three-year-old would answer, “my daddy’s gone”.³⁸ [REDACTED] doctor suggested that [REDACTED] needed to physically see his father.³⁹ Capt. [REDACTED] was terrified because of what he knew he looked like; he was afraid of scaring him.⁴⁰ When [REDACTED] brought [REDACTED] to visit, Capt. [REDACTED] remembers that [REDACTED] “somehow saw me as he remembered me before the crash. He ran to me and gave me the biggest hug.”⁴¹ “The reunion with [REDACTED] – there in the burn hospital – was full of tears and hugs and kisses. He finally knew that I was still alive.”⁴² The crash still impacts his children, “[t]o this day, [REDACTED] will not talk about the burns and went into tears when [REDACTED] and I had revealed our final wishes to be cremated (he asks me - “Why do you want to burn yourself again ?”).⁴³

³³ *Id.*

³⁴ *Id.*

³⁵ Dr. [REDACTED] Evaluation, Exh. B, p. 3; Statements and Correspondence, Exh. G, Attach. 2, Capt. [REDACTED] Emails (Apr. 6, 2017), p. 1

³⁶ Interview with Capt. [REDACTED] on March 10, 2017.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Statements and Correspondence, Exh. G, Attach. 2, Capt. [REDACTED] Emails (Apr. 6, 2017), p. 2

⁴³ *Id.*

In addition to the physical and mental separation from his family causing psychological strain, the realization that he could no longer do the career he loved, took a huge psychological toll on Capt. [REDACTED]. Even decades later, Capt. [REDACTED] breaks down when remembering hearing that his hands might have to be amputated because he knew that meant he would never fly again.⁴⁴ And because of his PTSD, this loss extended beyond his Air Force career to any career, as his therapist at the [REDACTED] Vet Center explains, “Mr. [REDACTED] life prior to the military was full of hope, promise and expectation. His military life took this away from him.”⁴⁵ Capt. [REDACTED] directly expressed this sense of desperation and his new inability to relate to people at the formal PEB hearing.⁴⁶ During the hearing, Capt. [REDACTED] described in detail to the PEB board not being able to function in any jobs requiring face to face interaction because he felt he could no longer relate to people, “[t]he primary problem I had was in meeting people.”⁴⁷

Today, his feelings of withdrawal,⁴⁸ anxiety⁴⁹ and intrusive memories,⁵⁰ as well as his sudden dependence on alcohol⁵¹ and intense irritability⁵² are recognized as PTSD. However, even though there was no formal diagnosis of PTSD in 1977 and 1978, it was clear that he was suffering psychologically: although the Air Force only had surgeons assess him for physical disabilities, these medical experts working with Capt. [REDACTED] solely on his physical disabilities could see he was suffering from internal wounds.⁵³ Despite the clear need for a psychological

⁴⁴ Dr. [REDACTED] Evaluation, Exh. B, p. 3.

⁴⁵ PTSD Treatment Records, Exh. F, Attach. 2, [REDACTED] MSW, LCSW, CADC, letter (Jan. 5, 20015) [hereinafter [REDACTED] Treatment Letter] p.2

⁴⁶ Exh. E, Transcript of Formal PEB Proceedings (Aug. 17, 1978) [hereinafter “Formal PEB Transcript”] pp. 8-9, 19.

⁴⁷ Formal PEB Transcript, Exh. E, p. 8.

⁴⁸ See e.g., *id.*; Capt. [REDACTED] Emails; Interview with Capt. [REDACTED] on March 10, 2017; Dr. [REDACTED] Evaluation, Exh. B, p. 3.; PTSD Treatment Records, Exh. F, Attach. 1, VA Records pp. 3-4, Attach. 2, [REDACTED] Treatment Letter, Attach. 3, [REDACTED] Ph.D., Connecticut Disability Determination Services Evaluation (Jun. 8, 2005) [hereinafter Dr. [REDACTED] Evaluation] p. 2.

⁴⁹ Dr. [REDACTED] Evaluation, Exh. B, p. 4; PTSD Treatment Records, Exh. F, Attach. 2, [REDACTED] Treatment Letter, p. 1, Attach. 3, [REDACTED] Evaluation, p. 2.

⁵⁰ PTSD Treatment Records, Exh. F, Attach. 1, VA Records p. 3, Attach. 2, [REDACTED] Treatment Letter, p. 1, Attach. 3, [REDACTED] Evaluation, p. 2.

⁵¹ Dr. [REDACTED] Evaluation, Exh. B, p. 3; PTSD Treatment Records, Exh. F, Attach. 1, VA Records p. 3, Attach. 2, [REDACTED] Treatment Letter, p. 2, Attach. 3, [REDACTED] Evaluation, p. 1.

⁵² Dr. [REDACTED] Evaluation, Exh. B, p. 3; PTSD Treatment Records, Exh. F, Attach. 1, VA Records p. 3, Attach. 2, [REDACTED] Treatment Letter, p. 1, Attach. 3, [REDACTED] Evaluation, p. 2.

⁵³ Service Treatment Records and Medical Board Processing, Exh. D, Attach 5, Report of Medical Examination (May 17, 1978) p. 5, Dr. [REDACTED] a hand surgeon qualified his assessment on Capt. [REDACTED] ability to fly by noting that his “psychological status” needed to be assessed; Attach. 7, Dr. [REDACTED] Letter to PEB (Aug. 1, 1978) p. 1, stating that Capt. [REDACTED] needed a “thorough psychiatric evaluation” as part of the PEB process.

examination given the profound trauma Capt. [REDACTED] suffered, the Air Force failed to administer any psychological exams and found him medically unfit at first a 100% rating and then, in 1978 at 50% based only on his physical wounds.⁵⁴

V. Capt. [REDACTED] has Struggled with the Psychological and Physical Disabilities from the Military Plane Crash for almost Four Decades

Capt. [REDACTED] had hoped to be a career Air Force pilot. The combination of losing the career he loved and the aftermath of witnessing multiple horrific trauma was psychologically debilitating. As Dr. [REDACTED] states:

[The KC 135 Tanker crash] constitutes a first-rank level psychological trauma, involved unexpected violence, witnessing others being burned to death, witnessing oneself being burned, experiencing loss of hope, escaping and then experiencing the plane blowing up, and spending 4 hours with open flesh not knowing whether he will be rescued. This is followed by 5 months of painful reconstructive medical treatment, physical deformity, and discharge from the career he loved.⁵⁵

Because the Air Force did not administer any sort of psychological exam and because PTSD was not a medically recognized diagnosis until two years after the PEB, Capt. [REDACTED] suffered psychologically without treatment for over two decades without knowing that the intrusive memories and problems sleeping; the depressive thinking and heavy drinking; the distancing himself socially, even from his family; and the inability to hold a steady job long term, were all classic symptoms of PTSD.⁵⁶ Finally, in 2003, Capt. [REDACTED] sought help at the VA and was diagnosed with PTSD.⁵⁷ In 2004, the VA service connected his PTSD, and he was able to begin to get treatment for the traumas he had been suffering from since the tanker crash in 1976.⁵⁸

⁵⁴ Military Records, Exh. A, Attach. 4, Air Force Retirement Order (Feb. 2, 1977); Attach. 5, Air Force Retirement Order (Sep. 8, 1978); *see also* Formal PEB Transcript, Exh. E; Statements and Correspondence, Exh. G, Attach. 1, [REDACTED] Affid. pp. 1-3.

⁵⁵ Dr. [REDACTED] Evaluation, Exh. B, p. 4.

⁵⁶ *See* Dr. [REDACTED] Evaluation, Exh. B, p. 3-5; PTSD Records, Exh. F, Attach. 2, [REDACTED] Treatment Letter p.2, Attach. 3, [REDACTED]'s Evaluation p. 2-3; *See also* Formal PEB Transcript Exh. E, pp. 8-9, 19.

⁵⁷ PTSD Records, Exh. F, Attach. 1, VA Records p. 5-9.

⁵⁸ PTSD Records, Exh. F., Attach 1, VA Records pp. 33, 37.

VI. This Board has the Opportunity to Correct the Errors and Injustices from the 1978 PEB and Grant Capt. [REDACTED] the 100% Medical Disability Rating He Deserves

In his previous filings, Capt. [REDACTED] petitioned for an increase in his disability retirement rating based solely on his physical disabilities at the time of his discharge.⁵⁹ Since that time, recognizing that the lack of knowledge surrounding PTSD led to unjust or erroneous separations from the U.S. Military, the Department of Defense has issued two key memorandums instructing boards for correction of military records (BCMRs) to give “liberal consideration” to records correction cases involving PTSD.⁶⁰

Additionally, the National Defense Authorization Act for Fiscal Year 2017 section 534 mandates that “[a]ny request for reconsideration of a determination of a [BCMR], no matter when filed, shall be reconsidered by a [BCMR] if supported by materials not previously presented to or considered by the board in making such determination”.⁶¹ In Capt. [REDACTED] case, the new and material evidence is the April 15, 2016 psychological evaluation from Dr. [REDACTED] [REDACTED].⁶² After a thorough examination, psychological testing, and review of Capt. [REDACTED] military file and medical history, Dr. [REDACTED] concluded that Capt. [REDACTED] was suffering from PTSD related to the horrific KC 135 Tanker crash at the time of his separation from the Air Force, and that the PTSD was so severe that it precluded his ability to continue to function in the Air Force.⁶³ Because the Air Force failed to evaluate Capt. [REDACTED] despite being advised to by its own doctors, and because PTSD did not exist as a medical diagnosis in 1978, Dr. [REDACTED] psychological evaluation is uncontroverted evidence that Capt. [REDACTED] was debilitated by PTSD at the time of his medical retirement.

⁵⁹ Although he does not concede any of his earlier arguments, Capt. [REDACTED] is aware that absent a federal court order remanding the case, the AFBCMR will not reconsider whether the PEB erred in its 1978 assessment of his level of disability. Thus, this brief focuses solely on his PTSD-related level of disability in 1978 as it combines with his current level of physical only 50% disability retirement.

⁶⁰ See “Memorandum for Secretaries of the Military Departments,” SEC. DEF., Sept. 3, 2014, [hereinafter DOD PTSD Memo]; and “Memorandum for Secretaries of the Military Departments,” PRINCIPAL DEPUTY UNDER SEC. DEF., Feb. 24, 2016 [hereinafter Second DOD PTSD Memo].

⁶¹ National Defense Authorization Act, Fiscal Year 2017, Pub. L. No. 114-840, § 534(a)(D) (2016) (amending 10 U.S.C §1552).

⁶² Dr. [REDACTED] Evaluation Exh. B.

⁶³ *Id.* at 4.

APPLICABLE STATUTES AND REGULATIONS

I. First DOD PTSD Memorandum, Secretary of Defense Chuck Hagel

On September 3, 2014, Secretary of Defense Chuck Hagel issued new mandatory guidance on records correction petitions made by veterans with PTSD (hereinafter DOD PTSD Memo).⁶⁴ Recognizing that PTSD was not a diagnosis until well after many veterans' service ended, the guidance directs this Board to give "liberal consideration" to records correction applications based on PTSD.⁶⁵ It also provides medical guidance that explains that if service records document symptoms of what is now recognized as PTSD, "liberal consideration will be given to finding that PTSD existed at the time of service."⁶⁶ Additionally, the guidance mandates that:

Liberal consideration will also be given in cases where civilian providers confer diagnoses of PTSD or PTSD-related conditions, when case records contain narratives that support symptomatology at the time of service, or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge. . . .⁶⁷

This medical guidance, along with the liberal consideration standard, establishes that this Board must give deference to the claims of veterans whose service led them to develop PTSD, particularly during an era before it was well understood within the military. This guidance is explicitly "intended to ease the application process for veterans who are seeking redress."⁶⁸

II. Second DOD PTSD Memorandum, Acting Secretary of Defense Brad Carson

In a second Department of Defense memorandum dated February 24, 2016, Acting Secretary of Defense Brad Carson reaffirmed the liberal consideration policy from the initial DOD PTSD Memo stating that the DOD "implemented this robust guidance in comprehensive and coordinated fashion, thereby easing the burden on Veterans seeking redress. . . ."⁶⁹

⁶⁴ See DOD PTSD Memo.

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1.

⁶⁹ Second DOD PTSD Memo.

Furthermore, it emphasized that the Boards for Correction of Military Records (BCMRs) “must renew and re-double our efforts to ensure that all Veterans . . . receive all of the benefits that the Supplemental Guidance may afford.”⁷⁰ To this end, the Acting Secretary directed this Board to waive any statute of limitation that applies to a records correction request by a veteran with a PTSD related claim.⁷¹ The Acting Secretary also mandated that any case previously considered without the benefit of the new guidance should be “granted de novo review” in order to incorporate the liberal consideration standard.⁷²

III. National Defense Authorization Act

The National Defense Authorization Act for Fiscal Year 2017 section 534 mandates that this Board allow “[a]ny request for reconsideration of a determination of a [BCMR], no matter when filed, shall be reconsidered by a [BCMR] if supported by materials not previously presented to or considered by the board in making such determination”.⁷³

IV. Air Force Instruction 36-3212 (Feb. 2006): Physical Evaluation for Retention, Retirement and Separation

The purpose of the disability evaluation system is “[t]o maintain a fit and vital force, disability law allows the Secretary of the Air Force (SAF) to remove from active duty those who can no longer perform the duties of their office, grade, rank or rating *and ensure fair compensation to members whose military careers are cut short due to a service-incurred or service-aggravated physical disability.*”⁷⁴

V. Retirement or Separation for Physical Disability, 10 U.S.C. ch. 61, § 1201

Under 10 U.S.C. §1201, upon the determination that a member is “unfit to perform the duties of the member’s office, grade, rank or rating because of physical disability incurred while entitled to basic pay. . . .” that member may be retired based on a finding that: (a) under accepted medical principles, the disability is of a permanent nature and stable, (b) the disability is rated,

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ National Defense Authorization Act, Fiscal Year 2017, Pub. L. No. 114-840, § 534(a)(D) (2016) (amending 10 U.S.C. §1552).

⁷⁴ Air Force Instruction 36-3212 2, sec. 1.1 (Feb. 2006) (emphasis added).

under the standard schedule of rating disabilities used by the VA at the time of the determination, at least 30%, and (c) the disability was incurred or permanently aggravated while a member was entitled to basic pay.⁷⁵

VI. Determinations of Disability: Requirements and Limitations on Determinations, 10 U.S.C. ch. 61, § 1216a

The VA rating schedule is used to determine the level of disability at the time of discharge. Under that schedule, *all* disabling conditions are assessed and calculated as part of the disability rating: “[i]n making a determination of the rating of disability of a member of the armed forces for purposes of this chapter, the Secretary concerned shall take into account *all medical conditions*, whether individually or collectively, that render the member unfit to perform the duties of the member's office, grade, rank, or rating.”⁷⁶

VII. 38 C.F.R. § 4.129 – Disability Rating for Mental Disorders due to Traumatic Stress

Recognizing how debilitating PTSD and other related disorders are, as part of the National Defense Authorization Act of 2008, Congress created a baseline of 50 percent disability retirement for servicemembers who are released from service due to a mental health disorder resulting from trauma incurred while on duty.⁷⁷ “When a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of *not less than 50 percent* and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted.”⁷⁸

⁷⁵ 10 U.S.C. § 1201(a),(b); *See also*, Department of Defense Instruction No. 1332.38, E3.P7.5.1 – E3.P7.5.2. (November 14, 1996) (incorporating change 1, July 10, 2006).

⁷⁶ 10 U.S.C. § 1216a (effective: January 28, 2008) (emphasis added).

⁷⁷ *See Russell v. U.S.*, 106 Fed. Cir. 696, 699-700 (2012).

⁷⁸ 38 CFR § 4.129 (emphasis added). *See also*, “Policy Memorandum on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008,” PRINCIPAL DEPUTY UNDER SEC., DEF, Oct. 14, 2008 at E7.2, mandating the secretaries of each military branch must follow the 50% minimum for disability retirements based on “Mental Disorders Due to Traumatic Stress”.

ARGUMENT

Pursuant to 10 U.S.C. § 1552, “[t]he secretary of a military department may correct any military record of the Secretary’s department when the Secretary considers it necessary to correct an error or to remove an injustice.” Capt. [REDACTED] disability rating of 50% reflects several errors and injustices, namely:

- (1) At the time the Air Force assessed Capt. [REDACTED] level of disability, PTSD was not a recognized diagnosis; thus, his disability retirement rating of 50% does not compensate him for the debilitating PTSD he was suffering from in 1978;
- (2) Under present DOD and Air Force regulations, Capt. [REDACTED] would receive a psychological exam as part of the disability evaluation process, and the minimum disability rating he could receive for PTSD alone is 50%;
- (3) The 1978 PEB erred because it failed to evaluate Capt. [REDACTED] mental health despite recommendations by the PEB’s own military doctors.

These errors and injustices have compounded Capt. [REDACTED] struggles since the fateful crash in 1976. For four decades, he has been undercompensated because the Air Force never properly assessed the psychological wounds he was suffering from at the time of his retirement. Today, this Board has the opportunity to right these errors and injustices by granting Capt. [REDACTED] 100% disability retirement retroactive to 1978.

I. Capt. [REDACTED] Current Disability Retirement Rate Is Unjust Because at the Time of the PEB Medical Science Was Not Advanced Enough to Give Him a Proper Diagnosis

Under current Air Force Medical Retirement Regulations, Capt. [REDACTED] would have received 100% disability based on both his physical and mental disabilities in 1978. However, unfortunately for Capt. [REDACTED] in 1978, medical science did not understand Post Traumatic Stress Disorder (PTSD) and its lasting effects. Thus, his disability was only based on the substantial physical trauma he received as a passenger in the KC135 Tanker airplane crash; the concept of PTSD as a result of the harrowing crash was not even considered.

Recognizing the inherent injustice of military members suffering from PTSD before medical science understood the disease, in 2014, then Secretary of Defense Chuck Hagel issued a memorandum instructing the BCMRs to liberally grant records correction applications with PTSD based claims.⁷⁹ In February 2016, Acting Secretary of Defense, Brad Carson, issued a subsequent memorandum instructing BCMRs to “redouble” their efforts to right the injustices caused by PTSD and further mandated that the boards to grant de novo review to all cases heard prior to its issuance.⁸⁰

In April 2016, Dr. [REDACTED] conducted a thorough psychological evaluation of Capt. [REDACTED] and issued a report on Capt. [REDACTED] current level of PTSD as well as his level of PTSD in 1978, when the Air Force conducted the PEB at issue. Dr. [REDACTED] reviewed all of Capt. [REDACTED] records, including the reports from the military physicians who urged the Air Force to do psychiatric evaluations as part of the disability evaluation process, and conducted interviews with Capt. [REDACTED] in which he described in great detail not only the horrific details of the flight, but the devastating psychological aftermath. Based on this thorough assessment Dr. [REDACTED] concluded:

[b]ased on my experience and expertise, and my evaluation, it is more likely than not that Mr. [REDACTED] was suffering from PTSD at the time of his medical discharge, and has continued to suffer from this condition to this day.⁸¹

Under both Secretaries Hagel and Carson’s guidance, and with the new psychological evaluation, Capt. [REDACTED] should be granted 100% disability based on the modern scientific understanding of psychological trauma. For almost four decades, Capt. [REDACTED] has suffered from PTSD relating to the horrific crash. This suffering has never been fully acknowledged or compensated by the U.S. Air Force. Under the new Hagel Memo and Carson Memo standards, the Air Force has the opportunity to right this injustice and grant Capt. [REDACTED] 100% disability retroactive to 1978.

⁷⁹ DOD PTSD Memo.

⁸⁰ Second DOD PTSD Memo.

⁸¹ Dr. [REDACTED] Evaluation, Exh. B, p. 4.

II. Capt. [REDACTED] Current Rate of 50% Disability Retirement Based on Physical Injuries Alone Is Unjust Because Under Present Law, the Absolute Minimum He Could Receive for Just His PTSD at Discharge Is 50%

The purpose of the disability evaluation system is “[t]o maintain a fit and vital force, disability law allows the Secretary of the Air Force (SAF) to remove from active duty those who can no longer perform the duties of their office, grade, rank or rating *and ensure fair compensation to members whose military careers are cut short due to a service-incurred or service-aggravated physical disability.*”⁸²

In an effort to ensure fair compensation for servicemembers who incur a mental health disability as a result of a service-related trauma, Congress created a minimum of 50 percent disability retirement baseline for servicemembers released from service due to a mental health disorder.⁸³ Congress did not create this baseline until 2008, and it is not retroactive. However, just as it is patently unjust not to compensate Capt. [REDACTED] for the PTSD he was suffering in 1978 merely because medical science did not understand PTSD, it is also unjust that were the crash to occur today, Capt. [REDACTED] would receive substantially more compensation for the same injuries. A PEB today would have to give him a *minimum* of 50% for his PTSD in addition to the 50% disability payments he is receiving for his physical wounds.

Although the AFBCMR does not explicitly define injustice, not receiving the benefit of a new regulation or law which would have afforded greater protections is the first definition of the Discharge Review Board’s parallel standard of inequity:

A discharge shall be deemed to be equitable unless: (1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that: (i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and (ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.⁸⁴

⁸² Air Force Instruction 36-3212 2, sec. 1.1 (Feb. 2006) (emphasis added).

⁸³ 38 CFR 4.129; *see also Russell v. U.S.*, 106 Fed. Cir. 696, 699-700 (2012).

⁸⁴ 32 CFR § 70.9(c)(1).

All of these criteria are met. Current Federal law, DOD Instructions, and Air Force regulations substantially enhance servicemembers' rights by mandating that PTSD and other mental health conditions are a routine part of the Disability Evaluation System screening, and that properly qualified mental health practitioners are integral members at all stages of the disability evaluation system.⁸⁵ Furthermore, today, if PTSD is diagnosed as part of the disability retirement process, the servicemember cannot be granted less than 50% disability.⁸⁶ Had these policies been in place, it would have been impossible for Capt. [REDACTED] to only receive the 50% rating he received for his physical disabilities alone because that rating would have been augmented by *at least* a 50% disability rating for PTSD. Thus, his case epitomizes the DRB's parallel standard of inequity.

III. The 1978 Physical Evaluation Board Erred Because it Failed to Evaluate Capt. [REDACTED] Mental State Against the Advice of its Own Military Physicians

Even without knowledge of PTSD, all evidence clearly demonstrates that the horrific plane crash inflicted more than devastating physical wounds on Capt. [REDACTED]. After surviving numerous combat missions in support of the Vietnam War, Capt. [REDACTED] life was irrevocably changed when the KC135 Tanker crashed carrying Capt. [REDACTED] and 19 of his fellow airmen. After the crash, he spent five months in the BAMC burn unit undergoing numerous reconstructive surgeries and intense physical therapy just so he could regain a semblance of a normal life.⁸⁷ He began drinking heavily and became withdrawn, even from his family.⁸⁸ At the first Christmas after the crash, Capt. [REDACTED] three-year-old son, [REDACTED] poignantly remarked on his father's psychological distance stating, "my daddy's burned up and I will never see him

⁸⁵ See generally DODI 1332.18 and DODI 1332.38 for board compositions and standards for evaluations; *see also*, "Policy Memorandum on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008," PRINCIPAL DEPUTY UNDER SEC., DEF, Oct. 14, 2008.

⁸⁶ 38 CFR §4.129

⁸⁷ See Service Treatment Records and Medical Board Processing, Exh. D, Attach. 1, Clinical Record (Sep. 27, 1976).

⁸⁸ See e.g., Dr. [REDACTED] Evaluation, Exh. B; PTSD Records, Exh. F, Attach. 2, [REDACTED] Treatment Letter, Attach. 3, [REDACTED] Evaluation p. 1; Statements and Correspondence, Exh. G, Attach. 2, Capt. [REDACTED] Emails (Apr. 6, 2017).

again.”⁸⁹ After months of being physically apart, when Capt. [REDACTED] was able to see his five-month-old daughter again, he refused, fearing that he would be a nightmare for her.⁹⁰

Because the Air Force, through the PEB, failed to even consider the psychological turmoil Capt. [REDACTED] was experiencing, it only had him examined by surgeons.⁹¹ However, his fragile mental state was clear to these medical experts. Both COL [REDACTED] the chief of plastic surgery and MAJ Tom [REDACTED] orthopedic surgeon, stated that he should have a thorough psychological assessment as part of the disability evaluation process.⁹² Despite their clear recommendations, the Air Force did not administer any psychological evaluations.

Moreover, based on his review of Capt. [REDACTED] records and his psychological examination of Capt. [REDACTED] Dr. [REDACTED] concluded that even without PTSD as a diagnosis, Capt. [REDACTED] symptoms in 1978 were severe enough that:

[h]ad a psychiatric examination been given at that time, it is more likely than not that a recommendation would have been made for 100% disability due to a psychiatric condition, most likely an anxiety disorder.⁹³

Thus, despite being instructed to perform a psychological assessment by its own medical experts, the Air Force failed to even attempt to assess whether Capt. [REDACTED] was psychologically fit to remain in the Air Force. It was obvious to the military physicians who examined him that he was suffering from psychological consequences from the accident. However, no psychological exam was conducted. As a result, for four decades, Capt. [REDACTED] has been undercompensated for his service-induced psychological disabilities.

⁸⁹ Dr. [REDACTED] Evaluation, Exh. B, p. 3.

⁹⁰ Interview with Capt. [REDACTED] on March 10, 2017; Statements and Correspondence, Exh. G, Attach. 2, Capt. [REDACTED] Emails (Apr. 6, 2017) p. 1

⁹¹ *See*, Service Treatment Records and Medical Board Processing, Exh. D. No record of a psychological exam was documented, despite two separate surgeons requesting one. *See also*, Formal PEB Transcript, Exh. E, in which Capt. [REDACTED] testifies in detail about all the evaluations that went into the PEBs.

⁹² Service Treatment Records and Medical Board Processing, Exh. D., Attach. 5, Report of Medical Examination (May 17, 1978), p. 5; Attach. 7, Dr. [REDACTED] Letter to PEB (Aug. 1, 1978) p. 1.

⁹³ Dr. [REDACTED] Evaluation, Exh. B, p. 5.

CONCLUSION

On September 26, 1976, Capt. [REDACTED] not only lost the physical ability to continue the career he loved, he also lost the psychological ability to function as an airman. He has suffered from these psychological wounds for over four decades without any compensation – or even acknowledgement – from the U.S. Air Force. Today, this Board has the opportunity to correct this error and injustice and grant Capt. [REDACTED] the 100% disability rating he deserves.