

In the United States Court of Federal Claims

**Nos. 02-454C & 04-460C
CONSOLIDATED
(Filed: July 20, 2006)**

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*
JAMES E. POOLE, *
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Plaintiff, *
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v. *
*
THE UNITED STATES, *
*
Defendant. *
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ORDER DENYING THE PLAINTIFF’S MOTION FOR REVIEW

Pending before the court is the motion by the pro se plaintiff, James E. Poole (“Poole” or “plaintiff”), for review of the decision of the Army Board for the Correction of Military Records (“ABCMR”) following a remand by this court.¹ Specifically, Mr.

¹ On March 23, 2005, the court remanded this case to the ABCMR. See Poole v. United States, 64 Fed. Cl. 776 (2005). The court held that the record established that Mr. Poole met the criteria for a 50 percent rating for mental disability under Army Regulation (“Army Reg.”) 635-40 (1990) and that his 30 percent rating was not consistent with the regulations. Id. at 782-783. On remand, the ABCMR agreed with the court that Mr. Poole should receive a 50 percent disability rating for mental disability.

The court also held that the ABCMR’s decision not to provide Mr. Poole additional disability payments based on his diabetes was supported by the administrative record. Id. at 783-784.

Poole seeks an additional 10 percent disability rating for his diabetes.² Upon remand, the ABCMR gave reconsideration to Mr. Poole's claim that he is entitled to additional disability payments based on his diabetes.³ After considering all of the evidence submitted by Mr. Poole, the ABCMR determined that Mr. Poole is not entitled to any additional disability retirement benefits based on his diabetes. Id.

For the reasons that follow, the court **DENIES** Mr. Poole's motion and affirms the September 7, 2005 decision of the ABCMR.⁴

A. Background Facts

1. Mr. Poole's Disability Retirement

The background facts are set forth in the court's initial opinion and the court will only briefly repeat certain relevant facts here. See Poole v. United States, 64 Fed. Cl. at 778-780. As stated in the court's initial opinion, an informal Physical Evaluation Board ("PEB") found in 1996 that Mr. Poole was unfit for retention, but that his medical condition had not sufficiently stabilized to render a permanent rating. On November 1,

² In Mr. Poole's initial complaint, he sought a 30 percent disability rating for his diabetes. However, without explanation, in his September 21, 2005 motion, he now seeks a 10 percent disability rating for his diabetes.

³ The ABCMR also denied Mr. Poole's claim that he was entitled to additional disability payments on the ground that he may have also contracted Lyme disease while in the service. He has since abandoned that claim. Mr. Poole has focused his objections to the ABCMR's decision following remand to the ABCMR's failure to increase his disability rating to include his diabetes.

⁴ Consideration of Mr. Poole's motion was delayed when Mr. Poole filed an untimely notice of appeal before the Court of Appeals for the Federal Circuit. The appeal deprived this court of jurisdiction over Mr. Poole's motion. The appeal was dismissed on April 4, 2006.

1996, Mr. Poole was placed on the Temporary Disability Retired List (“TDRL”) with a 30 percent rating due to mental disability. Upon reevaluation in 1998, an informal PEB concluded that Mr. Poole should be given a permanent disability retirement. On October 6, 1998, Mr. Poole was placed on the Permanent Disability Retirement List (“PDRL”) with a 30 percent rating due to mental disability.

2. Mr. Poole’s Claim Regarding Diabetes

The facts relevant to Mr. Poole’s present claim regarding his diabetes, which are set forth in the court’s initial opinion and in the administrative record (“A.R.”) following the remand⁵ are as follows. After Mr. Poole had been retired on a mental disability in 1998, he filed applications with the ABCMR, contending, among other things, that he had diabetes prior to his retirement and therefore he was entitled to an increase in his disability rating. As noted above, the ABCMR denied this claim and this court affirmed the ABCMR’s decision as to Mr. Poole’s claim regarding diabetes.

On remand from this court on the issue of the rating for his mental disability, the ABCMR allowed Mr. Poole to submit additional documentation regarding his diabetes. Mr. Poole resubmitted various medical records and letters from two medical doctors. The medical records indicated that Mr. Poole had tested “high” for glucose in 1998, and that he was being prescribed medication for diabetes in 2004. A.R. 4, 19, 20. Mr. Poole included a handwritten note from his doctor at the Department of Veterans Affairs, Dr.

⁵ The administrative record on remand is contained in the attachment to the government’s response.

Bernard Dunne, dated March 16, 2005, which stated that Mr. Poole “was diagnosed with diabetes based on an elevated blood sugar [test] on September 8, 1998.” A.R. 25.

Finally, Mr. Poole submitted a letter from Dr. T. Glen Gray dated April 1, 2005, which stated that it was not possible to conclude to a medical certainty based on Mr. Poole’s records whether his low energy levels and loss of vigor in 1998 was attributable to his diabetes. Dr. Gray states that Mr. Poole had first come to his medical office on August 29, 2000, and “given the fact that you had concomitant depression and mental health problems, the contribution of the diabetes to these symptoms is not possible to discern with any degree of certainty.” A.R. 25.

After considering this additional information, the ABCMR issued a new decision on September 7, 2005, denying Mr. Poole’s request. The ABCMR stated that, under the regulations that govern the evaluation of disabilities discovered while a service member is on TDRL, as was the case here, Mr. Poole was not entitled to any additional disability payment for his diabetes. In particular, the ABCMR relied upon DOD Instruction (“DODI”) 1332.38 (1996). A.R. 6-7. DODI 1332.38 provides, in relevant part:

E3.P6.2.4. Compensability of New Diagnoses. Conditions newly diagnosed during TDRL periodic physical examinations shall be compensable when:

E3.P6.2.4.1. The condition is unfitting; and

E3.P6.2.4.2. The condition was caused by the condition for which the member was placed on the TDRL, or directly related to its treatment; or

E3.P6.2.4.3. The evidence of record establishes that the condition was

either incurred while the member was entitled to basic pay or as the proximate result of performing duty, whichever is applicable, and was an unfitting disability at the time the member was placed on the TDRL. Otherwise, such conditions shall be deemed unfitting due to the natural progression of the condition and noncompensable

The ABCMR emphasized that, under DODI 1332.38, the key year to consider Mr. Poole's medical condition was 1996 (when he was placed on the TDRL), and not 1998 (when he retired). The ABCMR concluded that, because Mr. Poole's diabetes was not related to his depression, Mr. Poole did not satisfy the criteria listed under E3.P6.2.4.4. In addition, the ABCMR concluded that Mr. Poole did not meet the criteria listed under E3.P6.2.4.3 because he was not suffering from diabetes before going on TDRL in 1996. A.R. 7.

The ABCMR also relied on Army Reg. 635-40, which governs the evaluation of the physical fitness of soldiers who may be unfit to perform their military duties because of physical disability. The ABCMR stated that, under Army Reg. 635-40, "[o]nly the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability."⁶ A.R. 6. In this context, the ABCMR concluded that there was no evidence in the record to show that Mr. Poole's "non-insulin dependent diabetes was sufficiently

⁶ Army Reg. 635-40, App. B-3(f), provides: "Disabilities no unfitting for military service. Conditions which do not render a soldier unfit for military service will not be considered in determining the compensable disability rating unless they contribute to the finding of unfitness."

severe” at the time of his retirement to render him unfit for service. A.R. 7. For these reasons, the ABCMR denied Mr. Poole’s request for correction of his record. A.R. 8.

Mr. Poole contests the ABCMR’s September 2005 decision and argues that the ABCMR decision is arbitrary, capricious, not supported by substantial evidence and contrary to law. In particular, Mr. Poole charges that: (1) the ABCMR applied the wrong regulation in evaluating his diabetes claim; and (2) had the ABMCR applied the correct regulation, he would have been diagnosed with diabetes before he was permanently retired and would have received an additional disability pay for his diabetes.

B. The September 7, 2005 ABCMR Decision is Supported by the Administrative Record.

1. The ABCMR Did Not Err in Relying on DODI 1332.38.

Mr. Poole contends that the ABCMR erred when it relied upon DODI 1332.38 to conclude that he was not entitled to additional disability pay for his diabetes. Mr. Poole argues that DODI 1332.38 did not become effective until after he was placed on temporary disability in November 1996. For this proposition, he relies on the statement in DODI 1332.38, “This Instruction is effective for all [Medical Evaluation Boards] 120 days after the date of this Instruction [November 14, 1996].” Under this reading of DODI 1332.38, the effective date would have been in March 1997. Based on this same language, Mr. Poole also argues that DODI 1332.38 only applies to a Medical Evaluation Board (“MEB”) disability evaluation, and not to a PEB evaluation. Therefore, Mr. Poole argues that, instead of relying on DODI 1332.38, the ABCMR should have applied Army

Reg. 635-40 and Army Reg. 40-501 (2004). Mr. Poole argues that under these regulations, the Army was required to conduct medical examinations of him while he was on TDRL and that the PEB's disability rating should have reflected his diabetes.⁷

The government argues that the ABCMR did not err when it relied on DODI 1332.38. The government argues that this regulation was effective on the day that it is dated, November 14, 1996. The government also argues that DODI 1332.38 applies to MEBs as well as to PEBs because it lists both PEBs and MEBs as elements of the DoD Disability Evaluation System. Id. ¶ E3.P1.1.2.

The court agrees with the government that the ABCMR properly relied on DODI 1332.38. The court finds that the language of DODI 1332.38 includes the PEB evaluation process. In addition, the court finds that DODI 1332.38 was in effect at the time that Mr. Poole was diagnosed with “high” glucose levels in 1998.⁸ In such circumstances, the application of DODI 1332.28 to Mr. Poole's case does not trigger any retroactivity concerns. Concerns about retroactivity arise when the government endeavors to apply a

⁷ Army Reg. 635-40 provides, in pertinent part: “The purpose of the TDRL medical examination is to . . . [i]dentify any new disabilities while the soldier has been on the TDRL.” Id. ¶ 7-17(a)(4). It also provides: “Adjustment will be made at the time of removal from the TDRL to reflect the degree of severity of those conditions rated at the time of placement on the TDRL and any ratable conditions identified since placement on the TDRL.” Id. ¶ 7-20(b).

Army Reg. 40-501 provides, in pertinent part: “The causes for referral to an MEB are as follows: . . . Diabetes mellitus when proven to require insulin or oral medications for control.” Id. ¶ 3-11.

⁸ Regardless of which of the two dates applies – November 16, 1996 or March 1997 – while Mr. Poole was on TDRL before the effective date, his 1998 diagnosis of “high” glucose occurred after the effective date. It is the date of the diagnosis that is relevant here. Therefore, DODI 1332.38 applied regardless of whether the effective date was November 1996 or March 1997.

new regulation to a condition that arose before the regulation was in effect. See Kearfott v. United States, 320 F.3d 1369 (Fed. Cir. 2003) (“[A]n impermissibly retroactive law is one that ‘takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.’”) (citations omitted). In short, the Army would have been free to apply the regulation in place at the time Mr. Poole’s illness was discovered. As such, the ABCMR’s reliance on DODI 1332.38 was not incorrect.

2. The ABCMR’s Conclusion That Mr. Poole Did Not Meet the Conditions For Additional Disability Pay Is Supported By the Administrative Record.

As discussed above, under DODI 1332.38, in order to qualify for a disability based on conditions diagnosed while a service member is on TDRL, the service member’s condition must be caused by the illness which triggered the listing on the TDRL in the first instance, or the condition must have existed while the service member was on active duty and was unfitting at the time the person was placed on TDRL. There is no dispute that Mr. Poole cannot meet either of these criteria. The undisputed record shows that Mr. Poole was not suffering from diabetes at the time he was placed on the TDRL in 1996. Thus, Mr. Poole does not meet the threshold criterion for a disability under DODI 1332.38.

In addition, the letter from Dr. Gray fully supports the ABCMR’s conclusion that Mr. Poole did not establish that his non-insulin dependent diabetes was sufficiently severe to render him unfit for service when he retired in 1998, in any case. Mr. Poole’s reliance

on Dr. Gray's letter is misplaced. Dr. Gray states that it is "possible" that Mr. Poole's loss of vigor in 1998 was due to his diabetes. A.R. 26. Dr. Gray does not state that the diabetes would have rendered Mr. Poole unfit for service.⁹

CONCLUSION

For the reasons set forth above, the plaintiff's objections to the ABCMR decision following remand are without merit. The September 7, 2005 decision of the ABCMR is **AFFIRMED**. Mr. Poole's September 21, 2005 motion is **DENIED**. The clerk shall enter a final judgment for the defendant. Each party is to bear its own costs.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

⁹ Because Mr. Poole failed to produce evidence to establish that his diabetes made him unfit for duty before he was permanently retired in 1998, even if the ABCMR should not have relied on DODI 1332.38, Mr. Poole would not prevail under Army Reg. 635-40 or Army Reg. 40-501. Mr. Poole did not produce sufficient evidence before the ABCMR to prove that, had he received the medical testing he claims he should have received, once his "high glucose" was discovered, he would have gotten a disability benefit for his diabetes. Absent medical evidence to show that Mr. Poole was unfit for duty based on his diabetes, the ABCMR decision is not arbitrary or capricious.