

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 94-03455

COUNSEL: None

JAN 29 1999

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

His bad conduct discharge (BCD) be upgraded.

APPLICANT CONTENDS THAT:

His present serious medical condition of Systemic Lupus Erythematosus, diagnosed in Sep 93 while on active duty, is a life-threatening disease and his BCD will not allow him to seek health care through the Veterans Administration (VA). His financial hardship caused by the BCD makes meaningful employment nearly impossible to achieve and furtherance of his educational opportunities limited by denial of any federal or state student loans due. He takes full responsibility for his indiscretions. Since his court-martial, he has made positive strides on becoming a productive member of society.

In support of his request, applicant provided a copy of his medical records, character statements, certificates of achievement and other documentation relating to his appeal.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

On 2 May 91, the applicant enlisted in the Regular Air Force for a period of 4 years in the grade of airman basic.

Applicant's Enlisted Performance Reports reflect the following:

<u>PERIOD OF REPORT</u>	<u>OVERALL EVALUATION</u>
2 May 91 through 22 Jan 93	4
23 Jan 93 through 8 Dec 93	4

On 15 Oct 93, the commander requested the applicant permanent change of station (PCS) to Keesler AFB, Mississippi, for the purpose of conducting a court-martial.

On 18 Oct 93, a Medical Evaluation Board (MEB) convened under the provisions of AFM 168-4, 35-4, and 160-43. The MEB established a diagnosis of Systemic Lupus Erythematosus Autoimmune Hemolytic Anemia and found him not fit for worldwide duty. The MEB recommended referral to a Physical Evaluation Board (PEB) with a recommendation that applicant be discharged on medical disability.

On 15 Nov 93, an Informal Physical Evaluation Board (IPEB) was convened and found the applicant was unfit because of physical disability with a diagnosis of Systemic Lupus Erythematosus with Secondary Autoimmune Hemolytic Anemia and recommended the applicant be placed on the Temporary Disability Retired List (TDRL) with a 30% disability rating. On 2 Dec 93, the applicant agreed with the findings and recommendations of the IPEB.

On 13 Dec 93, officials within the Office of the Secretary of the Air Force directed that the applicant be placed on the TDRL, effective 12 Feb 94, in the retired pay grade of airman first class per AFR 35-4 with compensable percentage for physical disability of 30% and a date of separation (DOS) of 11 Feb 94 was established.

On 7 Jan 94, per Special Order #ACD-00632, applicant's placement on the TDRL, to be effective 12 Feb 94, was rescinded. It was indicated that since court-martial charges were preferred against the applicant, he was no longer eligible for disability processing; therefore, his disability case was terminated.

On 31 Jan 94, charges were preferred against the applicant in violation of Articles 121 and 81, Uniform Code of Military Justice (UCMJ), and he was charged with 9 specifications of larceny in violation of Article 121, UCMJ, and 2 specifications of conspiracy to commit larceny in violation of Article 81, UCMJ.

On 10 Mar 94, an Article 32, UCMJ, investigation was executed on applicant. He submitted a Chapter 4 (discharge in lieu of trial by court-martial) which was denied and he was scheduled for a trial.

On 15 Sep 94, per General Court-Martial Order #51, as pertains to Charge I, the applicant was arraigned on the offenses under Article 121, UCMJ, of 9 specifications of larceny to include between on or about 20 Jul 92 to on or about 1 Mar 93, for a total of \$6,360.96 in currency, military property, the property of the United States Air Force. The applicant pled guilty and was found guilty of these offenses.

Under Article 81, UCMJ, as pertains to Charge 11, Specification 1, the applicant did, on or about 20 Oct 92, conspire with W---s---, to commit an offense under the UCMJ, to wit: larceny of \$394.65 in United States currency, military property, and in order to effect the object of the conspiracy, he did accomplish

by writing in certain pertinent blocks, a DD Form 2278 (Application for Do It Yourself (DITY) Move and Counseling Checklist) and, also in order to effect the object of the conspiracy, the said W--- S--- did steal \$394.65 in United States currency.

Under Article 81, UCMJ, as pertains to Charge 11, Specification 2, the applicant did, on or about 4 Dec 92, conspire with J--- L---, to commit an offense under the UCMJ, to wit: larceny of \$467.55 in United States currency, military property, and in order to effect the object of the conspiracy, he did accomplish by writing in certain pertinent blocks, a DD Form 2278 and, also in order to effect the object of the conspiracy the said J--- L--- did steal \$467.55 in United States currency. Applicant pled guilty and was found guilty of these offenses.

On 13 Dec 96, a general court-martial sentenced applicant to a BCD, confinement for 12 months, and reduction in grade from airman first class to airman basic. The sentenced was adjudged on 13 May 94.

On 17 Dec 96, the applicant was discharged under General Court-Martial Order #12 with a BCD in the grade of airman basic. He was credited with 5 years, 7 months, and 16 days of active service, 9 months of which was served in confinement from 13 May 1994 through 22 Feb 95.

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, reviewed this application and indicated that the MEB findings as to applicant's medical condition were known throughout all phases of the judicial process affecting his court-martial. The MEB medical summary was an exhibit to the Article 32, UCMJ, investigation, as well as at trial. The applicant provided extensive sworn testimony during the sentencing portion of his trial and the court members were fully aware of his condition. There was video testimony by a rheumatologist that the applicant had lupus and none of this was rebutted by the government. His medical condition was mentioned in his clemency package and was considered by the convening authority. Even the Air Force Court of Criminal Appeals considered his medical condition on the issue of inappropriate sentence. What is not available for consideration is the extensive medical findings and recommendations a PEB would provide but it appears that applicant was headed for his court-martial before any PEB review was initiated. Of interest is footnote three at page five of the Air Force Court of Criminal Appeals opinion that applicant's trial defense counsel had information of physician disagreement as to whether applicant had lupus at all.

Applicant's record of trial has been thoroughly reviewed. The scheme he developed to steal government funds using false claims is clear from applicant's own sworn testimony, as well as that of other credible witnesses. Equally, his medical condition was known to all at his trial and in his clemency matters. There is no legal basis to disturb the obvious consideration the court members, the convening authority and appellate court all gave to these issues. There is no basis upon which to grant applicant his request nor is administrative relief possible nor appropriate. Accordingly, JAJM recommends denial,

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

The Chief, Medical Consultant, SAF/PC, reviewed this application and indicated that in accordance with AFI 48-123, Chapter 6, paragraph 6.5, "members sentenced to punitive discharge by a court-martial...are not eligible for MEB processing" and completion of his processing was suspended upon his conviction. The Medical Consultant further states that consideration under the disability evaluation system depends on honorable service while in the military and applicant obviously failed this prerequisite. Despite having a substantiated disqualifying medical condition, applicant, by his actions, rendered himself ineligible for benefits. The condition did not interfere with his ability to distinguish right from wrong and was not the cause of his misconduct. Reasons for discharge and discharge proceedings are well documented in the records. Action and disposition in this case are proper and reflect compliance with Air Force directives which implement the law. The Medical Consultant is of the opinion that no change in the records is warranted and the application should be denied.

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

The Chief, USAF Physical Disability Division, AFPC/DPPD, also reviewed this application and indicated that the purpose of the military disability system is to maintain a fit and vital force by separating members who are unable to perform the duties of their grade, office, rank or rating. Those members who are separated or retired by reason of physical disability may be eligible, if otherwise qualified, for certain disability compensations. Eligibility for disability processing is established by an MEB when that board finds that the member may not be qualified for continued military service. The decision to conduct an MEB is made by the medical treatment facility providing health care to the member.

At the time the applicant was convicted by a court-martial on 13 May 94, in accordance with AFR 35-4, all disability processing actions were terminated, DPPD has reviewed the medical and judge advocate advisories and concurs with their comments and recommendations. Because of his court-martial and BCD, the

applicant was appropriately found ineligible for processing through the Air Force disability evaluation system in accordance with AFRs 35-4 and 160-43.

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

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to applicant on 6 Oct 97 for review and response. 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 his BCD should be upgraded. His contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. 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 his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.

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 3 December 1998, under the provisions of Air Force Instruction 36-2603:

Mrs. Barbara A. Westgate, Panel Chair
Dr. Gerald B. Kauvar, Member
Ms. Rita J. Maldonado, Member
Mrs. Joyce Earley, Examiner (without vote)

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 4 Feb 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records,
- Exhibit C. Letter, AFLSA/JAJM, dated 29 Apr 97.
- Exhibit D. Letter, BCMR Medical Consultant, dated 7 Jul 97.
- Exhibit E. Letter, AFPC/DPPD, dated 11 Sep 97.
- Exhibit F. Letter, AFBCMR, dated 6 Oct 97.


BARBARA A. WESTGATE
Panel Chair