

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 18 7999

IN THE MATTER OF:

DOCKET NUMBER: 97-03433

COUNSEL: None

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

The punishment imposed upon him under Article 15, Uniform Code of Military Justice (UCMJ), on 19 August 1996 be set aside and his grade of technical sergeant be restored to its original date of rank (DOR) of 1 January 1995.

APPLICANT CONTENDS THAT:

The Article 15 should never have been imposed as he was not mentally stable during this period. He experienced marital problems, started drinking, and suffered from an undiagnosed medical condition (hypomanic bipolar disorder). He should have been directed to the mental health clinic instead of being given an Article 15 for two charges of drinking. He was very ill at the time but since he was so new to Germany no one could see how he had changed. His commander told him that based on his past performance his rank would be reinstated if he stayed out of trouble; however, he was reassigned before this could happen.

In support, he provides portions of his medical records.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant enlisted in the Regular Air Force on 6 October 1982. He was ultimately promoted to the grade of technical sergeant with a DOR of 1 January 1995. During the period in question (Article 15), he was assigned to the [REDACTED] Accounting & Finance Squadron (26AFS) at [REDACTED] GE, as a financial specialist.

On 20 September 1989, the unit commander referred the applicant to the [REDACTED] Mental Health Clinic (MHC) for evaluation due to a history of alcohol abuse problem and family conflict issues. Applicant was referred to the Alcohol Rehabilitation Center (ARC) on 26 September 1989.

On 18 July 1990, the Enlisted Performance Report (EPR) closing 16 June 1990 was referred to the applicant for unacceptable off-

duty conduct [not *specified*]. The overall rating was "3." Applicant did not provide comments. This was the first report under the "new" evaluation system. Reports prior to this one were under the "old" system and all reflect the highest overall ratings of "9." Subsequent to this referral EPR, all of his reports reflect the highest overall ratings of "5." All of the performance reports, including the referral, contain extremely laudatory comments with respect to the applicant's duty performance, professional qualities and character.

A 19 July 1996 Substance Abuse Element medical entry reflects that applicant was seen for an alcohol evaluation due to an alcoholic incident on 13 July 1996. Diagnosis was deferred pending further evaluation. A 24 July 1996 follow-up entry indicates the incident involved a fight with a German national; no charges; no blood alcohol test taken. Applicant was seen in the MHC that same day and given a provisional diagnosis of alcohol abuse/marital problems.

On 13 August 1996, the applicant was notified of his commander's intent to impose nonjudicial punishment on him for incapacitation for duty through prior overindulgence in alcohol on 5 and 8 August 1996, in violation of Article 134, UCMJ. On 16 August 1996, the applicant acknowledged that he understood his rights, had consulted a lawyer, waived his right to be tried by court-martial, and desired to make a personal and written presentation. On 19 August 1996, the commander determined the applicant had committed the offenses cited and imposed punishment consisting of a reduction to staff sergeant with a DOR of 19 August 1996, restriction to base for 45 days, performance of extra duties for 45 days, and a reprimand. The restriction and extra duty were suspended until 18 February 1997.

On 21 August 1996, the AFOSI began investigating the applicant for alleged wrongful use/possession of controlled substances [urinalysis was *positive*], housebreaking, unlawful entry, and indecent assault. These violations apparently occurred over the period of 5-21 August 1996.

The applicant was admitted to the ARC at [REDACTED] on 27 August 1996. He was subsequently transferred to the Mental Health Unit (MHU). A medical report dated 30 August 1996 diagnosed him as having alcohol dependence with physiological dependence. He was discharged from the MHU on 6 September 1996 with a diagnosis of alcohol and nicotine dependence, rule out cannabis abuse, bipolar or cyclothymic disorder.

The applicant's appeal of the Article 15 punishment was denied on 11 September 1996.

In their ongoing investigation, the OSI spoke to the Staff Psychiatrist at the [REDACTED] Medical Center, [REDACTED] on 17 September 1996. The doctor indicated he "could not be absolutely sure [the applicant] suffered from Manic Depression because he never had

the chance to speak to *[the applicant]* when *[the applicant]* was absolutely sober." He added that, due to the fact that the applicant possibly drinks because of his depression and the depression is enhanced by his drinking, it would be impossible to treat one disorder without treating the other at the same time. On 23 September 1996, a doctor with the Mental Health Flight at ██████████ informed the OSI that, although the applicant had most symptoms of bipolar disorder, he was not diagnosed with it because he did not have all the features of the disorder, and that he could be considered as suffering from a manic disorder not fitting a specific category.

A Narrative Summary, dated 2 October 1996, indicated the following: Applicant had a history of prior ARC treatment (1988-1989) at ██████████ when he was drinking to cope with marital problems. He stopped drinking for three years while attending Alcoholics Anonymous (AA) and then began "social" drinking. His drinking remained intermittent for a period of years with conscious control efforts until his remote tour in ██████████ when he discovered his wife's infidelity. He attended a men's support group while there to help with depression. Upon reassignment to ██████████ in June 1996, he discovered his wife's second infidelity and began to drink. He had multiple alcohol related problems such as being drunk in public, missing appointments, and receiving two Letters of Reprimand (LORs) and an Unfavorable Information File (UIF) *[these documents are not in the available military personnel records]*. He was admitted to Inpatient Psychiatry at Landstuhl on 8 August and again on 22 August 1996 for treatment of alcohol abuse and to rule out bipolar disorder. Prior to this he was noted to appear manic and would exhibit pressured speech, tangentiality of thoughts, disruptiveness and irritability. He tested positive for marijuana, although he denied its use. On 31 August 1996, he was reported as AWOL and was found later that night in the base exchange. He was transferred to Inpatient Psychiatry from ARC where he continued to show signs of hypomania. He was air-evacuated to ██████████ on 12 September 1996 for further evaluation and treatment, and discharged from the hospital on 30 September 1996. Diagnosis: Bipolar I disorder, single manic episode, moderate; onset August 1996; marked impairment for military service and considerable impairment for civilian industrial adaptability.

He was readmitted to ██████████ on 10 October 1996 for exhibiting inappropriate behavior and exhibiting symptoms of mania.

On 16 October 1996, a Medical Evaluation Board (MEB) convened at ██████████ and recommended referral to a Physical Evaluation Board (PEB). The diagnosis of the MEB was: Bipolar I disorder, single manic episode, moderate. Degree of impairment for military service was marked.

Applicant was seen by a staff endocrinologist at WPAFB for further evaluation of abnormal thyroid function tests. He appears

to have been placed on medication and was to have had additional tests in 6-8 weeks with a follow-up in six months.

On 4 December 1996, the Informal PEB found him unfit for service because of the bipolar disorder and recommended he be placed on the Temporary Disability Retirement List (TDRL) at 30% disability. The applicant concurred with the findings and recommendations.

A 13 January 1997 Mental Health Clinic progress note reflects the applicant had been noncompliant with treatment, i.e., not taking medication for bipolar disorder/hypothyroidism and drinking. Applicant did not show for a 14 February 1997 follow-up appointment.

In the interim, on 24 February 1997, the Secretary of the Air Force Personnel Council (SAF/PC) authorized applicant's advancement to the grade of technical sergeant within the meaning of Title 10, USC, Section 1212.

Applicant was to be placed on the TDRL effective 10 May 1997 with a 30% rating. However, based on pending court-martial charges (allegedly writing bad checks, driving without a license, possessing marijuana, rape), the TDRL order was rescinded on 19 March 1997.

A Sanity Board was conducted at Keesler AFB during 1-7 May 1997; its Summary, dated 7 May 1997, reflected a diagnosis of Bipolar I disorder without psychosis. Laboratory data indicated his admission thyroid stimulating hormone (TSH) was slightly elevated.

Ultimately, all court-martial charges were withdrawn and dismissed and another MEB/PEB process commenced on 7 October 1997. He was placed back on the TDRL effective 30 December 1997 in the retired pay grade of technical sergeant with a 30% disability rating.

Applicant is currently on the TDRL and is scheduled for a periodic physical evaluation in April 1999.

AIR FORCE EVALUATION:

The AFBCMR Medical Consultant reviewed the appeal and indicates that the applicant's evaluation at WPAFB in September is specific in dating onset of his bipolar disorder to August 1996, yet his medical records show that he was referred to mental health services on 19 July 1996 after being identified in an alcohol incident the previous week, well before the stated onset of his disorder. He **has** a long track record of alcohol problems dating back to at least 1989, and it was the alcohol abuse that brought about his demotion, not the symptoms and signs associated with

his subsequent bipolar disorder diagnosis. He was not shown to have a psychiatric disease that would alter his ability to distinguish right from wrong, and his abuse of alcohol cannot be attributed to his bipolar disorder. The Consultant opines that no change in the records is warranted. He does recommend a thorough evaluation of the abnormality in the applicant's TSH test if this has not been previously accomplished, as the potential exists that there is a connection with development of his symptoms if he is hypothyroid [See *Statement of Facts for additional info on this issue*].

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

The Chief, Physical Disability Division, HQ AFPC/DPPD, also evaluated the case and provided a background on the applicant's disability retirement. The Chief found no error in the applicant's diagnosis nor any grounds to warrant an early TDRL evaluation. Applicant's case was appropriately processed and rated. He was afforded all rights to which entitled under disability law and policy.

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

~~APPLICANT'S REVIEW OF AIR FORCE EVALUATION:~~

The applicant reviewed the evaluations and found some of the facts and discussion topics very alarming. When he looks back at his mental state and behavior during July and August 1996 he was out of his mind, had no concern between what was right or wrong and didn't think about any consequences. His medical records show August 1996 as the onset of his disorder but in reality it was about six months before while he was in [REDACTED]. He suggests the advisory opinion authors get precise medical information because they evidently don't know much if anything about this disease. He got sick due to the circumstances of Korea and Germany, his personal life, and not getting diagnosed and medicated sooner.

Applicant's complete response is at Exhibit F.

ADDITIONAL AIR FORCE EVALUATIONS:

The Chief, Physical Disability Division, HQ AFPC/DPPD, provided an explanation as to why the MEB periodically refers to the applicant as a technical sergeant and what military pay grade he is currently being paid while on the TDRL. The applicant was correctly retired in the grade of technical sergeant.

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

The Associate Chief, Military Justice Division, AFLSA/JAJM, reviewed the appeal and notes the applicant does not contest the procedural aspects of his August 1996 Article 15 action nor does he deny that he committed the offenses which resulted in that action. Review of his record indicates prior disciplinary problems, some involving alcohol abuse, dating back to 1988, well before the July-August 1996 period he now claims for the onset of his medical condition. Given his disciplinary and alcohol record prior to and independent from the onset of the medical condition claimed herein, and his demonstrated ability to function professionally regardless of personal extreme stress, it is difficult to find support for his central contention that he was not sane, could not distinguish right from wrong in August 1996 and, but for mental illness, would not have committed the alcohol offenses which resulted in the Article 15 Action at issue. Clearly, to whatever extent he suffered from a bipolar condition at the times he reported drunk for duty he was medically able to distinguish right from wrong and act accordingly. His failure to do so is not attributable to mental disease or defect but rather personal choice and bad judgment for which the applicant was and remains legally responsible. The author concludes that there are no legal errors requiring corrective action regarding the nonjudicial punishment and recommends applicant's request for vacation be denied.

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

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATIONS:

Applicant reviewed the additional opinions and contends that the date of onset/origin for his mental disease is August 1996. He suggests the Board contact a specific doctor of psychiatry at WPAFB for a first-hand medical opinion about him. He did not have a long track record of alcohol problems. He got treatment in 1988 but remained sober and out of any trouble until he arrived in Germany, August 1996, eight years later. The use of alcohol was self-medication because he had no understanding of what was wrong with him, what he was doing, or what the consequences of his actions would be. He wants to appear before the Board to provide insight into his difficulties.

Applicant's complete response, with attachment, is at Exhibit J.

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 the nonjudicial punishment should be set and his grade of technical sergeant restored to its original DOR. Applicant's 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. While we sympathize with the applicant's marital problems and acknowledge his ultimate diagnosis of bipolar disorder, he has not provided convincing evidence demonstrating he was neither mentally nor legally responsible for the alcohol offenses which resulted in the Article 15. 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 of having 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 relief sought.
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 7 January 1999, under the provisions of AFI 36-2603:

Mr. Thomas S. Markiewicz, Panel Chair
Ms. Rita J. Maldonado, Member
Ms. Peggy E. Gordon, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 25 Sep 98, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFBCMR Medical Consultant, dated 15 Jan 98.
- Exhibit D. Letter, HQ AFPC/DPPD, dated 6 Feb 98.
- Exhibit E. Letter, AFBCMR, dated 16 Feb 98.
- Exhibit F. Letter, Applicant, dated 8 Mar 98, w/atrch.
- Exhibit G. Letter, HQ AFPC/DPPD, dated 13 Jul 98.
- Exhibit H. Letter, AFLSA/JAJM, dated 16 Sep 98.
- Exhibit I. Letter, AFBCMR, dated 19 Oct 98.
- Exhibit J. Letter, Applicant, 21 Oct 98.


/ THOMAS S. MARKIEWICZ
Panel Chair