

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2016-00021-4

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request to change his honorable discharge to a medical retirement.

RESUME OF THE CASE

The applicant is an honorably discharged United States Air Force Academy (USAFA) cadet who was discharged with narrative reason for separation of "Involuntary Disenrollment due to Academic Deficiency," on 15 Sep 89, and credited with 1 year, 2 months, and 16 days of active service.

On 25 May 17, the Board considered and denied the applicant's request to change his discharge to a medical separation. In the original case, the applicant contended while he was on active duty as a USAFA cadet on 12 Jul 88, he was unintentionally served food containing raw sewage. Because of the damage to his health, he experienced severe difficulties performing his duties and was separated due to "Involuntary Disenrollment Due to Academic Deficiency." Based in part on an advisory opinion from the 10th Medical Group (Exhibit C), the Board was not convinced the applicant had provided sufficient evidence to conclude he was the victim of an error or injustice. Further, the Board determined the applicant did not file his application within three years after the alleged error or injustice and he offered no plausible reason for the delay in filing. Therefore, his application was determined untimely.

For an accounting of the facts and circumstances surrounding the applicant's original request and the rationale of the earlier decision by the Board, see the AFBCMR Letter and Record of Proceedings (ROP) at Exhibit E.

On 6 Dec 17, the applicant submitted a request for reconsideration of his application and that his discharge be changed to a medical retirement. The applicant contended due to his neurocognitive disorders, based on his anxiety and mental health diagnoses, which were caused by his service-connected bacterial infections, he was improperly discharged for academic failure, when he should have been found unfit due to his service-connected medical and mental health conditions, rated with 50 percent service-connection, and medically retired. He submitted a lengthy update of his medical history and the current state of his health, numerous citations from medical articles, and the Hagel memorandum, dated 3 Sep 14, which directs BCMRs to offer liberal consideration to applicant's with post-traumatic stress disorder (PTSD) when considering petitions to change their character of service. On 1 Jul 16, the Department of Veterans Affairs (DVA) issued the applicant a decision letter denying service-connection for H. Pylori infection, abscess left buttock, degenerative disc disease, eye condition, PTSD, neurogenic bladder, hypertension, bilateral hearing loss, and scoliosis. The applicant indicated he contracted infections and developed marginal ulcers, rated at 100 percent disability by the DVA, neurocognitive disorder, and PTSD. He reiterated his contention the bacteria in the meal he ate at the USAFA in Jul 88 caused career ending illnesses and diseases that do not appear in his service treatment records (STR). All of his medical treatment records at the USAFA were void, lost, misplaced, or destroyed. Based in part

on advisory opinions from the BCMR Medical and Mental Health Advisors (Exhibits G and I), the Board remained unconvinced the applicant had provided sufficient evidence to conclude he was the victim of an error or injustice.

For an accounting of the applicant's reconsideration request and the rationale of the earlier decision, see the AFBCMR Letter and ROP at Exhibit K.

On 20 Mar 20, the applicant requested reconsideration of his request and on 18 May 20, the Board closed his request and returned it without action due to his case was currently being adjudicated in Civil Court. On 30 Sep 20, the Civil Court denied the applicant's request and ruled, "Nothing in this Court's opinion forecloses Plaintiff's right to challenge the Board's second decision, if he so believes it is arbitrary, capricious, or contrary to law."

On 13 Dec 21, the applicant again requested reconsideration of the Board's earlier decision he be granted a medical retirement. The applicant contends on the date of his discharge (15 Sep 89), he was being treated for unstable bruxism and temporomandibular joint dysfunction (TMD), a symptom of PTSD. He indicated his medical conditions were not stable at the time of his discharge and within a full year after his discharge. He contends his STR lists bruxim and TMD symptoms for undiagnosed PTSD and it was not considered by the Board in any of his earlier requests. The DVA has rated his insomnia and bruxism under PTSD which should now be sufficient evidence to support he had a mental health disorder that contributed to his inability to maintain satisfactory performance as a cadet and he was inappropriately separated while acutely or chronically ill; either physically or mentally. On 14 Dec18, the DVA issued the applicant a decision letter and granted service-connection for PTSD (also claimed as insomnia) with an evaluation of 70 percent and residuals of H. Pylori infection to include gastritis and intestinal upset (also claimed as digestive ailments and peptic ulcer disease with an evaluation of 30 percent, effective 5 Mar 15. On 30 Jun 21, the DVA issued the applicant another decision letter and granted service-connection for TMD with bruxim (also claimed as limited ability to chew, tooth condition, grinding teeth as secondary to the service-connected disability of PTSD) with an evaluation of 20 percent. In support of his reconsideration request, the applicant submitted the following new evidence: 1) DVA decisional documents, dated 24 Dec 18, 28 Jun 21 and 30 Jun 21, and 2) a letter from the USAFA Freedom of Information Act office.

The applicant's submission is Exhibit L.

APPLICABLE AUTHORITY/GUIDANCE

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, TBI, sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental

health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued guidance to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to the supplemental guidance, paragraphs 6 and 7.

On 18 Jul 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit O).

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of the newly submitted records and finds these records are insufficient to support his request for a medical retirement for his mental health condition. In the previous mental health advisory dated on 2 Jan 19, the Psychiatric Advisor reported the applicant was denied service-connection for PTSD by the DVA and it appeared he was granted service-connection for this condition after this previous advisory was written, as evidenced by the DVA rating decision letter he provided. Although the DVA had granted him service-connection for PTSD decades after his disenrollment from USAFA, this information is not adequate to demonstrate his mental health condition was unfitting during his time at the academy meeting criteria to be referred to the Medical Evaluation Board (MEB) for a possible medical discharge. As the previous Psychiatric Advisor had reported, there was no evidence he had PTSD or any other mental health disorder at the time of his discharge and no records of any mental health symptoms or treatment he had received at USAFA. It appeared through time, he had developed symptoms of PTSD and eventually met diagnostic criteria for this disorder decades post discharge. This is not an uncommon occurrence with mental health disorders as it may take time for symptoms to become clear, but the evidence at the snapshot in time of service revealed he did not have PTSD or PTSD-like conditions during service causing his disenrollment for academic difficulties. The applicant submitted his dental records from the USAFA and these records appeared to be unremarkable. He received a classification of 4 on SF 603, *Health Dental Record*, but a handwritten note stating “needs annual exam” was annotated as the reason for this classification. This classification 4 is not the same as a duty limiting condition (DLC) profile with designation of 4 to indicate the severity of a condition that would be disqualifying for continued military service. The applicant had teeth grinding issues (bruxism) that were related to stress according to his dentist and it is possible his teeth grinding issues were related to PTSD as the research article suggested and was possibly experienced during his time at USAFA; however, this is only one symptom and

not enough to declare him unfit for duty. This symptom never elevated to being potentially unfitting. There were also no records he had experienced more classic symptoms of PTSD during his time at USAFA such as hypervigilance, flashbacks, nightmares, exaggerated startled responses, avoidance of reminders of trauma, anxiety, etc. These symptoms had developed decades post discharge and was possibly exacerbated and aggravated by his post service stressors as well.

In addition to never receiving any mental health treatment or disorder at the USAFA, there was no evidence his mental health condition had interfered with his ability to reasonably perform his duties, he was never placed on a DLC profile for his mental health condition, and he was never deemed not worldwide qualified due to his mental health condition. Experiencing a symptom or symptoms and receiving treatment do not automatically produce an unfitting condition. More information and markers are required that were absent from his records to make this determination. Therefore, the psychological advisor concurs with the opinion rendered by the previous psychiatric advisor and finds insufficient evidence has been presented to support his request for a medical retirement. There was also no error or injustice identified with his discharge from a mental health perspective.

For awareness since the applicant has received service-connection for his mental health condition by the DVA: The military's Disability Evaluation System (DES), established to maintain a fit and vital fighting force, can by law, under Title 10, United States Code (U.S.C.), only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of law, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary [improve or worsen] over the lifetime of the veteran.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are responses based on the available records to the four questions in the policy (Kurta memorandum):

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant contends he developed PTSD, TMD, bruxism, and digestive ailments as a result of combat related training during a mass casualty incident on 12 Jul 88.

2. Did the condition exist or experience occur during military service? There were no records reporting the applicant's mental health condition to include PTSD had existed or occurred during his time at USAFA. There were no records indicating he received any mental health evaluation, diagnosis, or treatment and no evidence he experienced any PTSD or PTSD-like symptoms or condition at USAFA. He was diagnosed with PTSD related to his service by the DVA more than 30 years post discharge.

3. Does the condition or experience excuse or mitigate the discharge? Since there was no evidence his mental health condition to include PTSD had existed or occurred during his time at USAFA, his condition does not excuse or mitigate his discharge. There was no evidence his mental health condition to include PTSD caused his academic difficulties and subsequent disenrollment for this issue and no evidence he had any unfitting mental health conditions for a referral to the MEB for a medical discharge.

4. Does the condition or experience outweigh the discharge? Since the applicant's mental health condition does not excuse or mitigate his discharge, his condition also does not outweigh his original discharge

The complete advisory opinion is at Exhibit M.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 20 Jul 22 for comment (Exhibit O), and the applicant replied on 26 Jul 22. In his response, the applicant reiterates his contention that his PTSD and illnesses caused him to be unfit at the time of his discharge and ended his career and therefore, his discharge should be upgraded to a medical retirement. In support of his reconsideration request, the applicant provided the following additional new evidence: 1) DD Form 463, *Record of Disenrollment from Officer Candidate – Type Training*, dated 15 Sep 89; 2) letters recommending retention, dated 16 Jan 89 and 17 Jan 89; 3) notification of placement on academic probation, dated 25 Jan 89; and 4) Academy Board disenrollment decision, dated 13 Jun 89.

The applicant's complete response is at Exhibit P.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, to include the applicant's response to the advisory opinion, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the applicant's PTSD was not a medical basis for career termination, nor did it meet the criteria for referral to the MEB. The Board applied liberal consideration based on his PTSD diagnosed by the DVA and finds the applicant's medical condition was not warranted to process through DES as a matter of equity or good conscience in accordance with DoDI 1332.18, *Disability Evaluation System*, Appendix 1 to Enclosure 3, paragraph 4. Therefore, the Board recommends against correcting the applicant's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2016-00021-4 in Executive Session on 21 Sep 22:

Panel Chair
Panel Member
Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit K: Record of Proceedings, w/ Exhibits A-J, dated 15 May 19.
Exhibit L: Application, RECON DD Form 149, w/atchs, dated 13 Dec 21.
Exhibit M: Advisory Opinion, AFRBA Psychologist Advisor, dated 19 Jul 22.
Exhibit N: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Jul 22.
Exhibit O: Letter, SAF MRBC to Applicant (Liberal Consideration), dated 20 Jul 22.
Exhibit P: Applicant's Response, w/atchs, dated 26 Jul 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.12.9.