

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-02756

XXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His discharge Under Honorable Conditions (General) be corrected to a Medical Retirement.

APPLICANT'S CONTENTIONS

His mental and physical health conditions produced or substantially contributed to the minor infractions that led to his administrative separation and made him unfit to reasonably perform his military duties. Specifically, he has obstructive sleep apnea (OSA), severe migraines, persistent-moderate asthma, lumbar and shoulder pain, idiopathic hypersomnia, major depressive disorder, post-traumatic stress disorder (PTSD), panic disorder and generalized anxiety disorder, all of which the Department of Veterans Affairs (DVA) has assigned a combined, stable, and permanent 100 percent rating since the day after his discharge from service. He believes these conditions were unfitting and incurred in service or aggravated by the same and therefore he should have been referred into the Integrated Disability Evaluation System (IDES) and medically retired.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force senior airman (E-4).

On 16 Dec 19, the applicant's commander notified the applicant he was recommending his discharge from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.49, *Minor Disciplinary Infractions*, with service characterized as Under Honorable Conditions (General). The applicant received six letter of reprimands (LORs) and seven letters of counseling (LOCs) for a variety of misconduct ranging from speeding, failing to report to mandatory appointments, suspected driving under the influence, failures to follow orders, failing to go to his place of duty, and making a false official statement.

On 23 Dec 19, the applicant responded to the discharge notification accepting full responsibility for his actions and asked for leniency before a final decision is made. The applicant claimed his attendance issues were the result of him seeking medical attention for his conditions for a prolonged period. He asked for an honorable discharge due to the special circumstances of his case and fully utilize his educational benefits for school to provide for his family.

On 23 Dec 19, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, paragraph 5.49, *Minor Disciplinary Infractions*, with service characterized as Under Honorable Conditions (General) for the specific reasons above.

On 2 Jan 20, the discharge action was found legally sufficient, and the discharge authority approved the recommendation on 6 Jun 20.

On 10 Jan 20, DD Form 214, *Certificate of Release or Discharge from Active Duty*, shows the applicant received an Under Honorable Conditions (General) discharge.

For more information, see the excerpt of the applicant's record at Exhibit B.

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, Traumatic Brain Injury (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 5 Apr 21, the Board provided the applicant a copy of the clarifying guidance (Exhibit F).

According to AFI 36-3208, *Administrative Separation of Airmen*, incorporating changes through 8 June 2017, paragraph 1.18, the types of service characterization are as follows:

Honorable. The quality of the airman's service generally has met Air Force standards of acceptable conduct and performance of duty or when a member's service is otherwise so meritorious that any other characterization would be inappropriate.

Under Honorable Conditions (General). If an airman's service has been honest and faithful, this characterization is warranted when significant negative aspects of the airman's conduct or performance of duty outweigh positive aspects of the airman's military record.

Under Other than Honorable Conditions. When basing the reason for separation on a pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct expected of airmen. The member must have an opportunity for a hearing by an administrative discharge board or request discharge in lieu of trial by court-martial. Examples of such behavior, acts, or omissions include, but are not limited to:

- The use of force or violence to produce serious bodily injury or death.
- Abuse of a special position of trust.
- Disregard by a superior of customary superior - subordinate relationships.
- Acts or omissions that endanger the security of the United States.
- Acts or omissions that endanger the health and welfare of other members of the Air Force.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.
- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. The applicant contends his mental conditions produced or substantially contributed to the minor infractions that led to his administrative separation. The applicant's documented misconducts began in May 2017, prior to the applicant seeking services in the mental health clinic. Based on the available records, there is no evidence to suggest that, at any time the applicant's symptoms rose to the level of an unfitting mental health condition. Because the applicant was deemed an unreliable reporter and admitted he was seeking secondary gain, the veracity of his claims and symptoms cannot be verified. Even if the symptoms were present to some extent, the wide ranging and often contradictory symptomology he presented to multiple mental health providers in the mental health clinic and off-base providers makes it more likely than not the applicant was seeking secondary gain. There is no evidence to suggest the applicant had any Category 1 mental health conditions in service that necessitated a Medical Evaluation Board. Furthermore, the applicant was diagnosed with malingering, which is an unsuited, non-compensable mental health condition. For awareness, the military's Disability Evaluation System, can by law under Title 10, United States Code (U.S.C), only offer compensation for those service incurred diseases or injuries which specifically a member unfit for continued active service and were the cause for career termination; and then only to the degree of impairment present at the "snapshot" in time of separation from service and not based on post-service progression of disease or injury. In contrast, the DVA, operating under a different set of laws, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus to military service,

without regard to its impact on a member's fitness to serve, the narrative reason for release for service, or the length of time that has transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating as the level of impairment from a given condition may improve or worsen over the life of the veteran.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are answers to the four pertinent questions from the liberal consideration policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant's counsel contends the applicant's mental conditions produced or substantially contributed to the minor infractions that led to his administrative separation.

2. Did the condition exist, or experience occur during military service?

There is evidence the applicant received mental health treatment in service; however, there is evidence the applicant admitted to falsifying symptoms for secondary gain and received a diagnosis of malingering from his primary mental health provider which is an unsuiting mental health condition.

3. Does the condition or experience excuse or mitigate the discharge?

The applicant was recommended for discharge due to misconduct. The applicant was seeking secondary gain by utilizing the health care system "to get out the right way". Although his diagnosis of malingering may have caused some (but not all) of his misconduct, it does not excuse nor mitigate his discharge.

Does the condition or experience outweigh the discharge?

The applicant was discharged due to misconduct. There were no errors identified with his discharge processing and thus, does not outweigh the applicant's original discharge.

The complete advisory opinion is at Exhibit C.

ADDITIONAL AIR FORCE EVALUATION

The AFBCMR Staff Physician recommends denying the application and opines that none of the conditions were found unfitting either individually or in combination as referenced and cited by the applicant in his counsel's brief nor were any of those same conditions service aggravated by duties performed by the applicant. The migraine headaches and shoulder/upper back pain were conditions that existed prior to service. The applicant's asthma condition was initially presented well after the start of his disciplinary infractions and despite the civilian provider, annotating a worsening of symptoms to the degree of requiring increased albuterol use remained inconsistent with the spirometry test, which revealed no increased air volume post the administration of albuterol. Additionally, a military training facility medication profile revealed no additional active albuterol prescription was obtained after September 2019. Therefore, the plausible conclusion is that the apparent erroneous asthma diagnosis (based on spirometry criteria) would not be considered an unfitting condition. The applicant cited that a fall during technical school was the start of his lower back pain for which he endorsed intermittent painful symptoms for over a three year period despite various medications and extended physical therapy (PT). The PT progress report authored in late 2019, which documented that his pain always remained the same despite treatment and that his pain perception did not match with improved physiological

changes, was simply another way to say that his subjective symptoms for which he claimed outweighed any objective physical findings. Finally, although the applicant received the diagnosis of (idiopathic) hypersomnia, this condition is often due to other medical conditions to include OSA. The dating of his sleep conditions was well past the start of his disciplinary infractions. Throughout the submitted and reviewed medical records, the applicant often cited his perception of poor and inadequate sleep as being negatively associated with most, if not all, of his physical and mental health conditions. Although initially not getting much fatigue relief in using the Continuous Positive Airway Pressure (CPAP) machine, his last sleep study done using the Bi-level positive airway pressure (BPAP) proved to provide significant symptom relief as indicated by nearly complete resolution of either decreased or stopped breathing events.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 5 Apr 21 for comment (Exhibit E), and the applicant replied on 30 Apr 21. For his response, the applicant provided a memo, dated 4 Jan 20 from his former Area Defense Counsel to the applicant's Commander and Judge Advocate. In the memorandum, the ADC requested the applicant be provided a real, honest opportunity to be referred to the Disability Evaluation System based on his many medical diagnoses, and that his case be allowed to go through the dual processing procedures.

The applicant's complete response is at Exhibit G.

FINDINGS AND CONCLUSION

1. The application is timely.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, 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 the AFBCMR Staff Physician and finds a preponderance of the evidence does not substantiate the applicant's contentions that his mental and physical health conditions substantially contributed to the infractions that led to his administrative separation. The Board is also satisfied that the application of liberal consideration does not warrant relief. Therefore, the Board recommends against correcting the applicant's record.

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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2020-02756 in Executive Session on 14 Jun 21:

- , Panel Chair
- , Panel Member
- , Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 26 Aug 20.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFRBA Psychological Advisor, dated 29 Mar 21.
- Exhibit D: Advisory opinion, AFBCMR Staff Physician, dated 31 Mar 21.
- Exhibit E: Notification of advisories, SAF/MRBC to applicant, dated 5 Apr 21.
- Exhibit F: Applicant Notification of Clarifying Guidance, various dates.
- Exhibit G: Applicant's response, w/atchs, dated 30 Apr 21.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Work-Product

Board Operations Manager, AFBCMR