

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-03450

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His Under Honorable Conditions (General) discharge be changed to a medical retirement.
2. In the alternative, his discharge be upgraded to Honorable with narrative reason of separation of "Secretarial Authority."

APPLICANT'S CONTENTIONS

He was administratively discharged in 2016 because his leadership did not want him to get a disability retirement. His unit senior noncommissioned officer (SNCO) leadership contrived a dereliction of duty charge while he was undergoing a medical retirement for asthma, and issued him non-judicial punishment (NJP) and demotion by two ranks, something unheard of except in serious criminal offenses. A witness stated the charge was issued to prevent, "the dirt bag from getting a medical retirement when we have to serve 20 years to retire."

He appealed to the Air Force Discharge Review Board (AFDRB) and they denied his request failing to address his contentions of the injustice that occurred and concluded his mental health conditions did not have any impact on the allegations of his misconduct. The Board missed the point of his entire argument. He never contended he should have been medically retired for mental health conditions, but rather for asthma.

While he regrets his misconduct during his military career, his medical history shows clearly that much of it was due to his mental health conditions.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 22 Jan 16, an Informal Physical Evaluation Board (IPEB) determined the applicant's asthma was unfitting with 30 percent disability rating and recommended temporary retirement.

On 3 Feb 16, according to Special Order **Work-Product**, the applicant was placed on the temporary disability retired list (TDRL) in the grade of senior airman with compensable percentage for physical disability of 30 percent, effective 28 May 16.

On 16 Feb 16, the applicant was offered NJP by his commander for dereliction in the performance of his duties by failing to send follow up emails weekly to members who had outstanding travel vouchers. For this misconduct, the applicant was reduced to the grade of airman (E-2). On 4 Mar 16, the applicant appealed the action and submitted a response and on the same date, the applicant's appeal was denied.

On 23 Mar 16, the applicant's commander recommended the applicant be discharged from the Air Force under the provisions of AFPD 36-32, *Military Retirements an Separations*, and AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.49 for minor disciplinary infractions. The specific reasons for the action were as follows:

- a. On 30 Jul 14, he failed to go to mandatory physical training at the prescribed time and on 30 Jun 14, he left work early without approval. For these offenses, he received a letter of reprimand (LOR), which was used to establish an unfavorable information file (UIF).
- b. On 8 Dec 15, he failed to go to his appointed place of duty for snow removal. For this offense, he was issued a LOR which was used to establish an UIF and control roster.
- c. Between 1 Nov 15 and 2 Feb 16, he was derelict in the performance of his duties when he negligently failed to send follow up emails weekly to members who had outstanding travel vouchers. For this offense, he received an Article 15, reprimand and was reduced to the grade of airman (E-2).

On 23 Mar 16, the discharge action was found legally sufficient, and the discharge authority approved the recommendation on 24 Mar 16.

On 31 Mar 16, the applicant's approved discharge was deferred pending the outcome of the required dual-action processing by the Secretary of the Air Force Personnel Center (SAFPC) and on the same date, according to Special Order Work-Product, the applicant's placement on the TDRL was rescinded.

On 20 May 16, SAFPC determined that it was more appropriate for the applicant to be administratively discharged, finding no nexus between his unfitting medical condition and his misconduct.

On 14 Jun 16, the applicant was discharged for minor disciplinary infractions and furnished an Under Honorable Conditions (General) character of service discharge.

According to SAF/MRBP, the applicant appealed to the Air Force Discharge Review Board (AFDRB) and the board denied the applicant's request for an upgrade of his discharge and concluded the evidence provided was not sufficient to conclude there was an inequity in the applicant's discharge.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C, E, F and H.

APPLICABLE AUTHORITIES

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.

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to military correction boards regarding liberal consideration for Vietnam veterans claiming Post-Traumatic Stress Disorder PTSD (Hagel Memo). In addition, time limits to reconsider decisions would be liberally waived for applications covered by this guidance.

Subsequent guidance expanded liberal consideration protections to include all veterans who requested a modification of their discharge, to include character of service, narrative reason for discharge and reenlistment code, due in whole or in part to any mental health condition rather than just PTSD or Traumatic Brain Injury, and included those veterans who were victims of sexual assault or sexual harassment. Liberal consideration would 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 21 Jun 21, the Board staff provided the applicant a copy of the liberal consideration (Exhibit G).

AIR FORCE EVALUATION

SAF/MRBP recommends granting the application. After a thorough review of all the available evidence, SAF/MRBP is not convinced that the AFDRB met its burden to adequately address certain pieces of evidence brought forward by the applicant related to the command's alleged motives in

pursuing administrative discharge. Specifically, the applicant provided two statements from former supervisors describing why they believed that leadership was motivated to administratively discharge the applicant to preclude him from qualifying for a disability retirement. These two pieces of evidence were discussed during the hearing, but not thoroughly addressed in the decisional documents or during the deliberation itself. At a minimum, the AFDRB should have addressed this evidence and offered some rationale as to why this evidence was not compelling. Additionally, SAF/MRBP finds that these two statements, combined with the curious timing of the NJP (days after the applicant's disability retirement orders were published) and its severity (demotion by two grades for failure to follow up on outstanding travel vouchers) troublesome and, taken together, believe they constitute sufficient evidence to conclude that it was at least as likely as it was not that NJP and subsequent administrative discharge were motivated by a desire to deprive the applicant of disability retirement benefits.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the Air Force evaluation to the applicant on 7 May 21 for comment (Exhibit D), but has received no response.

ADDITIONAL AIR FORCE EVALUATIONS

DAF/JA recommends denying the application and indicated the applicant's record contains no evidence of an error or injustice. It was within the commander's authority and discretion to take disciplinary action against the applicant, as a service member cannot escape accountability for misconduct simply because they are pending potential medical separation. To allow a service member to be above the law would be detrimental to good order and discipline, and devastating to unit morale. Based on the applicant's own statements and his history of misconduct that includes a pattern of disregard for rules, superiors, and co-workers, the commander could have reasonably decided to give the applicant NJP for his final misconduct, then subsequently discharge him for Misconduct (Minor Infractions) with a service characterization of Under Honorable Conditions (General). Furthermore, the same background could have also reasonably shaped the decisions of the AFDRB and the SAFPC.

The complete advisory opinion is at Exhibit E.

The BCMR Psychological Advisor completed a review of all available records and finds sufficient evidence to support the applicant's request for upgrade to an honorable discharge based on liberal consideration. His request to change his narrative reason to Secretarial Authority is also supported because there is evidence his unsuited mental health condition caused his behaviors and misconduct in service. There is no evidence the applicant had any unfitting mental health condition during service that would meet criteria for a medical discharge/retirement. Should the Board concur that his mental health condition caused, excused, and mitigated his misconduct and discharge, the Board may consider granting his request for a medical retirement for asthma since this condition was already found unfitting by the IPEB and his medical board/Integrated Disability Evaluation was completed. The applicant's misconduct discharge resulted from a dual-action case adjudicated by SAFPC.

The complete advisory opinion is at Exhibit F.

The BCMR Medical Advisor recommends concurrence with the recommendation of SAFPC to expunge the applicant's administrative discharge and to place him on the TDRL, effective 29 May 16, with a 30 percent disability rating due to asthma; for a period of 16 months, following which he was removed from the TDRL and retired permanently with a 30 percent disability rating due to asthma, effective 16 months following his date of initial TDRL placement.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATIONS

The Board sent copies of the Air Force evaluations to the applicant on 25 Jun 21 for comment (Exhibit I), but has received no response.

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, it is the Board majority's opinion the applicant is not the victim of an error or injustice. While the Board majority notes the comments of SAF/MRBP, the BCMR Medical Advisor, and the AFRBA Psychological Advisor are in favor of granting relief, the Board majority believes a preponderance of the evidence fails to substantiate the applicant's contentions. Specifically, the Board majority agrees with DAF/JA in that the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. Furthermore, the Board majority considered liberal consideration but finds no evidence that the applicant's mental health condition mitigated his actions which led to his discharge. Therefore, the Board majority recommends against correcting the applicant's records.
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The Board majority 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-2020-03450 in Executive Session on 14 Jul 21:

Panel Chair
Panel Member
Panel Member

A majority of the panel voted against correcting the record. **Work-Product** voted to grant and submits a minority report. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 6 Oct 20.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, SAF/MRBP, dated 11 Feb 21.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 12 Feb 21.
- Exhibit E: Advisory opinion, DAF/JA, dated 7 May 21.
- Exhibit F: Advisory opinion, AFRBA Psychological Advisor, dated 19 May 21.
- Exhibit G: Clarifying Guidance, AFPC/DP3SP, dated 21 Jun 21.
- Exhibit H: Advisory opinion, BCMR Medical Advisor, dated 25 Jun 21.
- Exhibit I: Notification of advisory, SAF/MRBC to applicant, dated 25 Jun 21.
- Exhibit J: Minority Opinion, dated 20 Oct 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.

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Board Operations Manager, AFBCMR