



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-00782-2

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request his discharge with severance pay (DWSP) be upgraded to a medical retirement, with a compensable disability rating of no less than 30 percent.

RESUME OF THE CASE

The applicant is a former Air Force airman first class (E-3).

On 12 Jan 12, a medical evaluation board (MEB) was convened for his right ankle sprain, with possible stress fracture and continued ankle pain.

On 15 Feb 12, the informal physical evaluation board (IPEB) recommended the applicant be DWSP with a disability rating of 20 percent for his unfitting condition of right ankle pain due to sprain with talofibular ligament injury. His condition was determined not combat related.

On 21 Feb 12, the applicant disagreed with the findings of the IPEB and requested a formal hearing.

On 9 Apr 12, the formal physical evaluation board (FPEB) recommended the applicant be DWSP for his unfitting condition of right ankle pain due to sprain with talofibular ligament injury.

On 11 Apr 12, the applicant agreed with the findings of the FPEB and on 18 Apr 12, the Secretary of the Air Force Personnel Council (SAFPC) directed the applicant be DWSP.

On 9 Jul 12, the applicant was honorably DWSP, with narrative reason for separation of "Disability, Severance Pay, Non-Combat Related." He was credited with 1 year, 8 months and 9 days of active duty service.

On 18 Aug 21, the Board considered and denied his request for a medical retirement on the basis of the Department of Veterans Affairs (DVA) and Social Security Disability Insurance (SSDI) findings he was fully disabled due to the conditions for his separation from active duty. The applicant also requested he be granted Combat Related Special Compensation (CRSC) for his injury that occurred during Basic Military Training (BMT), Basic Expeditionary Airmen Skills Training (BEAST) Week as a combat related activity. The Board concurred with the BCMR Medical Advisor there was no evidence he was improperly DWSP. The Board noted the applicant concurred with the findings of the FPEB's recommendation that he be DWSP for his

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right ankle injury. The Board also noted his ankle injury during BMT Beast Week did not meet the criteria for CRSC per 10 U.S.C. §1413a and the DoDFMR. The Board also found the applicant's request untimely and did not find it in the interest of justice to waive the three year filing requirement in accordance with 10 U.S.C. §1552.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit E.

On 10 Jan 23, the applicant requested reconsideration of his request he be granted a medical retirement for his post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). In support of his reconsideration request, the applicant submitted the following new evidence: (1) Personal Statement; (2) Neurosurgery Notes; (3) Brain Surgery Medical Notes and (4) DVA Provider Notes. He contends he was required to have brain surgery as a result of his service connected fall that occurred while he was in service. He has also been diagnosed with PTSD from the trauma. He requests he be granted a medical retirement on the basis of liberal consideration per the Kurta and Hagel Memorandums.

His DWSP was inadequate, and it has taken a decade to obtain the right doctors and right diagnoses. The new evidence he provides confirms his TBI and PTSD were incurred while on active duty and he was misdiagnosed. His prior case focused only on the ankle/foot dispute and CRSC, while turning a blind eye to other matters. The omission questions the objectivity of the practitioner who reviewed the case or their qualifications in the intricate domain of ankle/foot injuries and thereby casts a shadow on the fairness of the proceedings.

The applicant provides medical notes from the neurosurgery clinic dated 4 Jun 21. It states the applicant sustained a fall in Dec 10 while in the military which led to ankle injury and ligament tears that required surgical reconstruction. However, at the same time, he developed symptoms in his hands that he described as a loss of proprioception and diminished tactile feel. Unfortunately, it was never evaluated and most of the attention was focused on his ankle and lumbar sprain.

Per the medical note provided by the applicant, on 22 Jul 22, the applicant received surgery for suboccipital craniectomy and C1 laminectomy and duraplasty for brainstem decompression. The findings were compatible with Chiari type 1 malformation.

His DVA psychiatrist in a memorandum dated 14 Sep 22, states the applicant was diagnosed with PTSD on 18 May 22. In his opinion, his PTSD is more likely than not related to his repeated traumas incurred while on active duty. Due to his brain surgery the preceding year, it was brought to their attention a TBI more likely than not occurred during his fall while on active duty.

The applicant's complete submission is at Exhibit F.

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 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie Memo, 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 paragraphs 6 and 7 of the Wilkie Memo.

On 4 Apr 24, the Under Secretary of Defense for Personnel and Readiness issued a memorandum, known as the Vazirani Memo, to military corrections boards considering cases involving both liberal consideration discharge relief requests and fitness determinations. This memorandum provides clarifying guidance regarding the application of liberal consideration in petitions requesting the correction of a military or naval record to establish eligibility for medical retirement or separation benefits pursuant to 10 U.S.C. § 1552. It is DoD policy the application of liberal consideration does not apply to fitness determinations; this is an entirely separate Military Department determination regarding whether, prior to "severance from military service," the applicant was medically fit for military service (i.e., fitness determination). While the military corrections boards are expected to apply liberal consideration to discharge relief requests seeking a change to the narrative reason for discharge where the applicant alleges combat- or military sexual trauma (MST)-related PTSD or TBI potentially contributed to the circumstances resulting in severance from military service, they should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised.

Accordingly, in the case of an applicant described in 10 U.S.C. § 1552(h)(l) who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the military corrections boards will bifurcate its review.

First, the military corrections boards will apply liberal consideration to the eligible Applicant's assertion that combat- or MST-related PTSD or TBI potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief, such as an upgrade or change to the narrative reason for discharge, is appropriate.

After making that determination, the military corrections boards will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

On 28 Jun 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit M).

The entire guidance can be found at Exhibit M.

AIR FORCE EVALUATION

AFRBA Psychological Advisor finds insufficient evidence to support his request for a medical disability retirement based on his mental health condition. There is no evidence or records he had any unfitting mental health conditions, including PTSD, cognitive disorder or a TBI that met the criteria to be referred to the MEB. There is no identifiable error or injustice with his discharge from a mental health perspective.

The applicant was diagnosed with PTSD by his DVA providers 10 years after his discharge from his fall injuring his ankle and tearing his ligament. His psychiatrist reported "repeated traumas" from his time in service but only mentioned his one traumatic experience of his fall. The psychiatrist in his treatment notes also erroneously reported the applicant was in the Coast Guard so his psychiatrist's note may not be consistent or is inaccurate. Before he was given a formal diagnosis of PTSD by his psychiatrist, he was evaluated by numerous providers who determined he did not meet the diagnostic criteria for PTSD. Other clinical psychologists who provided therapy over the years reported he had depression, secondary to his chronic pain and did not give him a diagnosis of PTSD. Different mental health providers will have different clinical judgment, and this does not indicate he was misdiagnosed. Regardless of differing opinions, there is no evidence he had PTSD or a similar condition at the time of his service. Based on his DVA treatment records, he developed symptoms following his discharge from service that were developed and progressed over time. It appears he had a delayed onset of PTSD causing him to meet the diagnostic criteria for PTSD years after his traumatic experience occurred. Delayed onset is not an uncommon occurrence. His clinical presentation after service vastly differs from his clinical presentation during service, and again there is no evidence or records he had a mental health condition of PTSD that was unfit for military service.

There is also no evidence or records he had any direct head trauma or sustained a TBI during service. He was never given a diagnosis of a TBI, Cognitive Disorder, Mild Cognitive Impairment or any other related condition during and after from his fall. There is no evidence or records he had any neuropsychological problems such as with memory, concentration, problem-solving, speech, perceptual or learning during service. There is also no evidence of any significant behavioral, cognitive or intellectual changes affecting his overall functioning from the fall during service. As noted in his neurosurgery notes, his symptoms progressively worsened

over time. However, there is no evidence his neuropsychological or cognitive problems impaired his ability to function appropriately in a military setting or these problems made him unfit for service.

For awareness, since the applicant is receiving care and service connection from the DVA, the military's Disability Evaluation System (DES), established to maintain a fit and vital fighting force, can by law, under 10 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 time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, under 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 of time transpired since the date of discharge.

The applicant requests liberal consideration be applied to his request for medical retirement. However, updated clarifying guidance, the Vazirani memorandum dated 4 Apr 24, clearly states that liberal consideration does not apply to fitness determinations or medical discharge requests. Therefore, liberal consideration is not applied. The updated guidance also instructs a bifurcate review be performed when a mental health condition such as PTSD or TBI potentially contributed to the circumstances of discharge to determine whether an upgrade to the discharge or change of the narrative reason is appropriate. The applicant already received an honorable character of service and there is no error or injustice identified with his narrative reason for separation, so a bifurcate review is not necessary or required.

The complete advisory opinion is at Exhibit H.

AFPC/DPFDD recommends denial. There is no evidence of an error or injustice in the DES processing. The records shows the IPEB correctly applied the Veterans Administration System for Rating Disabilities (VASRD) by assigning a 20 percent rating for his unfitting right ankle condition during DES processing. There is no evidence he sustained a TBI or was diagnosed with PTSD while in service so these conditions would not be compensable under the DES.

On 12 Jan 12, a MEB found the applicant potentially unfit for right ankle sprain with possible stress fracture and continued ankle pain. According to the MEB narrative summary (NARSUM), he sustained an ankle injury during week 7 of BMT. He was allowed to graduate; however, after starting technical training, he continued to complain of ankle pain and received physical therapy but refused surgical intervention. There is no indication he was diagnosed with PTSD or sustained a TBI while in service. A Line of Duty (LOD) Determination dated 24 Oct 11 indicated he rolled his ankle in a pothole while participating in a BMT formation run but makes no mention of sustaining a head injury during this event.

A review of the applicant's DVA records indicate on 13 Feb 13, the DVA initially assigned a 10 percent rating for status post right ankle Brostrom talofibular ligament repair, with residual sprain and a 10 percent rating for status post right foot trauma. Although separated, the ratings combined still match the 20 percent rating assigned by the PEB for his ankle condition. It is also noted this rating decision awarded a 10 percent rating for degenerative disc disease lumbar spine secondary to his right ankle injury. However, there is no indication he was diagnosed with PTSD or a TBI shortly after separation from service. Further, the Air Force and the DVA disability systems operate under separate laws. A higher rating by the DVA based on new/and or current examinations conducted after discharge from service does not warrant a change in the total compensable rating awarded at the time of a member's separation.

The first mention of PTSD is found in a DVA rating decision dated 3 Dec 14, which was denied because he had not been clinically diagnosed. However, this rating decision indicates he was being evaluated for psychosis, which presented within two years of discharge and the DVA denied a claim for organic mood disorder of depressed type. The most recent rating decision dated 20 Sep 21 indicates the DVA diagnosed his mental health condition as Major Depressive Disorder (MDD) with Generalized Anxiety Disorder (GAD) associated with his DVA service-connected dermatitis. This rating decision also indicates the DVA denied service connection for PTSD. There is also no mention in his DVA records he was officially diagnosed with, or service connected for a TBI.

The applicant provided documentation from his neurosurgeon documenting surgery was performed on 22 Jul 21 due to a Chiari type I malformation, which is considered a congenital defect which develops as the skull and brain are growing. Symptoms may not occur until late childhood or adulthood. This condition is not considered a TBI and was not diagnosed while in service, although slight symptoms that did not interfere with military service may have existed. His DVA psychiatrist in a memorandum dated 14 Sep 22 states his PTSD more likely than not was related to his repeated traumas incurred while in service and his surgery brought to his attention a TBI more likely than not occurred during his fall while on active duty. However, there is no documented evidence in his military or DVA records to substantiate these assertions.

The complete advisory opinion is at Exhibit J.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the AFRBA Psychological advisory opinion to the applicant on 4 Jun 24 and the AFPC/DPFDD advisory to the applicant on 5 Jun 24 for comment (Exhibits H and J). In a response dated 24 Jun 24, he contends the comprehensive medical evidence, service treatment records (STR), extensive refutation statements and legal principles presented create a clear, compelling and persuasive case for upgrading his medical separation to a medical retirement with a disability rating commensurate for his service connected TBI and PTSD. The evidence establishes a strong nexus between his conditions and his military service.

Regrettably, his STR does not mention his head injury. He was instructed to focus solely on his right ankle injury and not to investigate new issues unless they were life threatening. He never had the opportunity to see specialists for his PTSD and TBI while on active duty and in medical hold status due to constraints placed on him by active duty physicians. This explains why there is no formal documentation of PTSD, TBI or other mental health diagnoses in his STR. These conditions would likely have disqualified him from active duty service.

As a former certified Compensation and Pension (C&P) examiner from 2015 to 2019 within the DVA, he is qualified to offer opinions following the medical opinions that it is at least as likely as not (a 50 percent or greater probability) that his TBI is directly related to his TBI sustained while on active duty on 31 Dec 10. It is also at least as likely (a 50 percent or greater probability) his PTSD is directly related to the continued torturous physical therapy events endured while on active duty. The MEB and PEB also obstructed his active duty orthopedic foot and ankle specialist from correcting his ankle and foot injuries due to concerns about cost and recovery time. The obstruction mirrors limitations imposed on his ability to address his head injury, TBI, PTSD and other conditions. Both instances highlight systemic issues that compromised his physical and mental health care.

The Board can rectify the injustice of his initial medical separation and provide him with the support to manage his ongoing health challenges. The failure to properly diagnose, document and treat his conditions during his time in service should not preclude him from receiving the

benefits he deserves. The Board's decision to grant him a medical retirement would also provide him with the appropriate recognition and benefits for his service connected disabilities and serve as a measure of justice and support for a veteran who has sacrificed so much in service for his country.

The applicant's complete response, with attachments, is at Exhibit L.

In an undated additional response, the applicant responded to the liberal consideration guidance. The applicant contends the Vazirani memorandum was emphasized over other relevant memorandums that provide a broader context and guidance for the review of discharge upgrade requests involving PTSD and TBI. The selective emphasis on the Vazirani memorandum is insufficient and potentially prejudicial.

The Hagel memorandum directs military branches afford "liberal consideration" to discharge upgrade requests involving PTSD or related mental health conditions. The Kurta memorandum further clarifies. These principles are codified in 10 U.S.C. § 1552 and 10 U.S.C. § 1553. He provides court cases (*Kelly v United States*, *Doyon v United States* and *LaBonte v United States*) as precedent to ensure his case is reviewed with liberal consideration, potentially leading to an upgrade to a medical retirement.

The Vazirani memorandum restricts the application of liberal consideration to fitness determinations. This should not apply retroactively to assess his medical fitness for continued service. The Hagel and Kurta memorandums mandate liberal consideration be applied to his request. The Vazirani memorandum should not be the sole focus because it provides an incomplete picture. A comprehensive review requires consideration of the broader context of the Hagel and Kurta memorandums, legal precedent and statutory mandates.

The applicant's complete submission is at Exhibit N.

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, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the rationale and recommendations of the AFRBA Psychological Advisor and AFPC/DPFDD and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds insufficient evidence to support his request for a medical disability retirement based on his mental health condition. There is no evidence or records he had any unfitting mental health conditions, including PTSD, Cognitive Disorder or a TBI that met the criteria to be referred to the MEB for a potential medical retirement. Moreover, there is no evidence of an error or injustice during DES processing. The record shows that the IPEB correctly applied the VASRD assigning a 20 percent rating for his unfitting right ankle condition during DES processing. As noted, there is no evidence he sustained a TBI or was diagnosed with PTSD while in service; therefore, these conditions would not be compensable under the DES. The Board also disagrees with the applicant that Department of Defense policy mandates liberal consideration be applied to his request. In this respect, the Vazirani memorandum is clear that liberal consideration does not apply to fitness determinations. Further, liberal consideration does not mandate relief. Therefore, the Board 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 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-2021-00782-2 in Executive Session on 22 Aug 24:

Work-Product, Panel Chair
Work-Product, Panel Member
Work-Product, Panel Member

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

- Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 23 Sep 21
- Exhibit F: Application, DD Form 149, w/atchs, dated 10 Jan 23.
- Exhibit G: Documentary evidence, including relevant excerpts from official records.
- Exhibit H: Advisory Opinion, AFRBA Psychological Advisory, dated 4 Jun 24.
- Exhibit I: Notification of Advisory, SAF/MRBC to Applicant,, dated 4 Jun 24.
- Exhibit J: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 5 Jun 24.
- Exhibit K: Notification of Advisory, SAF/MRBC to Applicant, dated, 5 Jun 24.
- Exhibit L: Applicant's Response, w/atchs, dated 24 Jun 24.
- Exhibit M: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 28 Jun 24.
- Exhibit N: Applicant's Response, w/atchs, undated.

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

9/6/2024

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Board Operations Manager, AFBCMR
Signed by: USAF