

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02353

XXXXXXXXXX

COUNSEL: XXXXXXXXXXX

(AKA) XXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. She be medically retired for her bipolar disorder with a disability rating exceeding 30 percent.
2. She receive all back pay and associated benefits.
3. Her narrative reason for separation and corresponding separation code be changed from "Personality Disorder" and "HFX" to "Secretarial Authority" and "JFF."

APPLICANT'S CONTENTIONS

Her mental health disorders caused her to have migraine headaches and trouble sleeping; she also had difficulty concentrating on daily tasks and was increasingly angry. Her mental health condition worsened and began affecting her ability to reliably serve, despite medication and therapy. As a result, the Air Force processed her for an accelerated administrative discharge for a misdiagnosed personality disorder. With the exception of her personality disorder diagnosis, the vast majority of her mental health records contradicts her personality disorder diagnosis and instead, she had severe bipolar II disorder, which the Department of Veterans Affairs (DVA) had determined was service-connected and was rated at 70 percent disabling. She should have been referred to the Disability Evaluation System (DES) for evaluation for a medical retirement instead of being administratively separated.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 18 Jun 07, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.11.9.1 for conditions that interfere with military service, mental disorder - personality disorder. The specific reasons for the action were:

- a. On 19 Mar 07, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment, Article 15 for intent to defraud by falsifying documents. She received a reduction in grade to senior airman (E-4), suspended until 18 Sep 07, and forfeiture of pay of \$200.00 for 2 months.

b. On 16 May 07, the Staff Psychologist diagnosed the applicant with a personality disorder which was deemed to be severe enough to impair her ability to function effectively in a military environment with a recommendation of an administrative separation.

c. On 17 May 07, AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, indicates the applicant violated Article 86 by failing to go on two separate occasions. The applicant was reduced to the grade of senior airman with a new date of rank (DOR) of 19 Mar 07.

On 20 Jun 07, the discharge authority directed the applicant be discharged for personality disorder, with an honorable service characterization.

On 21 Jun 07, the applicant received an honorable discharge. Her narrative reason for separation is "Personality Disorder" and she was credited with six years and one day of total active service.

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

APPLICABLE AUTHORITY

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 (USD P&R) issued supplemental 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 4 Apr 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

AIR FORCE EVALUATION

AFPC/DP2SSR recommends denying the applicant's request to change her narrative reason for separation and corresponding separation code to "Secretarial Authority" and "JFF." Based on review of the applicant's request and her master personnel record, there is no error or injustice with the discharge processing. The commander provided the Base Discharge Authority (BDA) ample documentation from the medical authorities to support her separation. The BDA determined that the applicant's diagnosed medical condition was not compatible with continued military service and directed discharge.

The complete advisory opinion is at Exhibit C.

The AFRBA Psychological Advisor completed a review of all available records and finds sufficient evidence to support a medical separation based on her bipolar II disorder as unfitting under the Veterans Affairs Rating Schedule for Disabilities (VARSD) code 9432 with a final 10 percent disability rating. Her narrative reason for separation should also be changed to "Secretarial Authority" or another appropriate narrative to correct the error of her personality disorder diagnosis and separation. This psychological advisor finds no evidence to support the applicant had a bona fide personality disorder. She was given a diagnosis of personality disorder, not otherwise specified (NOS), which in and of itself, is vague with no specific features or traits detailed in her records. Her treatment notes find no rationale provided in her service treatment records for how she met diagnostic criteria for a personality disorder. She was administered two assessments, which are personality inventories, presumably yielding a diagnosis of an unspecified personality disorder. This psychological advisor opines this is not a robust nor comprehensive battery of assessments that would be sufficient enough to confirm a personality disorder diagnosis or even to rule out a bipolar disorder diagnosis. Another important factor to consider is personality

disorders are considered to be pervasive, inflexible, and enduring patterns of maladaptive behavioral traits. If the applicant truly had a personality disorder, her DVA providers through the past several years would have been able to detect or observe her personality traits. The fact that none of them documented or gave her this diagnosis would provide credence to the notion that her personality disorder diagnosis was made erroneously. It is to note there was no evidence her military providers were intentional or malicious in their actions of giving her an erroneous personality disorder diagnosis but rather, her clinical presentation and symptoms were not clear at the time. It was demonstrated over the years her personality disorder diagnosis could not be sustained or enduring as required as the reason this diagnosis was not valid several years after the diagnosis was made. Thus, this psychological advisor finds an error was made with her personality disorder diagnosis.

This Psychological Advisor opines the applicant had experienced the onset of bipolar disorder during her time in service. She was in the typical age range of when symptoms of this condition would begin and would explain the need for psychological testing for diagnostic clarity. Bipolar disorder and its symptoms however, may take time and years to become clear in order to differentiate this condition from others, as many symptoms of bipolar disorder share symptoms with other conditions to include major depressive disorder and personality disorder, conditions she was diagnosed with during service. When the onset of a condition like bipolar disorder occurs, it could be very difficult to differentiate the condition and was probably the reason her military providers believed she had a personality disorder. She was reported to experience impulsive behaviors, expansive and labile mood, substance abuse, and sleep disturbances but did not experience enough symptoms to meet full criteria for any variations of a bipolar disorder according to her military providers. It is acknowledged the applicant received an independent assessment almost immediately following her discharge and claimed to the evaluator her civilian providers had diagnosed her with bipolar II disorder, the records were submitted to her military providers, and the diagnosis was rejected. These records are not available or submitted for review and so this psychological advisor could not offer an opinion pertaining to these records. Her independent evaluation and her Compensation and Pension (C&P) exam performed within months of discharge however, both resulted with a diagnosis of bipolar II disorder, and this psychological advisor accepts this diagnosis. Should the applicant be diagnosed with bipolar II disorder during service, she would have been referred to the DES as her condition appeared to have interfered with her functioning in the military. There was evidence she was placed on a duty limiting conditions (DLC) profile (S4) and was deemed not worldwide qualified (WWQ) due to her mental health condition, and her original reason for discharge was based on a mental health condition. Her condition would have been found unfit by the physical evaluation board.

In terms of a proposed rating, this psychological advisor finds no evidence to support the applicant and her legal counsel's request for a rating exceeding 30 percent for a medical retirement. Her symptoms and impairment better align to a 10 percent rating because she reported her symptoms have improved in the last several treatment sessions with no reported depressed mood, anxiety, safety concerns, labile mood, and sleep issues. She had even elected to stop attending treatment and taking her psychotropic medications by her own volition because she was feeling better. There was also no indication or evidence she needed continuous mental health treatment following discharge and this would support her condition was stable at, near, or around the time of her service and discharge. Her DVA treatment records reported she began taking an antidepressant

medication again prescribed in 2011, four years post-discharge, and did not receive regular mental health treatment until 2013. The applicant's rating would not change even if she was placed on the Temporary Disability Retired List (TDRL) because the maximum time allowed on the TDRL is three years and within her three years from discharge, she did not receive any mental health treatment and no evidence her symptoms were fluctuating signifying her condition was stable during a hypothetical TDRL period. It appeared her condition and symptoms had exacerbated and was aggravated by post-service stressors caused several years post-discharge and not related to her military service.

For awareness regarding rating disparities between the military and DVA ratings, the military 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 future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to serve, or the length of time since date of discharge. This is the reason an individual can be released from military service for one reason and yet, sometime thereafter, receive compensation ratings from the DVA for medical conditions that were service connected, but were not militarily unfitting at the time of discharge. The DVA is also empowered to conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease) 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 to the four questions in the 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 and her legal counsel contend the applicant was misdiagnosed with a personality disorder and should have been referred to the DES for bipolar II disorder with a rating exceeding 30 percent.

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

There is evidence the applicant was diagnosed with personality disorder NOS, major depressive and adjustment disorder during military service. She was also suspected to have possible bipolar symptoms and psychological testing was completed for diagnostic clarification during service. She was never given a diagnosis of bipolar II disorder by her military providers and was diagnosed with this condition 1-2 months post-discharge by an independent civilian provider and the C&P evaluator.

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

There is evidence the applicant was placed on a DLC profile and was deemed not WWQ due to her mental health condition. She should have been referred to the DES for bipolar II disorder and this condition would have been found unfit for military service meeting criteria for a medical discharge. Therefore, her condition would excuse or mitigate her discharge.

4. Does the condition or experience outweighs the discharge?

There is sufficient evidence the applicant had an unfitting mental health condition of bipolar II disorder and would meet criteria for a medical discharge with a final rating of 10 percent according to her records. Her unfitting mental health condition would outweigh her original administrative discharge for an unsuited mental health condition.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 4 Apr 22 for comment (Exhibit E), and the applicant replied on 4 May 22. In her response, the applicant's counsel disagrees with the mental health advisory which stated that a MEB would have found her bipolar disorder only warranting a 10 percent disability rating. The evidence clearly supports her condition warranted a rating that equals or exceeds 30 percent at the time of her discharge. The Board should adopt a 70 percent rating as determined by the DVA and award her a medical retirement. The opinion does not afford proper weight to the DVA's decision which was rendered shortly after the applicant's discharge and it examines a too small of a "snapshot" of the applicant's condition at separation. Her records are clear that her mental health disorders caused significant occupational and social impairment and that she was not functioning satisfactorily within the Air Force prior to her discharge.

The applicant's complete response is at Exhibit G.

FINDINGS AND CONCLUSION

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
2. The applicant exhausted all available non-judicial relief before applying to the Board.

After reviewing all Exhibits, the Board concludes the applicant is 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 substantiates the applicant's contentions in part. Specifically, the applicant's medical records show she was given a diagnosis of personality disorder, NOS, with no specific features or traits detailed in her records. Instead, she experienced the onset of bipolar disorder during her time in service. She was in the typical age range of when symptoms of this condition would begin which was later diagnosed by the DVA, which is sufficient to justify granting the applicant's request for a medical separation and a correction to her DD Form 214. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's and her legal counsel's request for a rating exceeding 30 percent for a medical retirement. Her symptoms and impairment better align to a 10 percent rating because she reported her symptoms have improved in the last several treatment sessions with no reported depressed mood, anxiety, safety concerns, labile mood, and sleep issues. The Board notes, the applicant elected to stop attending treatment and taking her psychotropic medications by her own volition because she was feeling better. There was also no indication or evidence she needed continuous

mental health treatment following discharge and this would support her condition was stable at, near, or around the time of her service and discharge. Therefore, the Board recommends correcting the applicant's records as indicated below.

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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

a. On 20 June 2007, she was found unfit to perform the duties of her office, rank, grade, or rating by reason of physical disability, incurred while she was entitled to receive basic pay; the diagnosis in her case was bipolar disorder, that her condition was under VASRD code 9432; with a disability rating of 10 percent; the degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during a period of unauthorized absence; and the disability was not a direct result of armed conflict or caused by an instrumentality of war and was not combat-related.

b. On 21 June 2007, she was not discharged due to a personality disorder but instead was discharged due to a physical disability – entitled to severance payment, with a 10 percent compensable disability rating. Her narrative reason for separation will be corrected to show “Disability, Severance Pay” with a corresponding separation code of “JFL.”

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

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-2021-02353 in Executive Session on 27 Apr 22 and 13 May 22:

, Panel Chair
, Panel Member
, Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 7 Jul 21.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory opinion, AFPC/DP2SSR, dated 1 Nov 21.

Exhibit D: Advisory opinion, AFBCMR Psychological Advisor, 28 Mar 22.

Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 4 Apr 22.

Exhibit F: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 4 Apr 22.
Exhibit G: Applicant's Response, dated 4 May 22.

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

Board Operations Manager, AFBCMR