

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02804

COUNSEL:

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His military records be corrected to reflect the following:

1. He be granted a medical retirement.
2. He be placed on the temporary disability retired list (TDRL) or,
3. In the alternative, he be granted a military retirement.

APPLICANT'S CONTENTIONS

He was unjustly and erroneously separated from the Air Force without receiving a Medical Evaluation Board (MEB). In 2004, he walked into an antenna and fell backwards on the tarmac while on Title 10 active-duty orders. He reported the fall to his supervisor, was examined at the clinic and was sent to see a chiropractor. He later obtained a civilian job but continued having medical issues. In 2010, he was again placed on Title 10 active-duty orders six months after signing back up with the Air National Guard (ANG). While running to meet an incoming aircraft, he experienced intense pain and his back went out and spent three weeks recovering. He was informed medical continuation (MEDCON) orders had been applied for but they were never approved. He was then discharged on 31 Mar 11. His command ignored his underlying medical condition, which caused further injury, depression and anxiety, due to their inaction and negligence. He received three months of incapacitation (INCAP) pay but his request for additional INCAP pay was denied. His command did not have the proper authority to administratively separate him, and he should have been referred to the medical evaluation board (MEB)/Physical Evaluation Board (PEB), considered for placement on the TDRL, or considered for a military retirement.

The applicant's counsel refers to the liberal consideration guidance and extensive directives related to post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI).

In support of the applicant's request, the applicant provides copies of military records, medical records for the period 1987 thru 1991, and Department of Veterans Affairs (DVA) decisional documents, dated 4 Jan 21 and 19 Jan 21.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air National Guard (ANG) staff sergeant (E-5) eligible for retirement and awaiting retirement pay at age 60 years (9 Apr 28).

On 31 Dec 05, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was released from active duty and transferred to the ANG after serving from 1 Oct 03 to 31 Dec 05 in support of Operation NOBLE EAGLE.

On 10 Jun 06, according to AF Form 348, *Line of Duty Determination*, dated 21 Oct 07, the applicant was struck by a baseball bat causing serious physical injury while participating in a wing organized event during unit training assembly (UTA) and was considered in line of duty (ILOD).

On 31 Mar 11, according to DD Form 214, the applicant was released from active duty and transferred to the ANG after serving from 8 Oct 10 thru 31 Mar 11 in support of Operation ENDURING FREEDOM.

On 19 Sep 12, according to NGB 22, *Report of Separation and Record of Service*, the applicant received an honorable character of service discharge and was credited with 21 years total service for retired pay.

On 20 Sep 12, according to Reserve Order xx, the applicant was placed on the Reserve Retired List awaiting retired pay at age 60 years (9 Apr 28).

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

APPLICABLE AUTHORITY/GUIDANCE

10 United States Code (U.S.C.) §12731b. Special rule for members with physical disabilities not incurred in line of duty (a) In the case of a member of the Selected Reserve of a reserve component who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for purposes of section 12731 of this title, determine to treat the member as having met the service requirements of subsection (a)(2) of that section and provide the member with the notification required by subsection (d) of that section if the member has completed at least 15, and less than 20, years of service computed under section 12732 of this title. (b) Notification under subsection (a) may not be made if—(1) the disability was the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned; or (2) the disability was incurred during a period of unauthorized absence.

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 Aug 17, 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 16 Aug 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

AIR FORCE EVALUATION

NGB/SGP recommends denying the application and finds no evidence of an error or injustice to the applicant's type of discharge. The applicant did not provide any substantiating civilian and military medical documentation for the injury to his head and back.

The applicant's counsel states while the applicant was on temporary duty (TDY) in 2004, he injured himself by walking into an antenna and fell backwards on the tarmac. The applicant incurred a lump on the head and back injury due to the fall. No civilian nor military medical documentation was provided to substantiate the injuries and treatment of the applicant's back and head. The specific date, time, and location of when the injuries occurred is not indicated. The military medical documentation provided were various acute medical issues between the dates of Aug 1987 to Jan 1991, a 2006 Line of Duty for a neck injury, and a DVA rating of 50 percent for obstructive sleep apnea (OSA).

The applicant has a DD Form 214 for the active duty period of 1 Oct 03 – 31 Dec 05 to validate he was on active duty during 2004. During the 2-year (2003-2005) period of active duty, the applicant would have been entitled to Tricare benefits to receive care for illness/injuries.

The applicant was also placed on a five month active-duty order for the period of 8 Oct 10 – 31 Mar 11. In order to be placed on any active duty order an individual must be medically cleared. This active-duty period indicates the member was medically cleared to be placed on active-duty orders. There is no medical documentation indicating the applicant was unfit at time of separation.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 5 Jul 22 for comment (Exhibit D), but has received no response.

ADDITIONAL AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence the applicant had any unfitting mental health conditions during service that would meet criteria for a referral to the MEB for a potential medical discharge/retirement. His records revealed he sought brief mental health treatment for depression that was secondary to this physical condition and financial problems. He was seen a total of three times at the mental health clinic and his treatment was terminated because his symptoms had improved and his mood was stable. At termination of treatment, he was assessed to be worldwide qualified (WWQ), did not require any duty limitations, and his mental health condition did not impair his occupational functioning. He was screened by psychiatry at the DVA right before his official discharge from service and reported having some depression with a suicide attempt the year prior, but there were no records he sought treatment after his attempt as the applicant had reported. Even if the applicant had experienced depression and had an accidental overdose that coincided with his time with the ANG, there was no evidence these incidents occurred while he was on orders or ILOD. There was no evidence he received any LOD determination for his mental health condition. A favorable LOD is required for a compensable medical discharge because he was a member of the ANG in accordance with policy. The applicant's depression was reported to have been related to his back injury, but his depression never elevated to a standalone or primary condition during service and did not become potentially unfitting causing career termination. Receiving mental health treatment or having a mental health condition does not automatically make a condition unfitting. More information and markers were needed to meet criteria for an MEB, and the presented records finds there was no error or injustice with his discharge and does not support his request for a medical retirement or temporary retirement pertaining to his mental health condition.

For awareness since the applicant has been service-connected for major depressive disorder (MDD) and OSA from 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.

The Board applied liberal consideration to the applicant's request due to the contention of a mental health condition. The following are answers to the four questions from the Kurta memorandum 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 his legal counsel are requesting a medical retirement, temporary retirement, or military retirement. They submitted a DVA Decision Rating document declaring he was granted a 50 percent rating for OSA secondary to MDD effective on 29 Dec 15.

2. Did the condition exist or experience occur during military service? There is evidence the applicant received brief mental health treatment for depression derived by his back injury and financial problems occurring in tandem while he was a member of the ANG. He was not on orders when he received mental health treatment at his local military treatment facility but was permitted to receive treatment because his depression was related to his back injury. He received a screening with psychiatry at the DVA prior to his official discharge and reported feeling somewhat depressed and had an accidental overdose/suicide attempt the previous year and did not seek medical treatment. There was no evidence he was on orders during any of these experiences.

3. Does the condition or experience excuse or mitigate the discharge? There is no evidence the applicant received a LOD determination for depression or other mental health condition. There is no evidence he had any unfitting mental health conditions that would meet criteria to be referred to the MEB for a medical discharge/retirement. Therefore, his mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge? Since there is no evidence his mental health condition may excuse or mitigate his discharge, his mental health condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 29 Aug 22 for comment (Exhibit G), 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, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and/or recommendation of NGB/SGP and the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the applicant's medical conditions were not a basis for career termination, nor warranted to process through DES as a matter of equity or good conscience IAW DoDI 1332.18, *Disability Evaluation System*, Appendix 1 to Enclosure 3, paragraph 4. The Board considered liberal consideration based on his mental health conditions, but does not find sufficient evidence to support a medical retirement or placement on the TDRL. Additionally, the Board notes the applicant's request for a military retirement and that he is currently on the Retired Reserve List awaiting retirement at age 60. The applicant is not eligible for any other type of military retirement, to include under 10 U.S.C. §12731b as he did not have a disqualifying medical condition. 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-2021-02804 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 A: Application, DD Form 149, w/atchs, dated 12 Aug 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, NGB/SG, dated 21 Mar 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 5 Jul 22.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 16 Aug 22.
- Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 17 Aug 22.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 29 Aug 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.