

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXX

DOCKET NUMBER: BC-2021-02984

COUNSEL: XXXXXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His narrative reason for separation be changed from "Misconduct (Minor Infractions)" to "Secretarial Authority."
3. He be given a medical retirement with a disability rating of at least 40 percent.
4. In the alternative, he be entered into the Integrated Disability Evaluation System (IDES) and given a medical evaluation and rating.

APPLICANT'S CONTENTIONS

He suffered injuries while on active duty that led to his depression that caused him to commit three instances of very minor misconduct. After he was recommended for inpatient treatment, his command decided to separate him with a general discharge to avoid responsibility for his medical care and further career progression. He should have been processed through the IDES for his unfitting medical diagnosis which was the cause of his loss of flight status.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 25 Aug 17, Aeronautical Order XXXXX indicates the applicant was terminated from aviation service due to being medically disqualified.

On 8 Nov 17, AF Form 2096, *Classification-on-the-Job Training Action*, indicates the applicant was removed from his Air Force Specialty Code (AFSC) of 1A351 (Airborne Mission Systems Operator) due to a medical disqualification. The form indicates the applicant is still Worldwide Qualified (WWQ).

On 12 Dec 17, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct (Minor Infractions)" and he was credited with four years, one month, and eight days of total active service.

On 15 May 18, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 18 Jul 19, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process. The Board noted, upon review of the applicant's service record, the board was not able to find any documentation regarding the discharge. Factoring in the known misconduct, the member's service record and the absence of the discharge package from the record, the board concluded the known misconduct outweighed the positive accomplishments and the discharge received by the applicant was appropriate.

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

POST-SERVICE INFORMATION

On 9 Mar 22, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); however, he has not replied.

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 (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 9 Mar 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

AFI 36-3208, *Administrative Separation of Airmen*, describes the types of service characterization:

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.

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. Addressing the applicant's request for a medical retirement, there is evidence the applicant was diagnosed and treated for depression to include inpatient psychiatric hospitalization during service however, his mental health condition never elevated to potentially unfitting to meet criteria for a referral to the Medical Evaluation Board (MEB) and Disability Evaluation System (DES) for a possible medical discharge. He was placed on a duty limiting conditions (DLC) profile and was declared not WWQ following his discharge from hospitalization as this is standard operating procedure. Through time, stabilization, and treatment, he was removed from

the DLC profile and was determined to be WWQ again. His treatment notes beginning on 9 Dec 16 following hospital discharge and until his discharge from service consistently reported his depressive symptoms had significantly improved. Due to his improvement, a referral to the MEB/DES was not necessary or required, and he was never referred to the MEB by any of his military providers. Receiving mental health treatment and/or receiving a diagnosis does not automatically render a condition as unfitting. There were also no concerns documented by his providers or leadership his mental health condition had impacted his ability to reasonably perform his military duties in accordance to his office, grade, rank or rating causing early career termination. Therefore, his request for a medical retirement could not be supported.

The applicant's request for an upgrade of his character of service also could not be supported. This is in part because his discharge paperwork is absent from his military file. The applicant and his legal counsel also did not submit this vital record. Although the applicant and his legal counsel had discussed reasons for his disciplinary actions, the objective record is needed in order to verify their claims and also to discern to whether his mental health condition could actually cause or mitigate some, all, or none of his misconduct. Furthermore, since the applicant's mental health condition was reported to have improved and stabilized in his records, it is highly doubtful his condition would have caused his misconduct or mitigated his discharge. The burden of proof is placed on the applicant to support his contention and request. At this time, presumption of regularity is applied and there is no error or injustice identified with his discharge.

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 questions from 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 his legal counsel contend he should have received a medical discharge or upgrade to honorable for depression as they believe this condition affected his misconduct leading to his discharge.
2. Did the condition exist or experience occur during military service?
There is evidence the applicant received mental health treatment, hospitalization, and a diagnosis for depression in his service treatment records during military service.
3. Does the condition or experience excuse or mitigate the discharge?
The applicant's condition of depression was reported to have improved resulting with him being removed from the DLC profile and being declared WWQ again following his hospital discharge. Due to these reasons, he did not meet the criteria to be referred to the MEB/DES for a medical discharge by his providers. The applicant's discharge paperwork was also not available for review to determine whether his mental health condition caused his behaviors and misconduct. Thus, his mental condition does not excuse or mitigate his discharge due to lack of evidence.
4. Does the condition or experience outweighs the discharge?
Since his mental health condition does not excuse or mitigate his discharge, his condition also does not outweigh his discharge.

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 9 Mar 22 for comment (Exhibit D), and the applicant replied on 23 Mar 22. In his response, the applicant's counsel contends the Board should disregard the advisory opinion when making the assumption that without the applicant's discharge paperwork, his mental health condition could not mitigate or outweigh his original discharge. The presumption of regularity does not apply; any benefit of doubt should go to the applicant since he was diagnosed with a mental health condition and he was only discharged for minor infractions. He should, at the very least, receive an honorable characterization of service. The applicant's counsel submits the applicant's entire military record to show that they made every effort to obtain his discharge paperwork to no avail stating it is the Air Force's duty to properly maintain discharge records. Therefore, it is impossible to meet the demands of the advisory opinion.

The applicant's complete response is at Exhibit F.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitation period established by 10 U.S.C. § 1552(b).
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 recommendation of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition, however, the applicant's condition of depression was reported to have improved resulting with him being removed from the DLC profile and being declared WWQ again following his hospital discharge. Due to these reasons, he did not meet criteria to be referred to the MEB/DES for a medical discharge by his providers. The applicant's discharge paperwork was also not available for review to determine whether his mental health condition may have caused his behaviors and misconduct. Thus, his mental condition does not excuse, mitigate, or outweigh his discharge due to lack of evidence. Per AFI 36-2603, *Air Force Board for Correction of Military Records*, paragraph 3.4.4, applicants have the burden of proof for providing evidence in support of their claim. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, and in the absence of post-service information and a criminal history report, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

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-2021-02984 in Executive Session on 27 Apr 22:

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 A: Application, DD Form 149, w/atchs, dated 8 Jul 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFBCMR Psychological Advisor, dated 22 Feb 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 9 Mar 22.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 9 Mar 22.
- Exhibit F: Applicant's Response, w/atchs, dated 23 Mar 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