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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2021-03460

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

He be given a medical retirement or, in the alternative, his separation status be corrected to retirement eligible by being placed on the Reserve Retired List (RRL).

APPLICANT'S CONTENTIONS

He served for 32 years in the Air Force Reserve (AFR), Air National Guard (ANG), and active duty and regretted not completing the retirement process. At the time of his separation from the ANG he was a high risk and danger to others and therefore did not feel he was in the right state of mind to deal with retirement. He was never the same after his gunshot trauma but reported he was able to get therapy and medication for Post-Traumatic Stress Disorder (PTSD), anxiety, and depression. He has received a 100 percent service-connected disability rating from the Department of Veterans Affairs (DVA).

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former ANG technical sergeant (E-6).

On 15 May 03, the applicant was notified of his eligibility for retired pay at age 60 noting he completed the required years of service under Title 10 U.S.C., Section 12731.

On 3 Aug 15, NGB Form 22, *National Guard Bureau Report of Separation and Record of Service*, reflects the applicant was honorably discharged from the ANG after serving 32 years, 5 months, and 18 days of total service for pay. He was discharged, with a narrative reason for separation of "Expiration of Enlistment."

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

APPLICABLE AUTHORITY/GUIDANCE

AFBCMR Docket Number BC-2021-03460

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Controlled by: SAF/MRB
CUI Categories: Work-Product
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

Per AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, dated 14 Apr 05, incorporating changes through 20 Sep 11, paragraph 1.2.1, *Former Members*, previous policy allowed Air Force Reserve members who chose discharge instead of transfer to the Retired Reserve to be reappointed or reenlisted for the purpose of transfer to the Retired Reserve any time prior to age 60. These members became eligible for partial use of some benefits prior to age 60, and upon attainment of age 60, they were eligible for full benefits whether they were reaffiliated or not. This criterion has changed. Members who are discharged today, instead of retired, will not be allowed to reaffiliate and will only be entitled to retired pay and medical care at age 60. These former members and their eligible family members will be issued the DD Form 1173, *Uniform Service Identification and Privilege Card*, on the member's 60th birthday. All members who are eligible for transfer to the Retired Reserve and choose discharge must be formally counseled concerning this policy and its effects on their benefits.

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 paragraphs 6 and 7 of the Wilkie Memo.

On 14 Apr 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

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 in determining 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.

On 6 Nov 24, the Board staff provided the applicant a copy of the supplemental liberal consideration guidance (Exhibit I).

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 a medical retirement based on his mental health condition. The applicant never received any mental health evaluation, diagnosis, or treatment during service and there were no reports of any mental health concerns documented in his available military personnel records. Additionally, since he was in the ANG at the time of his discharge, there was no line of duty (LOD) approved for his mental health condition, which is required to receive any ratings and compensation. The Psychological Advisor acknowledges he began to receive mental health treatment from the DVA within two years of discharge for trauma/PTSD, anxiety, and depression. His traumatic experience was being shot by a gang in Work-P... in 1987 when he was part of the AFR. There was no evidence this incident occurred while

he was on orders and again no LOD was approved for this incident. His records reflected he transferred from the AFR to the ANG years after this incident and so his experience/condition is considered to be a prior service impairment. There was no evidence his service with the ANG permanently aggravated his prior service impairment and since he was able to meet accession standards into the ANG, he is presumed to be fit for duty. There was no evidence he had any potentially unfitting mental health condition that would meet criteria for a referral to the Medical Evaluation Board (MEB) for a possible medical discharge or retirement. There are no records he was ever placed on a duty limiting conditions profile and never deemed not worldwide qualified (WWQ) due to his mental health condition. There were no statements from his medical providers or his leadership of any mental health issues that may interfere with his ability to reasonably perform his military duties in accordance to his office, grade, rank or rating. The applicant contends he was not in the right frame of mind as the reason he did not submit for retirement. If he was referring to a medical retirement, he does not make that determination because this decision and responsibility lies with his mental health care providers. It is plausible he was suffering from emotional distress at around the time of his discharge as claimed, but there was no evidence he had any mental health conditions that would impair his judgment and decision-making skills at the time of discharge. There were no misconduct problems, behavioral issues, or unsatisfactory performance reported in his records to indicate there was decline in his functioning and preventing him from requesting retirement. As a result, the Psychological Advisor finds no error or injustice with his discharge from a mental health perspective.

For awareness since the applicant has been receiving disability compensation 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, 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 or near the 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.

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 is requesting a change of his status to awaiting retirement and reported he was not in the right frame of mind to request for a retirement. He referenced he had been receiving treatment for PTSD, anxiety and depression from the DVA.
2. Did the condition exist or experience occur during military service?

The applicant did not receive any mental health evaluation, diagnosis or treatment during military service. There were no records he experienced anxiety or depression during service. He informed the DVA about two years post discharge he was shot by a gang in [REDACTED] [REDACTED] in 1987 coinciding with his time in the AFR.

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

There is no evidence the applicant had any mental health conditions that would impair his judgment and functioning at the time of discharge. There is no evidence the applicant had any unfitting mental health conditions during service that would lead to career termination and no LOD was approved for any mental health conditions to include PTSD, anxiety or depression. His traumatic experience was a prior service condition and no evidence his ANG duties permanently aggravated this prior service condition. His condition and experience do not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since there is no evidence his mental health condition was unfitting for continued military service, his condition and experience also not outweigh his original discharge.

The complete advisory opinion is at Exhibit C.

NGB/AIPP recommends denying the application. Based on the documentation provided by the applicant and the analysis of the facts, there is no evidence of an error or injustice. The applicant should have applied for retirement rather than pursuing separation. The applicant was separated from his ANG unit on 3 Aug 15 based on AFI 36-3209, paragraph 3.12.1, expiration of enlistment (ETS). The applicant states he knew of the separation but did not pursue retirement due to dealing with a lot of internal stressors and did not feel he was in the right frame of mind to deal with retiring.

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 14 Apr 22 for comment (Exhibit E), and the applicant responded on 10 May 22 by requesting his case be closed. The Board staff closed his case on 2 Jun 22 (Exhibit G). On 22 Sep 24, the applicant submitted a new application and acquired counsel. The applicant contends, through counsel, he should have been medically retired because he was unfit due to a permanent disability (PTSD) which incurred in the LOD while he was deployed during multiple operations and recovery efforts. His PTSD was aggravated from multiple exposures to stressors and trauma he faced while deployed to include the loss of a fellow airman during a training mission. His symptoms include anger management issues, alcohol usage, depression, and reactions to frightening events. He believes his request due to PTSD should be considered under liberal consideration. To support his request, the applicant submitted character reference letters, an FBI report, his resume and a personal statement.

The applicant's complete response is at Exhibit H.

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.
3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. While the Board notes the recommendation of NGB/A1PP against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. Specifically, the Board finds, if the applicant had known the proper procedures for the retirement application process, he would have adhered to them since he served sufficient time to be eligible for a Reserve retirement, which is sufficient to justify granting the applicant's request to be placed on the RRL. To deny relief in this circumstance would be to place form over substance, to the detriment of the applicant. However, for the applicant's request of a medical retirement, the Board finds the evidence presented did not demonstrate an error or injustice. In this instance, the Board does agree with the rationale and recommendation of the AFRBA Psychological Advisor in finding the applicant's records do not support his request for a medical retirement. The mere existence of a mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The applicant's military duties were not severely degraded due to his mental health. The Board took note of the applicant's disability ratings from the DVA but did not find this evidence compelling to warrant relief. The military's DES established to maintain a fit and vital fighting force, can by law, under Title 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 at or near the time of separation and not based on post-service progression of disease or injury to which the DVA can offer compensation. Lastly, based on the 4 Apr 24 memorandum from the Under Secretary of Defense for Personnel and Readiness, known as the Vazirani Memo, stating boards 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; the Board finds the applicant's request for a medical retirement to be considered under liberal consideration is not warranted. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show he was not discharged from the Air National Guard on 3 August 2015, but on that date, he was assigned to the Retired Reserve Section, his name was placed on the Retired Reserve List, and he was eligible for retired pay at age 60, under the provisions of Title 10, United States Code, Section 12731.

CERTIFICATION

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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-2021-03460 in Executive Session on 18 Dec 24:

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Panel Chair

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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 27 Sep 21.

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

Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 3 Mar 22.

Exhibit D; Advisory Opinion, NGB/A1PP, dated 10 Mar 22.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 14 Apr 22.

Exhibit F: Letter, SAF/MRBC, (Liberal Consideration Guidance), dated 14 Apr 22.

Exhibit G: Letter, SAF/MRBC, (Close Case), dated 2 Jun 22.

Exhibit H: Applicant's Response, w/atchs, dated 22 Sep 24.

Exhibit I: Letter, SAF/MRBC, (Supplemental Liberal Consideration Guidance), dated 6 Nov 24.

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.

1/2/2025

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Board Operations Manager, AFBCMR
Signed by: USAF

AFBCMR Docket Number BC-2021-03460

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