

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03767

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His DD Form 214, *Certificate of Release or Discharge from Active Duty*, be corrected to reflect a Medical Retirement under Combat-Related Special Compensation (CRSC).
2. His AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, be corrected to reflect the following:
 - a. Box 10C findings be changed to YES, Disability was the direct result of armed conflict or was caused by an instrumentality of war and incurred in line of duty during a period of war.
 - b. Box 10D findings be changed to YES, Disability was the direct result of a combat-related injury.

APPLICANT'S CONTENTIONS

In 2008, he was placed on the temporary disability retired list (TDRL) with a 50 percent disability rating for Post-Traumatic Stress Disorder (PTSD), currently rated at 100 percent.

On 10 Apr 20, the Air Force Discharge Review Board (AFDRB) upgraded his general (under honorable conditions) character of service to honorable stating his discharge was inequitable due to personal problems and arbitrary/capricious actions. His honorable discharge should be corrected to a medical retirement under CRSC.

The applicant provides a narrative to show the causal relationship between how his PTSD directly stemmed from the direct result of armed conflict and that he encountered a different incident pertaining to furthering his PTSD through Instrumentality of War. His records show he should have been medically retired but experienced reprisal and inequity.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 11 Dec 07, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFDPD 36-32, *Military Retirements and Separations* and AFI 36-3208, *Administrative Separation of Airmen*, Chapter 5, Section 5H-Misconduct, specifically, paragraph 5.49, Minor Disciplinary Infractions. The specific reasons for the action were:

- a. On 3 Feb 07, the applicant received an Article 15 for being disrespectful toward a noncommissioned officer (NCO). As a result, the applicant was ordered forfeiture of \$250 pay.
- b. On 16 Jun 07, the applicant received an Article 15 for falling asleep on post while deployed and being a derelict in performance of his duties. As a result, the applicant was reduced to the grade of airman (E-2), with reduction below airman first class suspended until 15 Dec 07, after which time it will be remitted without further action, unless sooner vacated. The new date of rank for airman first class is 16 Jun 07 and forfeiture of \$729 pay per month for 2 months, suspended through 15 Dec 07.
- c. On 24 Jul 07, the applicant received a Letter of Reprimand (LOR) for assaulting a fellow airman. As a result, the applicant received an Article 15 vacation and documentation in his UIF. He was reduced to the grade of Airman (E-2), with a new date of rank of 1 Jun 07. Forfeiture of \$729.00 pay per month for 2 months.
- d. On or about 7 Sep 07, the applicant underwent a Suitability Determination for Continued Military Service. As a result, a Clinical Psychologist, determined the applicant was unsuitable for continued military service for Post-Traumatic Stress Disorder (PTSD) and Adjustment Disorder with Disturbance of Conduct and would undergo a Medical Evaluation Board (MEB) for his condition in a dual-action case.
- e. On 6 Nov 07, the applicant received a LOR for testing positive for marijuana.

On 18 Oct 07, the applicant's commander recommended he be discharged from the Air Force due to his medical condition diagnosed by a Clinical Psychologist.

On 8 Jan 08, the staff judge advocate found the discharge action legally sufficient.

On 15 Jan 08, the discharge authority directed the applicant be discharged under the provisions of AFI 36-3208, Chapter 5, Section 5H-Misconduct, specifically, paragraph 5.49, Minor Disciplinary Infractions with a general (under honorable conditions) service characterization, without the offer of probation and rehabilitation.

On 17 Apr 08, according to Administrative Discharge Dual Action Memo, execution of the approved discharge was deferred pending the outcome of the required dual-action processing.

On 19 May 08, the applicant's commander amended the basis of the applicant's discharge recommendation. On 16 Jan 08, the Air Force Personnel Center noted an error in the discharge based on the positive urinalysis for marijuana on 26 Oct 07. As a result, the applicant's case would be joint processed under AFI 36-3208, Chapter 6, Section 6H- Joint Processing. The basis of the joint processing is under AFD 36-32 and AFI 36-3208, Section 5H – Misconduct, specifically, paragraph 5.49, Minor Disciplinary Infractions and paragraph 5.54, Drug Abuse because the applicant tested positive for marijuana on 26 Oct 07, resulting in a LOR, dated 6 Nov 07.

On 5 Jun 08, the Staff Judge Advocate found the discharge action legally sufficient.

On 9 Jun 08, the discharge authority directed the applicant be discharged under the provisions of AFI 36-3208, Chapter 5, Section 5H, Misconduct, specifically, paragraph 5.49, Minor Disciplinary Infractions and paragraph 5.54, Drug Abuse; the primary reason for discharge being paragraph 5.49, Minor Disciplinary Infractions. His discharge characterized as general (under

honorable conditions). However, the discharge would not be executed until the final decision regarding the applicant's MEB had been made. Probation and rehabilitation was not offered.

On 30 Jun 08, the Secretary of the Air Force Personnel Council (SAFPC) directed the applicant be discharged by execution of the approved AFI 36-3208 action. SAFPC found that PTSD did not cause or excuse the applicant's misconduct.

On 10 Jul 08, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct." He was credited with four years and five months of total active service.

On 19 Jun 19, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 10 Apr 20, the AFDRB concluded the discharge was inequitable due to personal problems and arbitrary/capricious actions. Therefore, based on the application of liberal consideration, the board determined the overall characterization of the applicant's service was more accurately reflected by an Honorable discharge and the discharge narrative reason was more accurately described as "Secretarial Authority." Additionally, the reenlistment eligibility code was changed to "2C."

On 14 Apr 20, the applicant received a corrected DD Form 214 with an honorable character of service. His narrative reason for separation is "Secretarial Authority" and reentry code is "2C."

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

POST-SERVICE INFORMATION

On 8 Nov 22, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not he had an arrest record. In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit F). The applicant replied on 1 Dec 22 and provided an FBI report dated 25 Nov 22. According to the report, the applicant was arrested on 18 Oct 13 for possession of marijuana.

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 paragraphs 6 and 7 of the Wilkie memorandum

On 8 Nov 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

AIR FORCE EVALUATION

SAF/MRBP recommends denying the application finding no error or injustice in the applicant's dual-action or AFDRB case processing. The AFDRB has statutory authority to apply liberal consideration whereas the Air Force Personnel Board (AFPB), when considering dual-action cases, does not have the authority to apply liberal consideration. The AFDRB's decision to upgrade the applicant's discharge based on the liberal consideration criteria does not constitute a decision by the AFDRB or the Air Force for that matter the applicant should be granted disability benefits by virtue of a medical retirement or separation. Upgrading the applicant's discharge under liberal consideration is not an indicator that the dual-action board's decision was the incorrect action. In evaluating the 2008 decision by the AFPB to direct the applicant's administrative discharge, it should be noted the AFPB fully considered that the applicant was facing either an administrative discharge for drug abuse and minor disciplinary infractions, or a temporary disability retirement for PTSD. In evaluating whether an applicant should be separated under administrative or disability provisions, the AFPB determines, among other things, whether there is a nexus between the unfitting medical condition and the misconduct which formed the basis for separation. In reviewing the 2008 AFPB decision, the AFPB concluded there was no nexus between the applicant's unfitting mental health condition and the misconduct which formed the basis for his administrative discharge, specifically noting some of the misconduct pre-dated the purported cause of the applicant's unfitting mental health condition. The AFPB ultimately concluded the applicant's PTSD did not cause or excuse the applicant's misconduct. Therefore, while the AFDRB saw fit to upgrade the applicant's administrative discharge from general (under honorable conditions) to honorable based on the

application of liberal consideration, this decision in no way constitutes a finding that the 08 dual-action decision by the AFPB represents an error or injustice.

The complete advisory opinion is at Exhibit C.

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the desired changes to the applicant's records. SAFPC elected an administrative discharge for misconduct over his MEB for PTSD and even an administrative discharge for his unsuiting adjustment disorder because they found his PTSD did not cause or excuse his misconduct to include his illicit marijuana use. SAFPC also stated his misconduct had started before the event that caused his alleged PTSD as reason for his misconduct discharge. SAFPC was well within their discretion and scope of practice to make this decision. About 11 years after his discharge, the AFDRB upgraded his discharge from general to honorable based on new policy, liberal consideration that had been enacted since his discharge. The AFDRB found that due to evidence of PTSD or mental health conditions found in his medical records, they applied liberal consideration to his case. The AFDRB did not specifically proclaim it was his condition of PTSD that caused his behaviors but found that there was sufficient evidence to convince the AFDRB he had personal problems affecting his discharge. He did have mental health issues during service that did cause him to be uncooperative, refusal to perform his duties, and had emotional distress that caused some of his behaviors and eventual discharge; the AFDRB upgraded his discharge because of these factors. The AFDRB's decision was proper and was well within their discretion and scope as well. The applicant should have been discharged for having an unsuiting mental health condition of adjustment disorder. The incident of another airman pointing a weapon at him resulted with him being angry that affected his thought processes of safety concerns, impaired judgment and poor decision making skills, and his maladaptive behaviors of failing to follow orders or treatment recommendation, assaulting another airman, and using marijuana were more likely than not, was the result of his mental health condition/adjustment disorder as SAFPC had indicated in their rationale. The relief that he was provided by the AFDRB of upgrading his discharge and changing his narrative reason for separation were appropriate and consistent to his records and clinical presentation at the time of service. There is no error or injustice with his general administrative discharge and the Psychological Advisor finds no evidence to support his request for a medical discharge/retirement.

Liberal consideration is applied to the applicant's petition due to the contention of a mental health condition. The following are responses to the four questions from the Kurta Memorandum based on information presented in the records:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant is requesting a medical retirement under CRSC for PTSD.

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

There is evidence the applicant presented to the theater clinic while in Iraq for complaints of occupational problems and being in altercation with an NCO. After he returned from deployment, he voluntarily presented to the mental health clinic for complaints about his deployment experiences, refusal to carry a weapon, expressing anti-government sentiments, and wanting to be discharged from the Air Force. He was given diagnoses of PTSD, Adjustment Disorder with Disturbance of Conduct, Adjustment Disorder with Depressed Mood, and Occupational Problem during service.

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

The applicant was simultaneously referred to the MEB for the potentially unfitting condition of PTSD and administrative discharge for his unsuiting condition of Adjustment Disorder with Disturbance of Conduct. His records found his behaviors and misconduct were caused by his primary condition of adjustment disorder and not PTSD and the SAFPC made this similar assessment. His condition of PTSD should not have been found unfitting by the IPEB as this referral was submitted too prematurely and diagnostic clarification was needed to determine his primary condition. The applicant received supportive therapy after he was referred to the MEB and his treatment records found his adjustment symptoms had resolved, his safety concerns had been eliminated, he was coping more effectively with his stressors, and his mood had improved. His mental health condition of adjustment disorder and not PTSD had excused and mitigated his discharge.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition of adjustment disorder and not PTSD were found to have excused and mitigated his discharge, his unsuiting mental health condition would also outweigh his original administrative discharge for misconduct to support upgrading his character of service from General to Honorable, which the AFDRB had previously provided this relief to him. There is no evidence to support the applicant should have received a medical discharge.

The complete advisory opinion is at Exhibit D.

AFPC/DPFDD recommends denying the applicant's request. Based on the documentation provided by the applicant and analysis of the facts, there is no indication an error or injustice occurred at the time the PEB processed his disability case. The applicant was administratively separated versus being medically retired. A change to his service characterization by the AFDRB does not change this fact. Additionally, there is insufficient evidence to support his claim his PTSD should have been considered combat-related. Furthermore, if approved for disability retirement he would need to apply for CRSC to determine eligibility under the rules of that program.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 9 Nov 22 for comment (Exhibit G), and the applicant replied on 1 Dec 22. In his response, the applicant contends he served in Operation IRAQI FREEDOM and should have been awarded the Army Commendation Medal for responding to a mortar attack from enemy terrorist. He did not receive this medal because he was a whistleblower for reporting unlawful acts between a NCO and detainees. As a result, he was silenced and a reprisal occurred.

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 or recommendations of SAF/MRBP, the AFRBA Psychological Advisor, and AFPC/DPFDD and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board notes there was no nexus between the applicant's unfitting mental health condition of adjustment disorder and not PTSD and the misconduct which formed the basis for his administrative discharge. Since the Board finds insufficient evidence to grant a medical retirement, the Board finds no evidence to grant the applicant CRSC. While the Board notes the applicant alleges he should have been medically retired but experienced reprisal and inequity. However, the applicant did not provide any evidence regarding an investigation or outcome of a complaint alleging reprisal or inequity. Based on the authority granted to this Board pursuant to 10 U.S.C. § 1034, the Board reviewed the complete evidence of record to reach our own independent determination of whether reprisal occurred. Based on our review, the Board concludes the applicant has failed to establish that his discharge was due to reprisal or inequity. 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-02463 in Executive Session on 30 Nov 22 and 7 Aug 23:

, 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 16 Nov 21.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, SAF/MRBP, dated 20 Sep 22.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 28 Sep 22.
Exhibit E: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 7 Nov 22.
Exhibit F: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 8 Nov 22.
Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 9 Nov 22.
Exhibit H: Applicant's Response, w/atchs, dated 1 Dec 22.

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

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Board Operations Manager, AFBCMR