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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-01424

Work-Product

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

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**APPLICANT'S REQUEST**

His honorable discharge be changed to a disability discharge, effective 31 May 85.

**APPLICANT'S CONTENTIONS**

On 12 Oct 77, he suffered a traumatic brain injury (TBI) with internal organ damage while on active duty with the Navy that left him permanently disabled. After receiving an honorable discharge from the Navy, he then served in the Air Force Reserve (AFR), Regular Air Force (REGAF), and Air National Guard (ANG), all while suffering from the residuals of the TBI until Dec 89 when he was discharged from the ANG involuntary with a demotion. He should have been referred to a disability board by either the Air Force or Navy in accordance with 10 United States Code (U.S.C.) 1201.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

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

According to DD Forms 214, *Certificate of Release of Discharge from Active Duty*, the applicant served in the Navy between 27 Sep 72 and 1 Oct 80. He received an honorable discharge with narrative reason for separation of, "Expiration of Term of Enlistment," and reenlistment code of RE-1, designating he was eligible for reenlistment.

On 16 Sep 80, according to AF Form 422, *Physical Profile Serial Report*, the applicant was determined medically qualified for worldwide duty and general military service by an Air Force Reserve medical doctor.

On 13 Dec 83, according to NGB Form 22, *Department of the Army and the Air Force National Guard Bureau Report of Separation and Record of Service*, the applicant enlisted in the ANG.

Between 21 Mar 87 and 16 Jul 89, the applicant was counseled numerous times for failing to attend unit training assemblies.

On 14 May 89, the applicant was notified of his commander's intent of demotion to the grade of senior airman (E-4). The specific reasons for the demotion action were as follows:

- a. Unsatisfactory attitude and aptitude for noncommissioned officer (NCO) leadership responsibilities by failure to progress satisfactorily as shop training scheduler.
- b. Unsatisfactory conduct and dereliction of duty for committing serious security violations on 19 Dec 88 and previously in Apr 88.
- c. Unsatisfactory attitude, contentiousness, and unprofessional conduct, threatening and disrespectful conduct toward his supervisors.
- d. Displaying indifference to NCO responsibilities.
- e. Uncooperative to the point of becoming abusive when required to be recertified on the Flare Dispenser system after causing an extremely serious safety violation.

On 27 Oct 89, according to NGB Form 22, the applicant was transferred to the Air Force Reserve for reason of "Unsatisfactory Participant," without service characterization, and deemed ineligible for reenlistment.

On 12 Dec 89, according to Reserve Order **Work-Product**, dated 16 Dec 89, the applicant was honorably discharged from the AFR.

On 7 Sep 21, according to a U.S. Court of Appeals for the Federal Circuit document, provided by the applicant, the applicant's appeal to the Claims Court of a Board for Correction of Naval Records (BCNR) decision where they denied his request for a disability retirement, the Court of Appeals concluded the applicant's arguments were without merit and the initial Claims Court decision was affirmed. Additionally, the document indicated the following notable points:

In 1977, the applicant struck his face against a wall and suffered a minor laceration near his eye that required two sutures and he was returned to duty.

In 1979, the applicant was referred to an endocrinologist with a provisional diagnosis of possible hyperthyroidism based on reported symptoms of weight loss, mood swings, and anxiety. But, after further examination, the applicant was found to have no evidence of thyroid disease.

In 1980, before his discharge from the Navy, he underwent a medical examination which noted no significant medical conditions. His performance evaluations while in the Navy reported that he "met the minimum requirements of his rate and job assignment" but exhibited "marginal performance" attributed to "domestic problems" and his "preparations for his transition to the civilian community."

In 1982, the applicant was hospitalized due to chest pain. In the same year, he received a computerized topography scan which revealed that he had a "normal brain" with a "prominent" pituitary gland that "may be in the upper limits of normal."

In 1983, the applicant underwent a medical examination for enlistment into the Air National Guard. The applicant indicated he was in good health with no history of head injuries, headaches, dizziness, eye trouble, thyroid trouble, chest pain, or memory loss.

In 1996, the applicant sought service-connected disability benefits from the Department of Veterans Affairs (DVA) and a DVA Outpatient Clinic diagnosed the applicant with dysthymic disorder. He was awarded a 70 percent disability rating due to a psychotic disorder effective 27 Feb 95, which was later increased to 100 percent rating on 1 Jul 08.

In 2009, the applicant sought service-connected benefits for an alleged TBI and residual conditions but the DVA denied the claim.

In 2018, while the applicant's TBI disability appeal was pending before the U.S. Court of Appeals for Veterans Claims, the applicant applied to the BCNR for correction of his military record to reflect a disability retirement pursuant to 10 U.S.C Section 1201. The BCNR denied the claim finding no evidence the applicant was unfit for continued Naval service at the time of his discharge. The applicant filed a complaint in the Claims Court and the court remanded the case back to the BCNR. The BCNR again denied the applicant's request and relied on the two medical examinations conducted in 1980 and 1983 where the applicant attested to his good health and denied experiencing a litany of enumerated medical complaints.

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

### **APPLICABLE AUTHORITY/GUIDANCE**

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 1 Mar 23, the Board staff provided the applicant a copy of the supplemental guidance (Exhibit C).

### **AIR FORCE EVALUATION**

The AFBCMR Medical Advisor and the AFRBA Psychological Advisor completed a review of all available records and recommends denying the applicant a medical disability separation or retirement. In order for the applicant to receive the medical retirement he desires, from either of his periods of military service, the evidence must show he had a medical condition that prevented him from reasonably performing the duties of his office, grade, rank, or rating. The meaning of the aforementioned statement is that if such a condition or circumstance existed, certain actions would be undertaken to protect the member from further injury or suffering and mission degradation; which would then warrant profile restrictions to duty or mobility for a designated period. If placed on a profile for an extended period [365 days or more], or sooner if not expected to resolve or return to unrestricted duty, would trigger a Medical Evaluation Board (MEB), to be followed by referral to a Physical Evaluation Board (PEB) for a determination of the individual's fitness to serve [retain vs. separate]. No such evidence is present in the applicant's case file.

Exploring the injury reportedly sustained by the applicant in 1977, for which he received two sutures and was returned to duty, the medical advisor concedes that any trauma to the external cranial vault risks potential intracranial injury; either at the point of impact or in a *contrecoup* manner. In the scientific assessment of suspected cranial injury, whether witnessed or not, an assessment of the individual's airway, breathing, and circulation would take initial precedence; and immediately corrected or supplemented if needed; followed by a rapid neurological

assessment alertness, verbal responsiveness, and response to pain, if not alert. In the case under review, it is apparent the applicant presented in an alert and conscious state sufficient to receive suture repair of a laceration, followed by his return to duty. If there was an alteration of mental state, or a history thereof, the standard of care would warrant further observation, close follow-up, and possible investigatory studies, to include imaging studies to identify any possible acute intracranial injury, e.g., intracranial hemorrhage or detectable axonal injury.

Under the Kurta memorandum, dated 25 Aug 17, in considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including PTSD, TBI, sexual assault or harassment, Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR), will consider the following four questions in deciding on relief.

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge? There is no objective evidence the applicant's injury of Oct 77, was the cause of termination of his career from the Air Force, Air Force Reserve, or Air National Guard.

b. Did that condition exist or experience occur during military service? The record indicates the applicant did experience an injury to the face or head, near the eye in Oct 77 while serving in the Navy, which was treated with two sutures, followed by his return to duty.

c. Does the condition or experience actually excuse or mitigate the discharge? The record indicates the applicant continued to serve from the time of his injury in 1977 to his discharge on 1 Oct 80. He was allowed to re-enlist following his service in the Navy and was cleared for worldwide duty to enter upon a subsequent period of service, without any service evidence of an identifiable or reported medical impediment to duty. His condition or experience does not excuse or mitigate his discharge.

d. Does that condition or experience outweigh the discharge? The advisors opine the injury reportedly sustained in Oct 77, which was treated with two sutures followed by return to duty, in the absence of any objective near-term neuropsychiatric sequelae attributable to the experience of Oct 77, did not outweigh the discharge. Any decades later delayed symptoms or diagnoses, e.g., psychotic disorder, ultimately found service-connected, would have no bearing upon the applicant's medical fitness to serve at the time of his military service or reason for separation. Knowledge that the applicant was reportedly also service-connected for headaches, reportedly attributed to a head injury, is insufficient to make a determination of an unfit finding for either of his periods of service or to warrant a medical retirement.

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 7 Mar 23 for comment (Exhibit E) 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 of the AFBCMR Medical Advisor and AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board applied fundamental fairness to his request in accordance with the USD P&R supplemental guidance (Wilkie memorandum), dated 25 Jul 18, specifically paragraph 6.h., and considered relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety, and finds his medical condition is not warranted to process through IDES as a matter of equity or good conscience IAW DoDI 1332.18, *Disability Evaluation System*, Appendix 1 to Enclosure 3, paragraph 4. Specifically, the applicant's TBI was not a medical basis for career termination, nor did it meet the criteria for a referral to the Medical Evaluation Board for a medical discharge or retirement. 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 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-2022-01424 in Executive Session on 22 Mar 23 and 7 Apr 23:

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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 23 May 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atch (USD P&R Supplemental Guidance), dated 1 Mar 23.
- Exhibit D: Advisory Opinion, BCMR Medical Advisor and AFRBA Psychological Advisor, dated 6 Mar 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Mar 23.

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.

12/20/2023

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Board Operations Manager, AFBCMR

Signed by

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**AFBCMR Docket Number BC-2022-01424**

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