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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03083

Work-Product

COUNSEL: NONE

Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

The Department of Veterans Affairs (DVA) has awarded him service connection disability for sleep apnea and bipolar disorder. These disabilities caused the infractions that led to his discharge for falling asleep while on duty and being late for work due to poor sleep and waking up late. He would like to further his education and ask for assistance through the Post-9/11 Montgomery GI Bill. Knowing what he knows now, if he were younger, he would ask to rejoin the military to further better his life and serve his country once again.

In support of his request for clemency, the applicant provides a DVA Summary of Benefits Letter.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 1 Oct 01, according to AF Form 3070, Record of Nonjudicial Punishment Proceedings, the applicant accepted nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), in violation of Article 86, UCMJ. The specific reasons for the action were on or about 11 Sep 01 and 18 Sep 01, without authority, he failed to go at the time prescribed to his appointed place of duty. For this misconduct, he received reduction to the grade of airman basic, with a new date of rank of 2 Oct 01 and 30 days extra duty.

On 10 Oct 01, the Staff Judge Advocate (SJA) found the action legally sufficient.

On 13 Dec 01, according to AF Form 3070, the applicant accepted NJP under Article 15, for violation of the UCMJ. The specific reasons for the actions were:

On or about 4 Oct 01, he violated a lawful general regulation by wrongfully wearing an earring in uniform while on duty and on 10 Oct 01, without authority, failed to go at the time prescribed to his appointed place of duty in violation of Article 86, UCMJ. For this misconduct, he received a reprimand and 30 days correctional custody.

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On 20 Dec 01, the SJA found the action legally sufficient.

On 1 Jul 02, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with one year, six months, and five days of total active service.

On 21 Nov 22, according to a DVA Summary of Benefits Letter, provided by the applicant, he was granted a service-connected disability for "one or more" conditions for a combined evaluation of 80 percent.

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

POST-SERVICE INFORMATION

On 8 Dec 22, the Board sent the applicant a standard request for post-service information. This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating his case. Although the applicant did provide post-service information with his initial application (Exhibit A), he did not provide a response to the request for an FBI background check or other criminal history data.

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

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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 Dec 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

Honorable. The quality of the airman's service generally has met Department of the 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.

General (Under Honorable Conditions). 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 member's military record.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence has been presented to support the applicant's request for an upgrade of his discharge. The applicant's military records consisting of his official discharge paperwork and service treatment records were unavailable for review. However, his available records revealed he received two Article 15's for failing to report to his appointed place of duty on numerous occasions and wore an earring in uniform while on duty. He reported he had sleep apnea, sleep disturbances and bipolar disorder that may have caused his behaviors/misconduct. While this is a possibility, his service treatment records were not available to determine whether any of these conditions existed or occurred during his military service or had a nexus to his behaviors and subsequent discharge. He was diagnosed with bipolar II disorder by the DVA almost 20 years post discharge and no records, to include from the DVA, indicating his mental health condition had a direct impact to his discharge. It appeared he developed this condition post-service. His discharge paperwork was also not available for review and so it is more likely than not, he may have had other misconduct issues in addition to the two Article 15's causing his discharge. This was evidenced by the applicant's contention when he revealed he had fallen asleep while on duty. None of his available Article 15's stated he was disciplined for falling asleep on duty and was possibly disciplined for this issue that was not in his available military records. Without the vital records of his discharge paperwork and service treatment records, it could not be determined with a degree of certainty whether his mental health condition may cause, excuse, mitigate, or outweigh his discharge. His contentions could not be substantiated as well without these records. The burden of proof is placed on the applicant to submit the necessary documents to support his request and contentions. As a result, presumption of regularity is applied and there is no evidence of any error or injustice with his discharge. The applicant may consider submitting his discharge paperwork and service treatment records for a reconsideration of his petition in the future.

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Liberal consideration is applied to the applicant's request due to his contention of a mental health condition. The following are answers to the four questions from the Kurta Memorandum from the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends two of his three service-connected disabilities are in line with the disciplinary actions taken against him such as sleep apnea, falling asleep while on duty, and waking up late due to poor sleep and bipolar disorder. He did not clarify his service-connected disabilities nor was it in the DVA letter he submitted.
2. Did the condition exist or experience occur during military service?
There is no evidence the applicant's conditions of sleep apnea, sleep disturbances, or bipolar disorder existed or occurred during military service. His service treatment records were unavailable for review. He was diagnosed with bipolar II disorder almost 20 years post-discharge by the DVA.
3. Does the condition or experience actually excuse or mitigate the discharge?
The applicant's discharge paperwork and service treatment records are not available for review. Without these records, it could not be determined whether his mental health condition had a direct impact to his misconduct and discharge. Based on the available records, his mental health condition or experience does not excuse or mitigate his discharge.
4. Does the condition or experience outweigh the discharge?
Since the applicant's condition or experience does not excuse or mitigate his discharge, his condition or experience also does not outweigh his discharge.

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 28 Dec 22 for comment (Exhibit E) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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 opinion of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. While it is possible the applicant had sleep apnea, sleep disturbances and bipolar disorder, his service treatment records were not available to determine whether any of the conditions existed or occurred during his military service or had a nexus to his behaviors and subsequent discharge. Furthermore, the Board applied liberal consideration to the evidence submitted by the applicant; however, it is insufficient to grant the applicant's request. The applicant did not provide any evidence or records to substantiate his claim that a mental health condition in service caused his misconduct, thus his

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condition does not mitigate or excuse his discharge. The burden of proof is placed on the applicant to submit evidence to support his 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.

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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-03083 in Executive Session on 26 Jul 23:

Work-Product [Redacted] Panel Chair
[Redacted] Panel Member
Work-Product [Redacted], Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 19 Nov 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 8 Dec 22.
- Exhibit D: Advisory Opinion, Psychological Advisor, dated 15 Dec 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 28 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.

3/6/2024

Work-Product [Redacted] _____
Board Operations Manager, AFBCMR
Signed by: *Work-Product* [Redacted]