

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00679

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended to change:

- a. Block 24. *Character of Service*, from "Under Honorable Conditions – (General)" to "Honorable."
- b. Block 28. *Narrative Reason for Separation*, from "Misconduct (Serious Offense)" to "Disability, Permanent."

APPLICANT'S CONTENTIONS

His discharge was improper and inequitable due to misdiagnosis of mental illness, and being prescribed medications for this incorrect diagnosis that led to ineffective treatments and worsened his symptoms. After he was discharged from the Air Force, the Department of Veterans Affairs (DVA) corrected the diagnoses to bipolar disorder with generalized anxiety disorder.

He was in the process of a medical discharge and was at the final step waiting for his narrative summary when his command changed his medical discharge at the last minute. Despite having knowledge of his daily struggles associated with mental health illness and that his charges were reduced to misdemeanors prior to the discharge, his commander cited Misconduct (Serious Offense) as the narrative reason for separation. When the applicant asked why he did that, his commander said, "I can put anything I want there."

The Air Force Discharge Review Board (AFDRB) denied his request for upgrade due to no evidence found of impropriety or inequity to warrant an upgrade of his discharge. The AFDRB Decisional Document stated they found some of his mental health conditions may have been a mitigating factor to misconduct but did not explain or excuse the misconduct sufficiently to warrant an upgrade. He did not receive his DVA rating until after he submitted documents to the AFDRB. The AFDRB did not have his DVA 100 percent permanent disability rating at the time they made this decision, nor did they have a complete list of the severe and numerous conditions of his mental health illness that were impacting him daily. The AFDRB also stated no evidence that a mental health condition was a mitigating factor in his first act of misconduct. Mental health conditions begin at some point, but are not diagnosed right away, nor was he evaluated for mental health issues at that time. The AFDRB also stated there was evidence that he was receiving mental health treatment before the second act of misconduct; however, there was insufficient evidence to provide the mental health condition mitigated the act of burglary and theft. The DVA decision letter proves his many and severe mental health conditions mitigated his acts of misconduct.

The impaired impulse control and impaired judgment began manifesting when he was attending the Defense Language Institute and abused alcohol. His mental health illness progressed rapidly causing behavioral misconduct, bad decisions, and bad judgment such as exploring an abandoned church and taking souvenirs. Anxiety, chronic sleep impairment, depressed mood, neglect of

personal appearance and hygiene, and occupational and social impairment with reduced reliability and productivity are factors that resulted in an overdue fitness test, failure to attend a fitness test, and a failed fitness test. Many days, he could not even get out of bed due to depression and chronic sleep impairment. Additionally, the medication he was prescribed for the misdiagnosed condition at that time contributed to weight gain and inability to pass a fitness test.

The multitude of severe mental illness conditions combined made it impossible to make rational decisions and function as needed on a day-to-day basis. His mental health issues were not something he had control over or even understood, and he was not treated correctly for these conditions. These debilitating conditions are overwhelming mitigating factors regarding his misconduct and erratic behavior, thus providing sufficient explanation and evidence to warrant an upgrade.

In support of his request for liberal consideration, the applicant provides a personal statement, copies of his medical records, letters of recommendation, and other documents related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 28 Apr 16, according to AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru SSgt)*, the applicant was issued nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), for:

- Violation of the UCMJ, Article 92; he who knew of his duties at or near the [REDACTED] *Work-Product*, California, on or about 15 Apr 16, was derelict in the performance of those duties in that he willfully failed to refrain from consuming alcohol while under the age of 21, as it was his duty to do.

The applicant was reduced to the grade of airman, with a new date of rank of 28 Apr 16; received forfeiture of \$878.00 pay, suspended through 27 Oct 16, after which time it will be remitted without further action, unless sooner vacated; restriction to the limits of the [REDACTED] *Work-Product*, California for seven days, and a reprimand.

On 1 Aug 16, according to AF Form 3212, *Record of Supplementary Action Under Article 15, UCMJ*, that portion of the NJP [dated 28 Apr 16], which called for forfeiture of \$878.00 pay, suspended through 27 Oct 16, after which time it will be remitted without further action, unless sooner vacated, was remitted.

On 22 Aug 16, according to AF Form 910, *Enlisted Performance Report (AB thru TSgt)*, the applicant was issued a referral enlisted performance report (EPR), in accordance with Air Force Instruction (AFI) 36-2406, *Officer and Enlisted Evaluation Systems*, for violating Article 92, UCMJ, and consuming alcohol under the legal age.

On 2 May 17, according to AF Form 910, the applicant was issued a referral EPR, in accordance with AFI 36-2406, for violating Article 134, UCMJ, and acting unprofessionally.

On 10 May 18, according to AF Form 910, the applicant was issued a referral EPR, in accordance with AFI 36-2406, for his arrest for burglary at an off-base location and six days jail time.

On 16 May 18, according to XXX/CC memorandum, provided by the applicant, his commander notified the applicant of his recommendation that the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*. The specific reasons for the action were:

- a. On or about 15 Apr 16, he was derelict in the performance of his duties. He willfully failed to refrain from consuming alcohol while under the age of 21. As a result, he received NJP, dated 28 Apr 16, consisting of reduction to the grade of airman, forfeiture of \$878.00 pay, suspended through 27 Oct 16, restriction to the limits of the **Work-Product**, California for seven days, and a reprimand.
- b. On 31 Jul 17, he failed to comply with AFI 36-2905, *Fitness Program*, and the XXX/CC's physical training policy by allowing his physical fitness assessment to go overdue. As a result, he received a Letter of Counseling (LOC), dated 10 Aug 17.
- c. On 23 Feb 18, he was arrested by XXX County Sheriff's department for burglary in the 2nd degree, a felony offense, and stealing, a misdemeanor offense, that led to his incarceration until 3 Mar 18. He unlawfully entered **Work-Product** Church and wrongfully took antique items that did not belong to him. As a result, he received a Letter of Reprimand (LOR), dated 7 May 18, and an Unfavorable Information File was established. Because of his arrest, his access to Secured Classified Information facilities and all classified material had been interim suspended, effective immediately, and a Security Information File was established. Furthermore, on 29 Mar 18, he was recommended for disqualification from Aviation Service.
- d. On 19 Mar 18, he failed to go to his scheduled physical fitness test. As a result, he received an LOC, dated 23 Mar 18. While not a basis for this action, he failed to uphold fitness standards as required of airmen. On 22 Mar 18, he completed an official fitness assessment with a composite score of 71.0 [Unsatisfactory]. As a result, he received an LOR, dated 26 Mar 18.

On 12 Jul 18, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct (Serious Offense)" and he was credited with 3 years, 6 months, and 27 days of total active service.

On 20 Dec 18, according to XXX County Circuit Court, [Amended] Judgment, provided by the applicant, the original charge of Burglary – 2nd degree [Felony D], with charge date 23 Feb 18, was amended to Trespass – 1st degree [Misdemeanor B].

On 24 Apr 21, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 11 Jun 21, according to the DVA Rating Decision, provided by the applicant, he was granted service connection for bipolar disorder with generalized anxiety disorder (also claimed as depression, psychosis, and suicidal ideation) with an evaluation of 100 percent, effective 3 May 20.

On 27 Aug 21, 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.

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

POST-SERVICE INFORMATION

On 24 Mar 23, 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 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 issued supplemental guidance, known as the Wilkie Memo, 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 24 Mar 23, 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.

Under Other than Honorable Conditions. This characterization is used when basing the reason for separation on a pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct expected of members. The member must have an opportunity for a hearing by an administrative discharge board or request discharge in lieu of trial by court-martial. Examples of such behavior, acts, or omissions include but are not limited to:

- The use of force or violence to produce serious bodily injury or death.
- Abuse of a special position of trust.
- Disregard by a superior of customary superior - subordinate relationships.
- Acts or omissions that endanger the security of the United States.
- Acts or omissions that endanger the health and welfare of other members of the DAF.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.
- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual abuse of a child, sexual harassment, and attempts to commit these offenses.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's requested changes based on a mental health diagnosis of bipolar disorder.

There was evidence that a bipolar disorder condition was considered by the treating psychiatrist but ruled out due to absence of clinical evidence to support a bipolar disorder. The applicant was being treated with a mood stabilizing medication for a few months after his discharge from the hospital. The rationale for discontinuing the medication was not clear; however, there was no documented benefit of the medication that is generally used to treat a mixed episode of bipolar disorder. The diagnosis assessed was persistent depressive disorder (Dysthymia) and adjustment disorder with depression and anxiety. Unfortunately, this file is severely deficient of any documentation upon which this psychiatric advisor can make a change in the diagnosis or determine if his mental health condition was unfitting to render a recommendation of a medical discharge. Although the applicant had a serious suicide attempt while under the influence of alcohol, nine months prior to separation, there was no record of a repeated hospitalization, suicide attempt, or emergency room visit related to mental health issue. There is evidence that his condition remained chronic but stable, without the need for additional changes to his treatment. He was on the high interest log due to his history of suicide attempt, and although his treatment plan included coping against suicidal ideation, the presence of active suicidal ideation with a plan or intent was not demonstrated in the nine months prior to separation. Additionally, the applicant was deemed fit for continued military service.

Unless additional clinical information related to a hospitalization, suicide attempt or plan, emergency room treatment, in the nine months of service is presented for the review, the psychiatric advisor would not be able to determine that error or injustice took place in the decision rendered.

The Board may elect to apply liberal consideration to the applicant's request due to the contention of a mental health condition (bipolar disorder). The following are responses based on information presented in the records to the four pertinent questions in the policy:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant contends that he used poor judgment and bad decisions due to being misdiagnosed while in service, and not properly treated for his condition of bipolar disorder diagnosed by the DVA, which led to his misconduct. However, there was no clinical documentation of a bipolar condition, nor evidence of a misdiagnosed mental health condition.

2. Did the condition exist, or experience occur during military service? There was evidence that the applicant was diagnosed with a mental health condition other than bipolar disorder and was treated with medication. The applicant contends that he was in the process of a medical discharge; however, there was no evidence that he was referred to the Physical Evaluation Board (PEB).

3. Does the condition or experience excuse or mitigate the discharge? Although this psychiatrist agrees that the applicant used poor judgment, evidence that his mental illness impaired his judgment is speculative at best. The applicant stated he and his friends were "exploring" what he thought was a ghost town, and they ran across a church he thought was abandoned. They entered and he removed items from the church. At no time did he state his judgment was impaired by his mental condition. He admitted he made a mistake in believing that the church was abandoned and admitted to the actions that followed. There was no profile that demonstrated an unfitting mental health condition, and there was no evidence that the applicant demonstrated any other misconduct during service, while having a mental health diagnosis. Therefore, his mental health conditions do not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge? Since the applicant's mental health condition of Persistent Depressive Disorder (Dysthymia) and Adjustment Disorder with Depression and Anxiety were never found to be unfitting for continued military service, his mental health conditions do not outweigh his original discharge and would not support his request for a change in narrative reason for discharge to "disability" from Misconduct, and change in Character of Service to Honorable.

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 Aug 23 for comment (Exhibit E), and the applicant replied on 7 Aug 23. In his response, the applicant contended he was in the process of a Medical Evaluation Board (MEB) when his commander terminated it. The MEB was almost completed, and he was only waiting on the narrative summary when it was terminated, so it never made it to the PEB. The applicant provided copies of his medical records to support his contentions.

He was prescribed Depakote (anti-psychotic) and Zyprexa (anti-convulsant) which are generally indicated in the treatment of a bipolar condition; however, they did not diagnose him as bipolar, and he was not prescribed Lithium which is the drug of choice for bipolar disorder. These medications provided some positive results, and the results were then deemed limited and were not helping, which attributes more to severe mood swings than the medications actually working. There were then changes in his medications.

He was referred for MEB processing and was found not fit for duty on 31 Jan 18, with prognosis guarded. The applicant also provided documentation from WebMD in support of his

contentions, stating he struggled daily with mental illness. Two providers stated he had bipolar disorder and the DVA diagnosed him with bipolar disorder. It should have been diagnosed during his many doctor and psychiatrist visits but instead he was misdiagnosed and prescribed medicine that was ultimately ineffective.

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, to include the applicant's rebuttal, 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. While the applicant had been seen and treated for mental health issues, there is insufficient documentation to determine if his mental health condition was unfitting to render a recommendation of a medical discharge, or if the MEB process was initiated prior to his discharge. Additionally, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of post-service information/criminal history provided by the applicant, 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-00679 in Executive Session on 20 Dec 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 12 Mar 23.
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 24 Mar 23.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 3 Aug 23.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Aug 23.
Exhibit F: Applicant's Response, w/atchs, dated 7 Aug 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.

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Board Operations Manager, AFBCMR