



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01895

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. Her under honorable conditions (general) discharge be upgraded to honorable.
2. Her narrative reason for separation be changed from "Misconduct (Drug Abuse)" to "Secretarial Authority."
3. Her reentry (RE) code "2B" for "Separated with a general or under other than honorable conditions discharge" be changed to "1" to denote reenlistment eligible.

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends the Air Force failed to refer her case to the Integrated Disability Evaluation System (IDES) before she was alleged to have ingested a controlled substance not prescribed to her. The Air Force then misapplied the retention criteria and involuntarily separated her on the basis of drug abuse, although she was a sexual assault victim who was actively being treated for depression and insomnia. Her severe post-traumatic stress disorder (PTSD) manifested itself in anxiety, depression, insomnia and a dissociative state.

Prior to enlisting in the Air Force, she was a child victim of domestic violence and sexual assault by her biological father. The abuse was reported and her father was convicted and incarcerated. While she was serving on active duty in Turkey, she was notified of her father's early release and her past trauma resurfaced when she viewed his sexual offender registration photograph. This triggered her PTSD. In Nov 15, she was coping with increased anxiety and sleeplessness. She felt she had no other choice but to try a medication prescribed to a friend, Alpha-Hydroxyalprazolam, referred to as Xanax. She then tested positive and was recommended for discharge.

She was diagnosed with ratable conditions at the time of her discharge. The conditions significantly interfered with her ability to perform her assigned duties, tasks and responsibilities. The general discharge was based on her nonjudicial punishment (NJP) that was fundamentally flawed. There was no investigation. If there was an investigation, it would have been discovered that no other individual ever witnessed her abusing or engaging in the distribution of Xanax. She has since been evaluated by the Department of Veterans Affairs (DVA) and has been assigned a disability rating of 100 percent.

AFBCMR Docket Number BC-2023-01895

Work-Product

Work-Product

In a personal statement, she states since her discharge on 17 Mar 16, she has strived to improve herself. She currently works as the front desk associate at a chiropractic office and volunteers as a victim's advocate for the local rape crisis center. Her past trauma, to include the sexual assault she experienced during her active duty service led to struggles and lapses in judgment which she regrets. Her discharge was directly related to her PTSD. She has received therapy for her trauma. Had she had the resources and support needed at the time, she would have made different choices. Her service to the Air Force was honorable and her lapse in judgment was not an accurate reflection of her dedicated service.

Counsel cites AFBCMR BC-2020-03450 and the Court of Federal Claims (CoFC) decision, Number 20-589, filed 27 Apr 22 as precedent to grant the applicant's request. On 14 Jul 21, the Board (BC-2020-03450) denied the applicant's request his general discharge be upgraded to a medical retirement or in the alternative his general discharge be upgraded to honorable. The Board Majority considered liberal consideration but found no evidence the applicant's condition mitigated his actions. The applicant in this case was processed as a dual action discharge case adjudicated by the Secretary of the Air Force Personnel Council (SAFPC). The CoFC remand order provided by counsel shows the Court remanded the plaintiff's case back to the AFBCMR for reconsideration. The Court found the AFBCMR failed to consider the entirety of the record and was unconvinced the AFBCMR properly applied the criteria for IDES referral.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 22 Feb 16, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*. The reason for the action was on 14 Jan 16, she tested positive for Alpha-Hydroxyalprazolam, a schedule IV controlled substance. On 19 Jan 16, a medical review of her records determined she did not have a prescription to account for the positive drug results. For the misconduct, she received NJP, dated 1 Feb 16.

On 2 Mar 16, the Staff Judge Advocate found the discharge action legally sufficient.

On 7 Mar 16, the discharge authority directed the applicant be discharged for drug abuse, with a general discharge. Probation and rehabilitation were considered, but not offered.

On 17 Mar 16, the applicant received an under honorable conditions (general) discharge. Her narrative reason for separation is "Misconduct (Drug Abuse)," RE code is "2B" and separation code is "JKK." She was credited with 3 years, 11 months, and 21 days of total active service.

On 5 Sep 19 and 17 Sep 20, the Air Force Discharge Review Board (AFDRB) denied the applicant's request for upgrade of her discharge. Due to evidence of a mental health condition, the AFDRB considered the case on the liberal consideration standards as required by the Office of the Under Secretary of Defense for Personnel and Readiness (OUSD P&R). The AFDRB found no conclusive indication any mental health issues had a direct impact on the applicant's misconduct or discharge. The Board found insufficient evidence of an inequity or impropriety that would warrant a change to the applicant's discharge. The discharge received was deemed to be appropriate.

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

POST-SERVICE INFORMATION

On 8 Dec 23, the Board sent the applicant a request for post-service information and advised the applicant she was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not she had an arrest record (Exhibit C). Her counsel replied on 28 Jan 24 and provided an FBI report dated 25 Jan 24. According to the report, aside from the drug abuse charge while in service, the applicant has had no arrests since her discharge. The applicant was hired and accepted a federal position as a program and management analyst. She volunteers her time with the rape crisis center and received training to volunteer as an on call sexual assault hospital advocate. She has also spent time in various efforts for her own trauma therapy, which has helped exponentially. She is involved with her DVA clinic and also spends time at church and does yoga. She is currently learning American Sign Language and is looking forward to getting more involved with the deaf community. The applicant provided a letter of support from her employer.

The applicant's complete response is at Exhibit F.

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 8 Dec 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.

AIR FORCE EVALUATION

AFRBA Psychological Advisor finds sufficient evidence to support the applicant's request for an upgrade of her discharge. Despite this finding, there is insufficient evidence that her mental health condition diagnosed during her military service, impacted her functioning or her ability to perform the duties of her office, grade rank or rating.

The AFDRB previously denied her request for upgrade in 2019 and 2020. Since these decisions, the applicant has submitted new evidence. In her self-authored affidavit dated 3 Feb 20, she contends she experienced a sexual assault during her active duty service and that this along with her past trauma from childhood led to certain struggles and lapses in judgment.

The applicant's first DVA compensation and pension (C&P) examination on 21 May 21 noted she was raped on her first assignment. The applicant was watching a movie with a friend in the barracks when she fell asleep and awoke to him penetrating her. She was not diagnosed with PTSD but with persistent depressive disorder. The following two C&P examinations on 12 Jul 21 and 13 Sep 22 diagnosed the applicant with PTSD from her in-service MST and both list the Criterion A stressor for PTSD as the MST. Sleep problems and other mental health symptoms following an MST can be part of the sequelae of symptoms associated with MST. The Psychological Advisor finds that the use of sleep medication to manage these symptoms has a nexus with MST, including non-prescribed medication (Xanax). The use of Xanax to manage other mental health symptoms can also be part of the sequelae of symptoms of MST. Therefore, the Psychological Advisor finds her misconduct of using a non-prescribed medication (Xanax) is mitigated by her in-service MST.

Despite this finding, there is insufficient evidence she developed PTSD before she was discharged from the military. Counsel contends the applicant was diagnosed with a ratable condition and the

conditions interfered with her ability to perform her assigned tasks; however, there is no evidence to indicate this to be the case. There is evidence she was evaluated for PTSD but did not meet the criteria. Throughout her mental health treatment, she was diagnosed with phase of life issues. She was also not diagnosed with PTSD during her first C&P examination. Further, being diagnosed with a mental health condition and receiving mental health treatment does not automatically render a condition as unfitting. More information is required to determine unfitness, such as being placed on a permanent duty limiting condition profile, being deemed not worldwide qualified and that the condition impacts or interferes with the service member's ability to reasonably perform their military duties in accordance with their office, grade, rank or rating. In the applicant's case, there is no evidence she was ever placed on any profile or had a duty limiting condition. She was also cleared for the personnel reliability program (PRP). Her separation examination found her qualified for continued military service and she was fit for military service from a psychological perspective. She also continually had exemplary performance evaluations.

Her DVA rating and diagnosis of PTSD do not demonstrate she was unfit for military service during her time in service or at discharge. The military's disability evaluation system (DES), established to maintain a fit and vital fighting force, can by law under 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 time of separation and not based on any post-service progression of the disease or injury. To the contrary, the DVA operating under 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 of time that transpired since the date of discharge.

Liberal consideration is applied due to the contention of a mental health condition. The following are responses to the four questions from the Kurta Memorandum:

1. Did the applicant have a condition or experience that may excuse or mitigate the discharge? The applicant contends she experienced an MST while in the military.
2. Did the condition exist or experience occur during military service? There is evidence in the applicant's medical records (C&P examinations) that she experienced an MST while in the military.
3. Does the condition or experience excuse or mitigate the discharge? The applicant contends she was a victim of MST while she was in the military. Her first C&P examination on 21 May 21, while not diagnosing PTSD, determined her MST stressor was at least as likely as not supported by and consistent with the in-service marker evidence including increased disregard for military or civilian authority (she was disciplined for taking a sleeping pill not prescribed to her). The examiner noted she was raped on her first assignment. The following two C&P examinations on 12 Jul 21 and 13 Sep 22 diagnosed the applicant with PTSD from her in-service MST (both list Criterion A stressor for PTSD as the MST).
4. Does the condition or experience outweigh the discharge? Since the applicant's mental health condition does excuse or mitigate her discharge, the applicant's condition does outweigh the original discharge.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

AFBCMR Docket Number BC-2023-01895

The Board sent a copy of the advisory opinion to the applicant on 2 Jan 24 for comment (Exhibit E), and the counsel replied on 28 Jan 24. Counsel contends the interest of justice demands the AFBCMR accept the applicant’s petition and the mental health review. The applicant’s chain of command committed a material error and injustice that prejudiced the substantial rights of the applicant.

The applicant’s complete response is at Exhibit F.

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 has presented evidence sufficient to demonstrate an injustice regarding part, but not all, of her request. While the Board finds no error in the original discharge process and notes the applicant was not diagnosed with PTSD or any unfitting conditions while in service, the Board recommends partial relief. The Board concurs with the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence substantiates the applicant’s contentions. The applicant contends the Air Force failed to refer her to the IDES. However, while the applicant’s misconduct was mitigated, there was no evidence her mental health condition during her military service impacted her function or her ability to perform the duties of her office, grade rank or rating for processing through the IDES. Moreover, dual action processing (administrative or medical) was not mandatory but instead was discretionary under the circumstances. The Board applied liberal consideration based on the applicant’s MST and finds sufficient evidence that the applicant’s MST experience excused and mitigated the applicant’s misconduct of drug abuse that led to her general discharge. However, the Board finds insufficient evidence to grant the applicant’s request her RE code be changed to “1K” to denote she was reenlistment eligible at the time of discharge, and the Board therefore finds no basis to recommend granting that portion of the applicant’s request. Therefore, the Board recommends the applicant’s records be corrected as indicated below.
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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show on 17 Mar 16, she was discharged with service characterized as honorable, narrative reason for separation of Secretarial Authority, separation code of “JFF” (Secretarial Authority) and reentry code of “3K” (Reserved for use by AFPC or AFBCMR for Correction of Military Records).

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-2023-01895 in Executive Session on 14 Mar 24:

Work-Product	, Panel Chair
Work-Product	, Panel Member
Work-Product	Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 22 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 8 Dec 23.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 13 Dec 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Jan 24
- Exhibit F: FBI Report, dated, 25 Jan 24.
- Exhibit F: Applicant's Response, w/atchs, dated 28 Jan 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.

5/6/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF