Work-Product

UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2023-03477

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be changed to a medical retirement.

APPLICANT'S CONTENTIONS

While serving on active duty, his condition was never treated properly. He went to medical numerous times with no real outcome. At the time of his separation from active duty, he received a general discharge instead of being recommended to the Medical Evaluation Board (MEB). Since his separation, he received numerous medical evaluations and a Department of Veterans Affairs (DVA) disability rating of 100 percent.

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 6 Sep 22, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of DAFI 36-3211, *Military Separations*, paragraph 7.38 for misconduct, minor disciplinary infractions. The specific reasons for the action were:

a. On 3 Oct 18, a Letter of Counseling (LOC) was issued for engaging in an argument with college students in a public area.

b. On 9 Oct 19, a Letter of Reprimand (LOR) was issued for failing to report for mandatory physical training.

c. On 9 Mar 20, an LOR was issued for failing to report for duty.

d. On 6 Apr 20, an LOR was issued for failing to report for duty.

e. On 27 Apr 22, an LOR was issued for substandard dress and appearance standards.

f. On 8 Jul 22, AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru SSgt),* indicates the applicant received nonjudicial punishment (NJP), Article 15 for failing to report for duty on one occasion and dereliction of duty on a separate occasion when he did not remain in his work center. He received a reduction in grade to airman (E-2), suspended until 28 Jul 22, forfeiture of $1,027.00 in pay for one month, pay in excess of $400.00 suspended until 28 Jul 22 was granted per the applicant's appeal, and 15 days of extra duty.

On 11 Sep 22, the Staff Judge Advocate found the discharge action legally sufficient.

On 14 Sep 22, the discharge authority directed the applicant be discharged for misconduct, minor disciplinary infractions, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

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

POST-SERVICE INFORMATION

On 14 Mar 24, 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 (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 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 4 Apr 24, the Under Secretary of Defense for Personnel and Readiness issued a memorandum, known as the Vazirani Memo, to military corrections boards considering cases involving both liberal consideration discharge relief requests and fitness determinations. This memorandum provides clarifying guidance regarding the application of liberal consideration in petitions requesting the correction of a military or naval record to establish eligibility for medical retirement or separation benefits pursuant to 10 U.S.C. § 1552.It is DoD policy the application of liberal consideration does not apply to fitness determinations; this is an entirely separate Military Department in determining whether, prior to "severance from military service," the applicant was medically fit for military service (i.e., fitness determination). While the military corrections boards are expected to apply liberal consideration to discharge relief requests seeking a change to the narrative reason for discharge where the applicant alleges combat- or military sexual trauma (MST)-related PTSD or TBI potentially contributed to the circumstances resulting in severance from military service, they should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised.

Accordingly, in the case of an applicant described in 10 U.S.C. § 1552(h)(l) who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the military corrections boards will bifurcate its review.

First, the military corrections boards will apply liberal consideration to the eligible Applicant's assertion that combat- or MST-related PTSD or TBI potentially contributed to the

circumstances resulting in their discharge or dismissal to determine whether any discharge relief, such as an upgrade or change to the narrative reason for discharge, is appropriate.

After making that determination, the military corrections boards will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

On 14 Mar 24 and 11 Jun 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibits C and G).

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 completed a review of all available records and finds insufficient evidence to support the applicant's request for a medical retirement. Additionally, while the applicant is not specifically asking for an upgrade of the characterization of his discharge, there is insufficient evidence to support a discharge upgrade.

There is no evidence the applicant was diagnosed with PTSD or any mood disorder while he was in service. There is a reference to an adjustment disorder noted on a Physical Health Assessment (PHA), dated 17 Aug 22, one month before his involuntary separation. Despite the applicant's contention, he had numerous evaluations that focused on his mental health. These include PHAs, Family Advocate Program (FAP) encounters, a deployment clearance, Mental Health Assessments (MHA), a post-deployment assessment, a Separation History and Physical Examination (SHPE), and an administrative checklist. These 11 encounters and evaluations did not diagnose him with PTSD or a mood disorder. They noted he denied all mental health symptoms, is in a sound mental state, minimal score on a screening for depression, and had no concerns for his mental health. These mental health encounters include evaluations that occurred after his deployment to Work-Pr...

The applicant was regularly found fit for duty from a psychological perspective. He was cleared for Air Force Specialty Code (AFSC) duties, he did not have any duty limiting conditions (DLC) or profiles, and he met retention standards. His performance evaluations, in which he met or exceeded expectations, demonstrate he was able to perform his duties adequately. There is

insufficient evidence to suggest a mental health condition impacted his ability to perform the duties of his office, grade, rank, and rating.

It is noted the applicant is somewhat inconsistent in his reporting. One instance is whether he encountered dead bodies. On encounters post-deployment, he denied encountering dead bodies, and he denied any traumatic experiences causing flashbacks, nightmares, or feelings of guilt. After he was discharged from the military, he reported he witnessed someone being crushed while he was on deployment. Another instance of inconsistent reporting is whether he had prior mental health treatment. On his Compensation and Pension (C&P) examination, post service, he stated he had not had mental health treatment. He denied any history of mental health treatment again on a mental health encounter on 19 Mar 24. There are two encounters, while the applicant was in service that note he was under the care of a mental health provider at T------- N-------. The applicant did not submit these encounters for review with his application. While the applicant was diagnosed with a mood disorder and is service-connected, it should be noted the military's Disability Evaluation System (DES), established to maintain a fit and vital fighting force, can by law, under Title 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 post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of laws, Title 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 time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary (improve or worsen) over the lifetime of the veteran. In the applicant's case, as mentioned above, there is insufficient evidence to suggest a mental health condition impacted his ability to perform the duties of his office, grade, rank, and rating. The Psychological Advisor concludes the applicant was fit for duty during his time in service and at discharge.

While the applicant is not specifically asking for an upgrade of the characterization of his discharge, the Psychological Advisor will address, based on his contentions his mental health symptoms began after his deployment to Work-Prod... There is no evidence the applicant was diagnosed with adjustment disorder until 17 Aug 22. Prior to that point, he denied any mental health symptoms and there is no evidence he had any mental health condition. All the applicant's misconduct occurred before he had any mental health diagnosis, therefore there are no mental health mitigating factors for his misconduct. Additionally, the applicant himself does not offer any mental health reasons for his misconduct at the time of the offenses. Rather, he stated his pride caused him to be involved in an altercation, he did not report to work because of his daughter's fever, his alarm clock did not go off, concern for his child who may have been exposed to COVID, and his haircut took longer than expected. These reasons do not involve mental health rationale. The applicant contends his mental health symptoms began after his deployment to Work-Pro... where he saw a person crushed by a truck. The applicant was never diagnosed with PTSD. He was diagnosed with a service-connected mood disorder. Even considering this mental health diagnosis, his substantive misconduct occurred before his deployment to Work-Prod... and therefore it is not a mitigating factor for his misconduct. His wearing of a nose stud/spacer (after being

reprimanded for it) after his deployment to Work-Pro... does not have a nexus with any of his mental health conditions, and therefore it is not a mitigating factor for his misconduct.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. A review of the available records finds no error or injustice with the applicant's discharge and insufficient evidence has been presented to support the applicant's request. 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 checked PTSD on his application form.

2. Did the condition exist, or experience occur during military service?
The applicant was diagnosed with adjustment disorder on 17 Aug 22. In-service encounters note the applicant was being seen for mental health services; however, the mental health records were not available for review. The applicant was service-connected for a mood disorder by the DVA after his military service.

3. Does the condition or experience excuse or mitigate the discharge?
There is no evidence the applicant was diagnosed with adjustment disorder until 17 Aug 22, one month before discharge. Prior to that point, he denied any mental health symptoms and there was no evidence he had any mental health condition. All of the applicant's misconduct occurred before he had any mental health diagnosis, therefore there are no mental health mitigating factors for his misconduct. Additionally, the applicant himself did not offer any mental health reasons for his misconduct at the time of the offenses. Rather, he stated his pride caused him to be involved in an altercation, he did not report to work because of his daughter's fever, his alarm clock did not go off, concern for his child who may have been exposed to COVID, and his haircut took longer than expected. These reasons do not involve mental health rationale. The applicant contends his mental health symptoms began after his deployment to Work-Pr..., where he saw a person crushed by a truck. The applicant was never diagnosed with PTSD. He was diagnosed with a service-connected mood disorder. Even considering this mental health diagnosis, his substantive misconduct occurred before his deployment to Work-Pro... and therefore, it is not a mitigating factor for his misconduct. His wearing of a nose stud/spacer (after being reprimanded for it) after his deployment to Work-Pro... does not have a nexus with any of his mental health conditions, and therefore it is not a mitigating factor for his misconduct.

4. Does the condition or experience outweigh the discharge?
Since the applicant's mental health condition does not excuse or mitigate his discharge, the applicant's condition also does not outweigh the original discharge.

The complete advisory opinion is at Exhibit D.

The AFBCMR Medical Advisor recommends denying the application. After an extensive review of the available records, the Medical Advisor finds insufficient evidence to support the applicant's

request to change his discharge outcome to reflect a medical retirement. A post-service DVA rating is not synonymous or equivalent to the military's disability evaluation near the time-of-service discharge as described above. There was no definitive evidence of a material error, injustice, impropriety, or inequity found in the process leading up to the applicant's separation. The DES is not a direct option for any individual, but rather is bought forth when there exist a potentially unfitting condition and one's fitness and ability to continue serving remains at bay. Although there were intermittent and temporary profiles, his ability to maintain duty function remained complete. The burden of proof is placed on the applicant to submit evidence to support his request. The evidence he did submit were assessed to not support his request for a finding of or granting a medical retirement.

The determination of unfitness by the military is when a physical or mental health condition interferes with the member's ability to reasonably perform their military duties in accordance with their rank, grade, office, or rating and only then the condition may become ratable within the DES for a possible medical retirement or discharge with severance pay. Throughout the applicant's military service, he was placed on profiled restrictions for two separate conditions. The first was a minor facial skin condition for which he received a waiver for shaving. The second was for a fracture of the left ankle which was successfully treated by non-surgical means and was documented as being resolved by May 22. Despite the resolution of his definitive fracture, he reported a return of left ankle pain with physical activity; however, such subjective complaint coupled with normal repeat x-rays as well as a normal detailed examination which included joint stability, range of motion, and joint strength would not have met the criteria of being unfit. Additionally, the other found conditions or the complaint of condition symptomatology which included those associated with headaches, sleep apnea, tinnitus, back pain, depression, PTSD, or asthma did not occur to a degree of being possibly unfitting for continued military service.

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 11 Jun 24 for comment (Exhibit F), but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade 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. 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. Additionally, the Board concurs with the rationale and recommendations of the AFRBA Psychological Advisor and the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board does not find any of the applicant's medical or mental health conditions at the time of his discharge unfitting to include PTSD. The DES is not a direct option for any individual. The mere existence of a medical or mental health diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The applicant's military duties were not severely degraded due to his medical or mental health conditions. The Board took note of the applicant's disability ratings from the DVA but did not find this evidence compelling to warrant relief. The military's DES established to maintain a fit and vital fighting force, can by law, under Title 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 or near the time of separation and not based on post-service progression of disease or injury to which the DVA can offer compensation. Based on the 4 Apr 24 memorandum from the Under Secretary of Defense for Personnel and Readiness, known as the Vazirani Memo, stating boards should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge; liberal consideration was only applied to the applicant's case to determine if a discharge upgrade to honorable is warranted. However, since there is no evidence his mental health condition had a direct impact on his behaviors and misconduct resulting with his discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge. The majority of his misconduct occurred before his deployment and before he was diagnosed with any mental health diagnosis. In the interest of justice, the Board also 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. The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his current moral character, occupational, and social advances, in the consideration for an upgrade of discharge characterization due to clemency based on fundamental fairness.

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-2023-03477 in Executive Session on 17 Jul 24:

Work-Product Panel Chair
, Panel Member

Work-Product Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 17 Oct 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 14 Mar 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 10 Apr 24.
Exhibit E: Advisory Opinion, AFBCMR Medical Advisor, dated 30 May 24.
Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Jun 24.
Exhibit G: Letter, SAF/MRBC, w/atchs (Supplemental Guidance), dated 11 Jun 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.

7/30/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF