



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01478

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to general (under honorable conditions) or honorable.

APPLICANT'S CONTENTIONS

He endured an injury during service to his hip and knees which left him immobilized and in persistent pain for over a year. He underwent surgery; however, with no improvement he was ultimately recommended for a medical separation with a 20 percent disability rating. Due to ineffective pain relief measures, he resorted to self-medication which led to his BCD. His ongoing pain and mobility issues exasperated his mental health. His ongoing pain and diagnosed major depressive disorder (MDD) are well documented and he should be granted a discharge upgrade under the Kurta memo guidelines. Additionally, his convictions were comparatively less severe and raise due process concerns which warrant liberal consideration. According to the Wilkie memo his application should be approved as similar offenses by other service members may not have resulted in the same punishment. His prolonged period of intense pain provides a mitigating factor for his self-medication. Even though he was convicted of wrongful distribution, the context of these charges can be further explained. He was introduced to other members with similar pain issues and participated in the use of spice with these other members. This was a group smoking spice rather than an illegal drug transaction. This act of sharing was not driven by the intention to sell or profit from the distribution of drugs. Furthermore, he plead not guilty to the charge of distributing oxycodone but was found guilty even though there were flaws in the testimony being charged with the distribution of hydrocodone and oxycodone. Since he was prescribed oxycodone and not hydrocodone, he was only found guilty of oxycodone distribution. During his post-trial confinement, he grappled with pain and other obstacles related to his medical conditions as outlined in *United States v. Bentley*, 2013 CCA LEXIS 734.

In support of his request for a discharge upgrade, the applicant provides a personal statement, his complete military records, his Department of Veterans Affairs (DVA) disability ratings, and a copy of his court filing.

STATEMENT OF FACTS

AFBCMR Docket Number BC-2024-01478

Work-Product

Controlled by: SAF/MRB
CUI Categories: Work-Product
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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

On 30 Aug 11, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of left and right hip osteoarthritis with acetabular impingement with a disability compensation rating of 20 percent with a recommendation of “Discharged with Severance Pay (DWSP).”

Dated 3 Nov 11, AF Form 1359, *Report of Result of Trial*, indicates the applicant plead guilty and was found guilty of one charge and two specifications of violating a lawful general order by wrongfully using and distributing a controlled substance (spice) in violation of Article 92; and pled guilty and was found guilty of one charge and two specifications of wrongfully using and distributing a controlled substance spice in violation of Article 112a. Under the violation of Article 112a, the applicant was charged with two other specifications for which he pled not guilty. Of these, he was found guilty of wrongfully distributing oxycodone and was found not guilty of wrongfully distributing hydrocodone. He received a reduction to the grade of airman basic (E-1), forfeiture of all pay and allowances, confinement for 12 months, and a BCD.

On 9 Jan 12, a letter regarding the applicant’s disability processing indicates the Medical Evaluation Board (MEB) was returned without action due to the court-martial findings.

On 27 Aug 13, the U.S. Air Force Court of Criminal Appeals issued an opinion denying the applicant’s appeal, and denying relief in *United States v. Bentley*, 2013 CCA LEXIS 734; 2013 WL 4734519. His request for review by the U.S. Court of Appeals for the Armed Forces was subsequently denied in *United States v. Bentley*, 2013 CAAF LEXIS 1515 on 30 Dec 13. This document was provided by the applicant. The findings and sentence were affirmed as the applicant failed to show an objectively and sufficiently serious act or omission resulting in the denial of necessities and prison officials were deliberately indifferent to his medical conditions that might have violated the Eighth Amendment of the Uniform Code of Military Justice (UCMJ). Additionally, the applicant failed to show his trial defense counsel were deficient for failing to present evidence he was taking medication and dealing with pain, insomnia, depression, and other issues during the span of his spice use or that any deficiency resulted in prejudice. The evidence was found legally and factually sufficient to support his conviction for the wrongful distribution of oxycodone.

On 4 Feb 14, the convening authority published General Court Martial Order (GCMO) Number Work... The Order stated the sentence as promulgated in GCMO Number 3 was affirmed and having been complied with, the BCD would be executed.

On 21 Mar 14, the applicant received a BCD discharge. His narrative reason for separation is “Court-Martial (Other)” and he was credited with four years and two months of total active service.

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 Oct 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. This letter informed the applicant a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating his case.

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 8 Oct 24, 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.

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 completed a review of all available records and finds insufficient evidence to support the applicant's request. A review of the available records finds the applicant's and his legal counsel's contentions plausible but are not fully corroborated by his objective military records.

There is evidence the applicant had made complaints of having anxiety and depression caused by his physical pain as early as 28 Oct 10 when he initially sought mental health treatment. He was given a diagnosis of pain disorder associated with both psychological factors and a general medical condition based on the evaluation of his symptoms. He would then receive and attend regular

individual psychotherapy sessions for these issues starting on 11 Jan 11 and ending on 15 Aug 11. During this iteration of treatment, he was seen in the emergency department (ED) on 29 Aug 11 after he displayed psychotic behaviors that were believed to have been caused by his use of synthetic cannabinoids (spice) based on his possession of this substance. It was after this ED visit his stressors had increased exponentially because he had been referred and convicted at a general court-martial shortly after this incident for a variety of drug-related offenses. He voluntarily terminated his psychotherapy treatment because he believed talking about things he could not change, which was in reference to his court-martial, made him feel worse. He did not return to treatment after he terminated his mental health treatment. He did receive a psychiatric evaluation while he was in confinement, but no records exist to confirm he received regular or recurring treatment after the evaluation.

The applicant's legal counsel claimed he did not receive mental health counseling for his condition of MDD. This contention is not quite supported by his records. The applicant was never diagnosed with MDD by any military medical or mental health providers. He was first diagnosed with MDD by a provider at the DVA on 13 July 11 for compensation and pension purposes when he was processed through the Integrated Disability Evaluation System (IDES) after he was referred to the Medical Evaluation Board (MEB) for his physical conditions. It is possible his depression, originally secondary to his physical pain, had developed into MDD over time and was exacerbated by his legal, occupational, and relationship stressors. Regardless of who had diagnosed him with MDD, the applicant did receive mental health counseling when he had complaints of anxiety and depression caused by his physical pain. In fact, he was receiving mental health treatment when he was diagnosed with MDD by a DVA provider because his records showed he terminated treatment of his own volition on 15 Aug 11, a month after he was formally diagnosed with MDD on 13 Jul 11. He chose not to continue with treatment. When he was evaluated by a provider in confinement, he was not given any mental disorder diagnosis, and this is most likely the reason he did not receive mental health treatment or counseling after this evaluation.

While there is evidence the applicant had made complaints of having anxiety and depression secondary to his physical pain before he was referred to a general court-martial for his drug-related offenses, it is accepted he most likely had coped using spice as contended. There are records reporting he was having hip problems from an injury beginning in boot camp or technical school and he was experiencing mood issues in early 2010 that predated his drug use. It is, therefore, accepted he used spice to cope with his mental health issues and his mental health condition may mitigate his spice use. However, since the applicant denied he distributed spice and oxycodone, then it is not possible his mental health condition caused these behaviors and misconducts based on his report. Hypothetically if he did acknowledge distributing these substances, his mental health condition would still not excuse or mitigate these misconducts. Distribution of drugs entails having knowledge, intent, and plans to engage in this behavior, which are premeditated behaviors, and premeditated behaviors are not excused or mitigated by having a mental health condition. The Psychological Advisor cannot comment on the validity of his court martial conviction as it is out of the scope of practice of the Advisor, but the information documented in his military records stated he did engage in the distribution of illicit substances and was convicted for these offenses in addition to drug use. Considering all the reasons for his discharge, the Psychological Advisor finds his mental health condition mitigates some of his misconducts specifically the use of spice,

but his mental health condition does not mitigate most of his misconducts, especially the distribution of spice and oxycodone. These latter offenses are serious offenses. Therefore, the Psychological Advisor finds no error or injustice with his discharge from a mental health perspective, and his request for an upgrade of his discharge based on his mental health condition is not supported.

Liberal consideration is applied to the applicant's request due to his contention of having a mental health condition. It is reminded that liberal consideration does not mandate an upgrade per policy guidance. 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's legal counsel on behalf of the applicant contends the applicant suffered from insomnia and depression caused by his physical pain. He was diagnosed with MDD and did not receive mental health counseling for this condition. He coped with his mental health condition with spice but denied engaging in distribution of spice and oxycodone. His drug use led to his court-martial conviction and discharge from service.

2. Did the condition exist or experience occur during military service?

There is evidence the applicant sought mental health treatment in Oct 10 for having anxiety and depression caused by his physical pain. He attended about 14 individual psychotherapy sessions from Jan 11 to Aug 11 for these problems in addition to his legal, work, and relationship problems that occurred after his drug use was discovered. He terminated his treatment because he felt talking about things that are not changing (alluding to his legal problems) made things worse for him. He was given mental disorder diagnoses of pain disorder associated with both psychological factors and a general medical condition, partner relational problems, and insomnia secondary to pain condition by his military mental health providers. There is no evidence he was given a diagnosis of MDD by his military providers, but he was diagnosed with MDD in Jul 11 by a DVA provider from his compensation and pension examination for mental disorders. Contrary to his legal counsel's contention, the applicant did receive mental health counseling for depression and was receiving counseling at the time he was diagnosed with MDD. He voluntarily terminated treatment one month after he was diagnosed with MDD.

3. Does the condition or experience actually excuse or mitigate the discharge?

Since there is evidence the applicant had complaints of anxiety and depression secondary to his physical pain, it is accepted he used spice to cope with his mental health condition. However, since he denied distributing spice and oxycodone, his mental health condition did not cause these misconducts. His mental health condition may have caused, excused, and mitigated some of his misconducts specifically the use of spice, but his mental health condition did not cause most and his more serious misconducts of distribution of illicit substances. Thus, his mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition does not excuse or mitigate his discharge, his mental health condition also does not outweigh his original discharge. His convicted offenses of distribution of

spice and oxycodone are serious offenses, and the severity of these offenses does not outweigh his use of spice and his overall discharge.

The complete advisory opinion is at Exhibit D.

AF JA/JI recommends denying the application finding insufficient evidence to recommend relief on the basis of a legal error. In accordance with 10 U.S.C. Section 1552(f), because the applicant's request for a discharge upgrade pertains to records resulting from a court-martial conviction and sentence, the ABCMR can only take two types of action: (1) correction of a record to reflect an action taken by reviewing authorities under the Uniform Code of Military Justice (UCMJ) (e.g. convening authority clemency or appellate corrections); or (2) action on the sentence of a court-martial for purposes of clemency. The applicant has provided no evidence of an error in any record of action taken by a reviewing authority of his court-martial. Therefore, the only correction for consideration is action on the applicant's court martial sentence for purposes of clemency.

The Board may determine clemency is warranted or appropriate in the applicant's case, or there is a basis for relief under the equity, injustice, or clemency considerations pursuant to the Wilkie Memorandum, or the guidance for liberal consideration of mental health issues pursuant to the Kurta Memorandum. Nevertheless, the Board should consider important factors to the contrary. First, the Psychological Advisor determined there was insufficient evidence to support the applicant's request for an upgrade of his discharge based on his mental health condition. Second, in accordance with paragraph 19 of the attachment to the Kurta Memorandum, premeditated misconduct is not generally excused by mental health condition. The applicant's offenses involve premeditated misconduct, specifically the offenses of drug use and distribution.

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 27 Nov 24 for comment (Exhibit F) and the applicant replied on 2 Dec 24. In his response, through counsel, the applicant contends the Psychological Advisor misinterpreted the timeline of events. He suffered a hip injury soon after he enlisted in Jul 09 which caused severe pain and deteriorating mental health. In Jan 11, he began the process of being medically separated and he received an initial DVA disability rating. This process continued until Nov 11 when he was caught and convicted of wrongful drug use. The conviction retroactively set the dates of the drug usage to the period between 18 Feb 10 and 5 May 11. The Psychological Advisor mistakenly assumed he had already been caught and his psychotherapy sessions between Jan 11 thru Aug 11 stemmed from his anxiety about a pending court-martial conviction. This error critically impacted the Psychological Advisor's conclusion and severely undermines the medical records supporting his claim. The legal advisory relies on the mental health advisory which contains a critical error in the misinterpretation of the timeline. Additionally, the legal advisory fails to provide a detailed response to address the premeditated misconduct or his substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition. He plead guilty to distribution of spice as he understood it referred to acts of sharing, not for profit and falls within the scope of "substance-seeking" and he denies distributing

oxycodone as it would be illogical to give away the pain medication he needed for his recovery and the conviction was solely based on his prescription history which coincided with the alleged period of distribution. Given the flawed opinion of the Psychological Advisor and the Legal Advisor's failure to address additional arguments, the advisory opinions should be reconsidered in light of these factors.

The applicant's complete response is at Exhibit G.

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. Section 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. Furthermore, the Board concurs with the rationale of the AFRBA Psychological Advisor and AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds his mental health condition and coping with pain management most likely led to his use of spice to alleviate his symptoms; however, his more serious misconduct of drug distribution could not be excused by his mental health condition. The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. Again, his mental health condition may have possibly caused some of his misconduct resulting with his court-martial conviction; however, the Board finds the more serious misconduct of distribution of illicit substances as premeditated and does not warrant a change to his discharge. The Board took note of the applicant's contention he did not distribute spice with the intent to profit or distribute oxycodone; however, finds the preponderance of evidence does not convince the Board to grant the applicant's request in excusing this misconduct as minor under liberal consideration. 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 and a criminal history report, the Board finds no basis to do so. Lastly, the Board noted his contention he did not receive mental health counseling for depression; however, the Board finds the evidence suggests otherwise and the applicant himself terminated the mental health treatment he was receiving. 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-2024-01478 in Executive Session on 15 Jan 25:

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 18 Apr 24.

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 Oct 24.

Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 9 Oct 24.

Exhibit E: Advisory Opinion, AF/JAJI, dated 27 Nov 24.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 27 Nov 24.

Exhibit G: Applicant's Response, dated 2 Dec 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.

1/22/2025

Work-Product

Board Operations Manager, AFBCMR

Signed by: USAF