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Military & Veterans' Law Section

"Military Discharges and Their Civilian Ramifications"

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Discharges in Military

Lt. Colonel John Cummings

No Materials Available

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Civilian Ramifications of Discharge

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Civilian Ramifications of Military Discharges

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Agenda

- Statutes and regulations
- Bars to benefits
  - Statutory bars
  - Regulatory bars

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Who gets VA benefits

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Veteran

- "person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable" 38 USC Sec 101(2)
- "For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty … the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred …" 38 USC 1110/1131

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Veteran

- Discharge must be "other than dishonorable"
- VA makes an administrative decision on character of discharge that can be appealed to the Board and Federal Courts, if necessary

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Non-interchangeable Language

- When evaluating whether a person's characterization of discharge meets the requirements for VA purposes – it is important to remember the terminology and language used by VA does not directly correspond with the language used by the military.

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Types of Discharge Characterization Issued by the Military

- Honorable Discharge
- Discharge under honorable conditions (General Discharge).
- Discharge under other than honorable conditions (Other than honorable/OTH)
- Bad Conduct Discharge (punitive)
- Dishonorable Discharge/Dismissal (punitive)

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Types of Discharge Characterization Issued by the Military

- Administrative discharges that do not characterize an individual's service:
  - Entry Level Separation
  - Void enlistment or induction; and
  - Dropped from the rolls

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VA Determination of Characterization of Discharge

- Only three of the previous types of discharge will always result in a certain determination:

1) Honorable always qualifies for benefits

2) A person who receives a "dishonorable discharge" will always be determined to have been discharged under dishonorable conditions.

3) The VA must consider an "entry level separation" administrative discharge to be under conditions other than dishonorable.

**All other types require further analysis.

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Two-Step Analysis

To determine if a discharge qualifies a person for VA benefits the VA applies a two-step analysis:

1.) Are there any Statutory Bars?

2.) Are there any Regulatory Bars?

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Statutory Bars

- Statutory bar to benefits 38 USC 5303
  - Discharge or dismissal by reason of sentence in general court martial
    - Except where person was insane when committing the act 5303(b)
  - Conscientious objector who refused to perform duties
  - Officer resigned for good of the service

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Statutory Bars

- Desertion
- Discharge as alien during a time of hostility
- Discharge under other than honorable due to AWOL for more than 180 days
  - Unless show "compelling circumstances to warrant such prolonged unauthorized absence"
- shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed

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Special Exception for OTH as a result of AWOL

- This statutory bar will not apply if the VA determines there were "compelling circumstances to warrant the prolonged unauthorized absence." 38 U.S.C.S. § 5303 and 38 C.F.R. § 3.12(c)(6)

The VA will consider: 1) quality and length of service; 2) family emergency or obligations; 3)obligations or duties owed to third parties.

The VA should also consider– age, cultural background, education, and judgmental maturity.

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Multiple Periods of Service

- Person can be eligible for benefits even if last period of service ended in disqualifying discharge
- Can still get credit for prior period of service, assuming that ended in qualifying discharge
  - In 2002 service member enlists for 3 years
  - At year 2 (2004), she reenlists for additional 3 years
  - In 2006, she goes AWOL and receives BCD

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Multiple Periods of Service

- This person is a veteran, and eligible for benefits
- The first term was for 3 years
- She served those 3 years honorably
- The bad conduct did not occur until after the initial 3 years were completed
  - However, she can only get benefits for any disability that was incurred during the first three years

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Statutory Bars

In a nutshell: The VA looks at the reason for discharge and more specifically at the behavior that led to the discharge

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Regulatory Bars

- Honorable, General, and Discharge under honorable conditions are not subject to regulatory bars to benefits.
- For Bad Conduct Discharges (adjudged by a Special Court-Martial), undesirable discharge, or discharge under other than honorable conditions, the VA must determine if a regulatory bar precludes entitlement to VA benefits.

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Regulatory Bars

- The VA will consider the discharge to be a discharge under dishonorable conditions if the conduct upon which it is based fits one of the following:
  - Accepting an undesirable discharge in lieu of court-martial.
  - Mutiny or spying.
  - An offense involving moral turpitude
  - Willful and persistent misconduct
  - Homosexual acts involving aggravating circumstances or affecting performance of duty

  38 C.F.R. § 3.12

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The Two Most Difficult Regulatory Bars

- The two regulatory bars that present the biggest challenge in making a determination on are “an offense involving moral turpitude” and “willful and persistent misconduct.”
- When making determinations on these two, there is little objective guidance to what constitutes these bars.

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The Two Most Difficult Regulatory Bars

- The regulation does clarify that an offense involving moral turpitude "generally" includes conviction of a felony.
- It also explains that discharge because of a minor offense is not considered willful and persistent misconduct if service was otherwise honest, faithful, and meritorious.
- Basically further guidance is lacking.

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Exception to Regulatory Bars

- If the person is determined to be regulatorily barred from benefits, he/she is still entitled to VA health care for any disability incurred or aggravated during active service in the line of duty. 38 C.F.R. § 3.360
- This exception is not applicable if the person received a Bad Conduct Discharge.

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Insanity Exception

- VA benefits may be granted even though the discharge would normally bar the person from benefits, if it can be established that, at the time of the offense leading to the discharge, the veteran was insane. 38 U.S.C.S. § 5303(b)
- The statute requires that the insanity merely exist at the time the misconduct was committed,
- NOT that there was an causal connection between the insanity and misconduct.

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Insanity Exception

- The CAVC has determined that when applying this exception the fact finder should "apply the phrase 'due to a disease' to all three circumstances provided for in the regulation.

Zang v. Brown, 8 Vet. App. 246 (1995).

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Insanity Exception

- To prevail under this exception, it is necessary to have medical evidence or a medical opinion that the veteran was insane (under the VA definition) at the time of the misconduct leading to the discharge.
- Important to note that Military Justice uses a narrower definition of insanity than the VA.

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Compelling Circumstances Exception

- In June 2024 VA finally corrected it archaic regulatory scheme to account for the realities of the long war
- Prior to 2024, veterans were limited to arguing insanity or that their conduct was not persistent misconduct or morally wrong

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Compelling Circumstances Exception

- In June 2024 VA amended 3.12 to add a compelling circumstances exception
- "The bar to benefits for prolonged AWOL under paragraph (c)(6) of this section and the two types of misconduct described in paragraph (d)(2) of this section will not be applied if compelling circumstances mitigate the AWOL or misconduct at issue."
  - 38 CFR 3.12(e)

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Compelling Circumstances Exception

- There are several factors VA must consider when determining whether an AWOL or 3.12(d)(2) offenses disqualify someone for VA benefit
- Length and character of service exclusive of the period of prolonged AWOL or misconduct. Service exclusive of the period of prolonged AWOL or misconduct should generally be of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation

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Compelling Circumstances Exception

Reasons for prolonged AWOL or misconduct

(i) Mental or cognitive impairment at the time of the prolonged AWOL or misconduct, to include but not limited to a clinical diagnosis of (or evidence that could later be medically determined to demonstrate existence of) posttraumatic stress disorder (PTSD), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities.

(ii) Physical health, to include physical trauma and any side effects of medication.

(iii) Combat-related or overseas-related hardship.

(iv) Sexual abuse/assault.

(v) Duress, coercion, or desperation.

(vi) Family obligations or comparable obligations to third parties.

(vii) Age, education, cultural background, and judgmental maturity.

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Compelling Circumstances Exception

- Whether a valid legal defense would have precluded a conviction for AWOL or misconduct under the Uniform Code of Military Justice. For purposes of this paragraph (e)(3), the defense must go directly to the substantive issue of absence or misconduct rather than to procedures, technicalities, or formalities.

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Compelling Circumstances Exception

- These new elements make it much easier to show veteran status.
  - Specifically does not punish veterans for one bad act when the rest of their service is otherwise honorable
  - Takes into account mental health considerations
  - Takes into account realities of life: e.g. family obligations

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Compelling Circumstances Exception

- Recommend for any SM facing a discharge that legal counsel advise them to seek treatment for any mental health issues before leaving service
  - This will make it easier to show the presence of a condition, and its likely affect on the behavior leading to the discharge

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Compelling Circumstances Exception

- Great balance between maintaining good order and discipline, and allowing folks that do not belong in the military to still access their benefits
  - Remember, veterans discharged under these circumstances face extraordinary barriers to work and often turn to substance abuse
  - Access to healthcare and compensation benefits can ease their transition and hopefully prevent many of the problems faced in the past
  - Commanders owe some level of consideration to those that volunteered, even when it does not work out

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Other "exception"

- A veteran may also receive benefits if he has one period of honorable service, but the final discharge is deemed a regulatory bar
  - This only applies for disability that was incurred during that period of honorable service

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Other "exception"

- Veteran enlists in 1988 for 4 years
- Deploys to Desert Storm and reenlists in theater for three years
- 1993 given OTH for a DUI and other misconduct
- Can still get service connection so long as his first period of service (1988-1992) was honorable
  - Thus, any condition incurred in DS are compensable

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Character of Discharge Determination

- VA review of the circumstances surrounding the person's discharge.
- VA determines if statutory or regulatory bar exists.
- Initially made at the VA Regional Office
- Can be appealed like any other decision.
- One of the more complex determinations the VA makes.
- All service records must be considered.

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Discharge Upgrades

- Each service has a Board for Correction of Military Records. (BCMR) Discharge Review Boards were also created to review discharge upgrades. (DRB)
- BCMRs have the authority, among other powers, to upgrade discharges including punitive discharges. DRBs do not have the authority to upgrade discharges levied by courts-martial.

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Final Thoughts

- The VA benefits system exists to compensate those who served for the injuries and diseases they incur while serving this nation
- For those that serve or have served, we know that every single person is exposed to physical harm every day, and many experience physical and mental trauma (to include the sexual assault epidemic) that cause lasting problems
- Congress promised, in exchange for putting their bodies and health on the line, that the Country will not only pay them a salary while serving, but will do what we can to take care of veterans after service
  - This includes robust benefits packages for health care, education, home loans, and compensation
  - On the compensation side; this money is recognition that we broke our veterans and exposed them to so many terrible chemicals, environments, etc, and we intend to take care of them
- As a former commander and soldier, I see great value in each SM knowing that they are going to be taken care of so long as they do their part

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Final Thoughts

- "For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty … **the United States will pay to any veteran thus disabled** and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred …" 38 USC 1110/1131
- Periods of war
  - World War II. December 7, 1941, through December 31, 1946
  - Korean conflict. June 27, 1950, through January 31, 1955
  - Vietnam era. The period beginning on November 1, 1955, (August 5, 1964 for service in Vietnam) and ending on May 7, 1975
  - Persian Gulf War. August 2, 1990, through date to be prescribed by Presidential proclamation or law
    - * major combat operations ended in 2021 when we withdrew from Afghanistan

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Questions?

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37 Vet.App. 140
United States Court of Appeals for Veterans Claims.

Jeffrey K. LILE, Appellant,
v.
Denis MCDONOUGH, Secretary of Veterans Affairs, Appellee.

No. 21-6977
|
(Argued January 11, 2024)
|
(Decided April 11, 2024)

Synopsis

Background: Claimant, who was discharged from service in Army as result of voided enlistment based on fraudulent entry, appealed determination of Board of Veterans' Appeals finding claimant had no creditable service for Veterans Affairs (VA) benefits purposes.

Holdings: The Court of Appeals for Veterans Claims, Michael P. Allen, J., held that:

service department's voidance of enlistment did not conclusively bar claimant's entitlement to benefits, and

remand was required to allow Board to make independent assessment as to whether claimant's voided enlistment categorically barred him from being eligible for VA benefits, and, if it did not, whether the character of service barred entitlement to benefits.

Set aside and remanded.

Procedural Posture(s): Review of Administrative Decision.

***142** On Appeal from the Board of Veterans' Appeals

Attorneys and Law Firms

Melissa Hendricks, with whom Glenn Bergmann and Michal Leah Kanovsky were on the brief, all of Rockville, Maryland, for the appellant.

Jennifer K. Hamel, with whom Richard J. Hipolit, Deputy General Counsel; Mary Ann Flynn, Chief Counsel; and Drew A. Silow, Deputy Chief Counsel, were on the brief, all of Washington, D.C., for the appellee.

Before PIETSCH, ALLEN, and LAURER, Judges.

Opinion

ALLEN, Judge:

This case sits at the crossroads of veterans law and military law. Appellant Jeffery K. Lile seeks basic entitlement to VA benefits by proving his status as a veteran. What stands in appellant's way is a July 15, 2021, Board of Veterans' Appeals (Board) decision in which the Board found that (1) he has no creditable service upon which to warrant basic entitlement to VA benefits because the Army discharged him from service as a result of a voided enlistment based on fraud and (2) his voided service is equivalent to a dishonorable discharge.[1]

As we discuss, when appellant enlisted in the Army, he denied having been convicted of any crime and, in fact, disclaimed any involvement with civilian criminal courts and law enforcement.[2] But these representations proved untrue. During his service, the Federal Bureau of Investigation (FBI) informed Army officials that appellant had been convicted of two crimes.[3] Thereafter, the Army released appellant from its custody and control due to fraudulent entry.[4] Appellant eventually applied for VA benefits, leading to the Board decision on appeal. The Board found that a "discharge for concealment of a conviction by [a] civil court which would have prevented enlistment will be held to be under ***143** dishonorable conditions, and therefore a bar to VA benefits."[5] The Board ultimately denied appellant's claim after finding that he had "no creditable service for VA benefits purposes."[6]

This panel was convened to address how appellant's voided enlistment affects his eligibility for Title 38 benefits. Neither our Court nor the United States Court of Appeals for the Federal Circuit has had occasion to explore that question in a precedential decision. This lack of judicial attention perhaps explains the defects we discuss below in the Board's assessment of appellant's eligibility for VA benefits. And it may also explain why the Secretary's defense of the Board's eligibility assessment bears no resemblance to the Board's reasoning.

To summarize what follows, we hold that, while VA is bound by a service department's act of voiding an enlistment as well as its determination of the dates of a person's entry and separation, VA must conduct an independent assessment of whether a claimant subject to a voided enlistment is eligible for VA benefits. Specifically, VA must determine benefits eligibility by applying 38 C.F.R. § 3.14, most significantly subsections (a) and (b). If VA determines that a claimant's voided enlistment falls under subsection (b), its work is done because such a claimant is categorically not eligible for benefits under the regulation. In contrast, if VA determines that a claimant's voided enlistment comes within the ambit of subsection (a), then VA must proceed to assess the character of the claimant's service (assuming the service department left the period of service subject to the void enlistment uncharacterized, as should be the norm in a voided enlistment) and whether it bars entitlement to benefits under the appropriate provisions of 38 C.F.R. § 3.12.[7]

It does not appear that the Board approached the question of appellant's eligibility using the correct legal framework. At a minimum, the Board's analysis is unclear, frustrating judicial review. So, we will set aside the Board decision on appeal and remand this matter for the Board to consider appellant's eligibility for benefits under the law as we have described.

I. BACKGROUND

A clear timeline of the procedural and factual history will help frame this matter. Appellant enlisted in the United States Army on September 24, 1979.[8] On his enlistment documents, appellant initialed under "no" in response to a question about whether he had "ever been arrested, charged, cited, (*including traffic violations*) or held by any law enforcement or juvenile authorities in the United States or in a foreign country regardless of whether the citation or charge was dropped or dismissed or you were found not guilty."[9] Appellant also answered "no" when asked, as "a result of being arrested, charged, cited, or held by law-enforcement or juvenile authorities, have you ever been convicted, fined, or forfeited bond ...?"[10] He then handwrote "I claim no other involvement with the police."[11]

***144** In November 1979, the FBI, after conducting a background check, reported to the Army that appellant had been convicted of two crimes before he enlisted, larceny and breaching the peace.[12] In January 1980, appellant received two letters of commendation from his command.[13] He maintains that he was initially recommended for retention.[14] Despite the letters of commendation, in March 1980, appellant's commander recommended him to be "eliminated from service" for fraudulent entry because, since February 1980, appellant had "not demonstrated a desire to remain in the Army. Through demonstrated poor attitude, lack of motivation, and self-discipline, [appellant] has succeeded in negating all previous high recommendations toward a possible retention in the Army."[15] The commander further stated that appellant's "performance has rapidly declined since originally recommended for retention in the [A]rmy."[16] The rest of appellant's command recommended elimination from service by voidance of the enlistment contract.[17]

On April 11, 1980, the Army released appellant from its custody and control due to fraudulent entry.[18] Appellant signed a statement acknowledging that the basis of the separation was for fraudulent entry and that he understood "that[ ] if I am being considered for separation for fraudulent entry, my enlistment may be voided under certain circumstances."[19] Appellant's DD-214 shows "00" for "net active service" for the period from September 1979 to April 1980 (as shown in the following excerpt of item 12 from the DD-214), and his character of discharge is "uncharacterized."[20]

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12. RECORD OF SERVICE	YEAR (s)	MON (s)	DAY (s)
a. Date Entered AD This Period	79	09	24
b. Separation Date This Period	80	04	11
c. Net Active Service This Period	00	00	00
d. Total Prior Active Service	00	00	00
e. Total Prior Inactive Service	00	00	00
f. Foreign Service	00	00	00
g. Sea Service	00	00	00
h. Effective Date of Pay Grade	79	09	24
i. Reserve Oblig. Term. Date	00	00	00

In the years following his separation, appellant made multiple attempts to amend his discharge documents with the Department of the Army, specifically in July 1998, March 1993, January 1999, and October 2015, but none succeeded.[21] In June 2016, appellant filed a claim for VA benefits seeking service connection for depression/anxiety, bilateral hearing loss, and tinnitus.[22] In response, VA sent appellant a letter stating that his military service was not honorable, but that he could be eligible for benefits so long as his service was not "dishonorable."[23] In February 2017, the VA regional office

(RO) found that appellant's service was not honorable.[24] It further found that under 38 C.F.R. § 3.14(b) "the evidence, including facts and circumstances, shows that [appellant's] enlistment has been voided by the service department, thus a statutory bar to benefits is established," but it assessed none of the facts leading to the void enlistment when rendering that finding.[25] In June 2017, appellant submitted a Notice of Disagreement with the February 2017 RO decision.[26]

Appellant perfected his agency appeal in February 2018 and explained that he admitted his convictions to the army recruiter, that he entered service quickly, and that when he was accused of fraudulent entry, he tried to fight it but "was getting ***146** depressed and suicidal from the time it took to get this settled[.]"[27]

In May 2021, appellant participated in a Board hearing in which he testified about his past convictions, that he was convicted of misdemeanors, that he informed his recruiter of his criminal history, and that he simply followed his recruiter's instructions when he did not list the convictions on his enlistment forms.[28] He also stated that he believed his service was honorable, that he received letters of commendation, but that once he was cited for fraudulent entry, he was only assigned the most miserable jobs.[29]

The Board issued the decision on appeal in July 2021.[30] The Board cited 38 C.F.R. §§ **3**.**12**(k)(2) and 3.14(a)-(b) and reasoned that a "discharge for concealment of a conviction by [a] civil court which would have prevented enlistment will be held to be under dishonorable conditions, and therefore a bar to VA benefits."[31] It then found that, because appellant would have been prevented from enlisting if he had not fraudulently concealed the civil court convictions, the service is void and equivalent to a dishonorable discharge.[32] Ultimately, the Board denied benefits on the grounds that "appellant has no creditable service for VA benefits purposes" and could not attain veteran status for the purpose of establishing eligibility for VA benefits.[33] This appeal followed.

II. ANALYSIS

The threshold matter in any VA benefits claim is the claimant's basic eligibility. Basic eligibility is determined by proving "veteran" status.[34] A claimant is a veteran if he or she served in the active military, naval, air, or space service, and was discharged or released from service under conditions other than dishonorable.[35] Whether a claimant meets veteran status is a finding of fact we review for clear error.[36] Of course, we review legal questions de novo.[37]

For all its findings on material issues of fact and law, the Board must support its determinations with an adequate statement of reasons or bases that enables the claimant to understand the precise basis of its decision and facilitates review in this Court.[38] To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant.[39] The Board must also discuss ***147** all provisions of law and regulation that are made "potentially applicable through the assertions and issues raised in the record."[40]

A. A service department finding voiding an enlistment is not an automatic bar to benefits.

As we noted earlier, there is scant caselaw addressing voided enlistments. Before proceeding to explain our holding about how VA is to assess such voided service, we first must consider an argument the Secretary advances that, were we to accept it, would resolve this appeal at the outset. Specifically, the Secretary argues that the Board correctly found that appellant was not a veteran and that he was ineligible for VA benefits because VA is bound by the "fundamental controlling fact that the service department has determined that [appellant] was not a veteran."[41] In other words, he maintains that when a service department voids an enlistment there is no work for the Agency to do; it simply must accept that a benefits-claimant whose enlistment is voided is categorically barred from receiving VA benefits.

The Secretary principally relies on the Court's decision in *Duro v. Derwinski*[42] to support his argument.[43] In *Duro*, the Court reviewed whether a purported member of the Philippine Commonwealth Army (PCA) or recognized guerilla unit (GU) was entitled to burial benefits from VA because such members were deemed to have been in the service of the U.S. Armed Forces.[44] The Court held that 38 C.F.R. § 3.203 (1991) required United States service department verification to establish service in the U.S. Armed Forces, and that

"service department findings as to the fact of service in the U.S. Armed Forces are made binding upon VA for purposes of establishing entitlement to benefits."[45] Similarly, in *Soria v. Brown*, the Federal Circuit considered whether a Philippine national could use Philippine records to prove service in the U.S. Armed Forces under § 3.203.[46] The Federal Circuit emphasized that where service department verification is required under § 3.203(c), "VA has long treated the service department's decision on such matters as conclusive and binding on VA."[47]

According to the Secretary, *Duro* (and *Soria*) resolve this appeal because, in the context of a voided enlistment, the service department's voidance decision conclusively establishes whether a claimant has a period of service that can establish eligibility for VA benefits.[48] The Secretary is wrong. To be clear (and as we discuss further below), we agree that certain service department findings concerning voided enlistments bind VA. For example, VA must accept the service department findings about whether an enlistment ***148** has been voided as well as the dates of entrance and voidance for a claimant.[49] These matters are the responsibility of the relevant service department.[50] But neither *Soria* nor *Duro* supports the Secretary's position that a service department finding voiding service conclusively bars eligibility for VA benefits. Both cases concern whether VA could accept documents other than an official service department record to verify actual service in the U.S. Armed Forces under § 3.203.[51] However, verifying actual U.S. military service is not at issue here. We know that appellant served in the U.S. Army—we know his entrance date, his discharge date, and the facts of his service. The question at issue here—unlike in *Soria* and *Duro*—is whether the time appellant indisputably spent in service makes him eligible to receive VA benefits. And as to that question, as we turn to next, there is a directly applicable regulation (38 C.F.R. § 3.14) that instructs VA about how it is to assess the impact of a voided enlistment. In short, *Duro* and *Soria* don't speak to the issue before us at all.[52]

Before leaving the Secretary's argument, we note two oddities. First, the Secretary's argument bears no resemblance to how the Board considered this matter. Indeed, the Board never even cited *Duro* or *Soria*. Our review is of Board decisions, not the Secretary's post-hoc rationalizations.[53] Nevertheless, we have addressed the argument on the merits because it involves a pure question of law about an issue that would be dispositive of the appeal were the Secretary correct.

The second issue is more substantive. The Secretary's argument contradicts VA General Counsel Precedential Opinion 16-1999.[54] That opinion states that the "net active service" entry on the DD Form 214 is understood by VA to be a service department personnel management tool for calculating eligibility for increased pay or retirement based upon longevity.[55] The VA General Counsel opinion further explains that "the fact that the [service department] did not credit the claimant with any time in service is not, in our view, controlling for purposes of section 101(2)."[56] The ***149** Secretary's departure from the General Counsel opinion stating that the DD-214 is not controlling for purposes of establishing "veteran status" under 38 U.S.C. § 101(2) is significant because VA's current position cuts against that basic principle. If the Agency's official position—as stated in G.C. Prec. 16-1999—is that VA (and not the service department) determines who is a veteran for VA benefits purposes, VA should also determine who is a veteran when it is unclear. Of course, we are not bound by the General Counsel's opinion.[57] But the opinion is important because it contradicts in practical terms the argument the Secretary's counsel advanced in this appeal and may affect the Board's analysis on remand. And, as we turn to now, the Precedent Opinion tracks how we view the law in the context of voided enlistments employing our de novo review of that question.

B. VA must assess void enlistments in terms of determining eligibility for title 38 benefits first under 38 C.F.R. § 3.14 and then, as appropriate, under 38 C.F.R. § 3.12.

Now that we have rejected the Secretary's argument that VA must categorically deny a claimant's eligibility for VA benefits where a service department has voided the claimant's enlistment, we turn to how VA should approach that question. VA must conduct an independent assessment of the facts leading to the voided enlistment and whether they are a bar to benefits. When assessing those facts, the starting point is 38 C.F.R. § 3.14, a provision entitled "validity of enlistments."[58] Determining the meaning of § 3.14 is a question of law, and the Court reviews such regulatory construction questions de novo.[59] If the regulation's meaning is clear from its language, that is "the end of the matter."[60] Without ambiguity, "[t]he regulation then just means what it means—and the court must give it effect."[61]

We conclude that § 3.14 is unambiguous. The regulation opens with the sentence, "service is valid unless enlistment is voided by the service department."[62] If the regulation ended there, then entitlement to benefits would turn on whether there was a period of service invalidated by a void enlistment, and VA would be bound by that service department finding to establish eligibility for VA benefits. But the key is that the regulation does not end with ***150** that single sentence. Instead, subsections (a)-(d) carve out scenarios in which service can be valid for VA benefits purposes despite a service department voiding a claimant's enlistment.[63] The regulation goes on to detail how *VA* is to assess the impact of a voided enlistment on entitlement to benefits. The key provisions are subsections (a) and (b):

> ***(a) Enlistment not prohibited by statute***. Where an enlistment is voided by the service department for reasons other than those stated in paragraph (b) of this section, service is valid from the date of entry upon active duty to the date of voidance by the service department. Benefits may not be paid, however, unless the discharge is held to have been under conditions other than dishonorable.
>
> ***(b) Statutory prohibition***. Where an enlistment is voided by the service department because the person did not have legal capacity to contract for a reason other than minority (as in the case of an insane person) or because the enlistment was prohibited by statute (a deserter or person convicted of a felony), benefits may not be paid based on that service even though a disability was incurred during such service. An undesirable discharge by reason of the fraudulent enlistment voids the enlistment from the beginning.

Perhaps most significantly for our resolution of the appeal before us, subsections (a) and (b) make clear that voided enlistments can fall into one of two categories. One category (the one reflected in subsection (b)) is enlistments that are voided for reasons that categorically bar eligibility for benefits. The other category (under subsection (a)) concerns enlistments voided for reasons that do not categorically bar eligibility for VA benefits. While we highlight some of the specific regulatory language below, the central point, as an overall matter, is that VA is charged under § 3.14 with making an independent determination about the effects of a voided enlistment on a claimant's eligibility to obtain benefits —the Agency must determine whether a particular voided enlistment comes under subsection (a) or subsection (b).

Of course, VA is not entirely unconstrained by service department findings when assessing the impact of voided enlistments on the eligibility of a claimant to obtain VA benefits. The regulation makes this point clear as well. For example, both subsection (a) and subsection (b) begin with the phrase "[w]here an enlistment is voided by the service department...."[64] And this language tracks the regulation's introductory sentence referring to an "enlistment [ ] voided by the service department."[65] These references make clear that it is the service department that determines whether an enlistment has been voided. VA is not at liberty to conclude otherwise. In addition, subsection (a), the part of the regulation that addresses situations in which a void enlistment does *not* categorically bar eligibility for benefits, states that "service is valid from the date of entry upon active duty to the date of voidance by the service department."[66] This language, on its face, requires VA to accept not only the service department's finding that an enlistment was voided but also the service member's date of entry, the date of voidance, and the date of release. In other words, the regulation's ***151** plain terms require VA to accept the inputs necessary to determine the period of service underlying the voided enlistment—the start date and the end date of the applicable period. But it is equally true that VA may not unquestionably accept that a claimant who was subject to a voided enlistment is categorically barred from receiving VA benefits. Instead, after accepting the fact of voidance and the entry and separation dates, VA must apply the relevant regulation—§ 3.14—to determine how a particular voided enlistment affects a claimant's eligibility for VA benefits.[67]

As we discuss below, the Board, in the decision on appeal, did not proceed as we outlined thus far under § 3.14. That is, the Board did not (or at least did not clearly) decide whether appellant's voided enlistment came within subsection (a) or subsection (b). We'll return to the Board's discussion in a moment. We make the comment here to underscore that our decision today is a limited one because we are constrained by the Board's deficient discussion. So, we don't have occasion to say much about applying the various factors the regulation sets out to determine whether a particular voided enlistment categorically prevents eligibility for benefits under subsection (b) or whether such an enlistment comes within subsection (a). Again, the key is that subsection (a) clearly instructs that service can be valid despite a voided enlistment so long as the service department voided the enlistment "for reasons other than those stated in paragraph (b) of this section."[68] But given the inadequacies of the Board's discussion of the impact of

appellant's voided enlistment, we leave for another day an exploration of the intricacies of subsections (a) and (b) of § 3.14.

As we said, if VA determines that a claimant's voided enlistment comes within subsection § 3.14(b), the analysis is complete. Such a claimant is not eligible to receive VA benefits under the unambiguous language of the regulation. In contrast, and also under the unambiguous language of the regulation, if a claimant's voided enlistment comes under § 3.14(a), a claimant may be eligible for benefits. So, in the subsection (a) context, VA has more work to do. The next step for VA to take when it determines a voided enlistment comes under subsection (a) is reflected in the subsection's limitation that "benefits may not be paid, however, unless the discharge is held to have been under conditions other than dishonorable."[69] The import of all of this is that VA must assess *first* whether a particular voided enlistment falls within § 3.14(a) or § 3.14(b). And *only* if such a voided enlistment falls within subsection (a) does VA move on to the next step and decide about the character of service during the voided enlistment period. If VA reaches this step, it will typically face an uncharacterized discharge because the service department will likely not have characterized the period of service underlying a void enlistment.[70] And when VA faces a ***152** voided enlistment coming within § 3.14(a) and the service department has not characterized the period of service underlying the voided enlistment, VA should turn to 38 C.F.R. § **3**.**12**, entitled "[c]haracter of discharge," and apply the relevant criteria to characterize the voided period of service. In such cases, VA should proceed as it would whenever it assesses a claimant's character of discharge.[71]

Regulations, like statutes, must be considered as a whole.[72] And regulations, like statutes, derive their meaning from the context of the surrounding regulatory scheme.[73] Our reading of § 3.14 follows both the fundamental principles of regulatory interpretation and VA's regulatory scheme. To that end, 38 C.F.R. § 3.14 has one purpose: to permit VA to award benefits in certain situations despite an enlistment being voided by the service department. And when read along with § **3**.**12**, it follows that VA must independently assess the facts of a voided enlistment and whether they fall into §§ 3.14(a) or (b) before addressing whether the character of discharge bars benefits.

To recap: 38 C.F.R. § 3.14 sets out a clear order of operations when VA faces a voided enlistment. VA must apply § 3.14 to determine whether the facts leading to a voided enlistment fall within subsection (a) or subsection (b). Should VA determine that the facts fall within subsection (b) because the enlistment was voided as a result of certain statutory prohibitions, its assessment ends there because under the regulation benefits may not be paid when (b) applies.[74] However, should the facts leading to the void enlistment fall under subsection (a) (because facts leading to the voided enlistment do not fall under (b)), then the voided enlistment is not a categorical bar to benefits and VA must move on to the next step —characterizing the period of service, which would likely require VA to consider the applicable provisions of 38 C.F.R. § **3**.**12**.[75]

C. Assessing the Board's July 15, 2021, Decision

We turn now to the July 15, 2021, Board decision on appeal. Appellant argues that the Board erred by failing to adequately apply 38 C.F.R. §§ 3.14(a) and (b) when finding that his prior convictions would have prevented his enlistment and thus barred eligibility for VA benefits as a ***153** matter of law.[76] Appellant also argues that the Board erred by failing to adequately explain why it found his characterization of discharge "undesirable" when his DD-214 shows he had an uncharacterized period of service.[77] We conclude that the Board's statement of reasons or bases is inadequate given the legal principles we have described specifying how VA must assess eligibility for benefits in the context of a voided enlistment. Most significantly, the Board's consideration of the voided enlistment issue appears to elide the distinction between the question § 3.14 considers (whether the voided enlistment categorically bars benefits or whether it does not) and the question under § **3**.**12** (what is the character of service). The result is that the Board's discussion does not facilitate meaningful judicial review because we can't tell if the Board employed the correct legal principles.

In fact, the Board's discussion strongly suggests that the Board did not understand how it was to assess eligibility for benefits in a voided enlistment situation. To start, the Board does not engage in any analysis (or at least no reasoned analysis) about whether the facts of appellant's voided enlistment come within § 3.14(a) or § 3.14(b). This omission is highly significant because, as we discussed above, placement of voided enlistment into either subsection (a) or subsection (b) is the *first* thing VA must do because answering that question sets the stage for whether a claimant is categorically

barred from receiving benefits based on a voided enlistment. But there is more confusion in the Board's reasoning. For example, the Board found that an "undesirable discharge by reason of fraudulent enlistment voids the enlistment from the beginning[,]" citing 38 C.F.R. § 3.14(b).[78] While this statement looks like it could be directed at categorizing a voided enlistment in either subsection (a) or subsection (b), we can't be sure. After all, the Board discusses an "undesirable discharge," but that term refers to a character of discharge determination[79]—something we know the Army did not do here because it recorded an uncharacterized separation.[80] The Board then states that, because appellant's service was properly voided, his separation was under the equivalent to being discharged under dishonorable conditions.[81] However, no law supports the finding that a void enlistment is equivalent to a dishonorable discharge or that the character of discharge turns on the facts of a void enlistment in the way the Board reasons. As we discussed, the effect of a void enlistment on eligibility for VA benefits is distinct from an inquiry into whether a character of discharge bars benefits. While the Board cited subsection (b) in this part of its decision, one only proceeds to consider character of discharge issues after concluding that the voided enlistment comes within § 3.14(a).

These significant deficiencies in the Board's discussion are enough to require remand. But we will exercise our discretion to highlight certain additional issues for the benefit of the Board on remand.[82] First, the Board recognized that appellant had been convicted of crimes and stated that these convictions would have prevented ***154** his enlistment.[83] But the Board does not explain why it reached this conclusion. In this regard, we note that neither § 3.14(a) nor § 3.14(b) discusses convictions of a crime generally. Subsection (a) says nothing about convictions at all and, perhaps more importantly, subsection (b) refers only to a conviction for a felony.[84] And here, it appears that appellant's convictions were treated as misdemeanors.[85] We need not definitively resolve that factual issue—although the parties appear to accept that the conditions are misdemeanors.[86] The point is that the Board did not explain how appellant's concealed convictions, including how the classification of those convictions as either misdemeanors or felonies, played into the analysis under § 3.14. The Board must attend to this issue on remand.

In addition, the Board's discussion of § **3**.**12**(k)(2) is perplexing. That regulation states that when VA is confronted with an uncharacterized separation, "a void enlistment or induction may be a bar to VA benefits depending on the facts and circumstances surrounding the separation."[87] To begin with, as we've noted above, it is not clear how the Board reached § **3**.**12** to consider whether it needed to characterize an uncharacterized period of service. Plus, the Board did not, in fact, address whether the facts and circumstances of appellant's uncharacterized service are a bar to benefits, something it would have to do under the regulatory provision the Board cited.[88] But even if we turned a blind eye to these questions, we don't understand why the Board referred to § **3**.**12**(k)(2) at all. By its own terms, § **3**.**12**(k) applies only to those separations occurring on or after October 1, 1982.[89] Appellant's separation from service occurred in April 1980.[90] On remand, should the Board again rely on § **3**.**12**(k)(2) it must explain why it is doing so given the date of appellant's separation (and, of course, otherwise provide an adequate statement of its reasons or bases if it concludes the regulation provides guidance).

In sum, remand is warranted for the Board to conduct an independent analysis of the effect of appellant's void enlistment on his eligibility for VA benefits under 38 C.F.R. § 3.14. Should the Board find that the facts of appellant's voided enlistment come within 38 C.F.R. § 3.14(b), then it can end its analysis there. But if the Board determines that appellant can attain veteran status despite the void enlistment because 38 C.F.R. § 3.14(b) does not apply (i.e., the voided enlistment falls under subsection (a)), then it must move on to characterizing that period of service under the relevant portions of 38 C.F.R. § **3**.**12**.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant.[91] On ***155** remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board must consider any such relevant evidence and argument.[92] The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.[93]

III. CONCLUSION

For the foregoing reasons, we SET ASIDE the Board's July 15, 2021, decision and REMAND this matter for further proceedings in accord with this opinion.

All Citations

37 Vet.App. 140

Footnotes

1 Record (R.) at 5, 8, 11.

2 R. at 375.

3 R. at 436-37.

4 R. at 248.

5 R. at 8 (citing 38 C.F.R. § 3.14(a)-(b) (2023)).

6 R. at 6.

7 *See* 38 U.S.C. § 5303; 38 C.F.R. § **3**.**12** (2023).

8 R. at 248.

9 R. at 375.

10 *Id.*

11 *Id.* Although appellant responded in the negative when asked about his criminal involvement before service, he maintains that he informed his Army recruiter about the two convictions and that the recruiter advised him that he didn't need to disclose them on his enlistment documents. *See* R. at 142, 256, 260.

12 R. at 436, 437. The record also refers to the larceny conviction as "petty theft." R. at 256. No document specifies whether appellant's convictions were felonies or misdemeanors, and the Board did not make any findings on the matter. Appellant argues that the pre-enlistment convictions were indeed misdemeanors. *See generally* Appellant's Brief (Br.); R. at 44-45. And the record reflects misdemeanor-type sentences for both convictions. *See* R. 436 (FBI report detailing that appellant served 12 total days in jail for both convictions). The Secretary argues that the distinction between felony and misdemeanor is irrelevant because § 3.14 does not apply where there is no qualifying service listed on appellant's DD-214. *See* Secretary's Br. at 19. But the Secretary does not affirmatively challenge that the convictions at issue were treated as misdemeanors. We need not take a position on this factual matter at this point. As we discuss below, the Board will need to assess this question when it applies § 3.14 on remand.

13 R. at 363-64, 448.

14 R. at 23, 414.

15 R. at 438; *see* R. at 447-48.

16 R. at 414.

17 R. at 415.

18 R. at 248.

19 R. at 429.

20 R. at 248.

21 R. at 256, 267, 273, 274, 277, 449, 450.

22 R. at 531-34.

23 R. at 517-28.

24 We note that VA's confusion about appellant's character of discharge was pervasive. Despite the February 2017 RO finding that appellant's service was not honorable, in February 2018, the Phoenix, Arizona, RO provided appellant with a certificate for use in establishing civil service preference. That certificate stated that appellant served on active duty and was separated from the Army under honorable conditions. R. at 127-28. But on March 7, 2020, the Salt Lake City, Utah, RO sent separate letters (1) certifying that records "disclose that Jeffrey K. Lile served on active duty and was separated under honorable conditions from the Armed Forces," R. at 82-83, and (2) summarizing his VA benefits and stating that appellant's discharge from service was dishonorable for VA purposes. R. at 79-81. And on March 10, 2021, the Nashville, Tennessee, RO certified that records "disclose that Jeffrey K. Lile served on active duty and was separated under honorable conditions from the Armed Forces." R. at 68-69, 82-83. Not only has VA never explained these contrary findings, but VA's constant flip-flopping about whether appellant was separated from service under honorable conditions reveals a basic misunderstanding of the case and underscores VA's confusion about how to adjudicate void enlistment cases.

25 R. at 234-44. The RO's reference to a "statutory bar" also indicates the Agency is confused about how to proceed in void enlistment cases because it fails to explain which statutory bar appellant has triggered and why it prevents his eligibility for benefits.

26 R. at 222-23.

27 R. at 142.

28 R. at 44-45.

29 R. at 47.

30 R. at 5-14.

31 R. at 6-8 (citing 38 C.F.R. § 3.14(a)-(b)).

32 R. at 8.

33 R. at 11.

34 *Donnellan v. Shinseki*, 24 Vet.App. 167, 172 (2010).

35 38 U.S.C. § 101(2); 38 C.F.R. §§ 3.1(d) (2023), **3.12**(a).

36 38 U.S.C. § 7261(a)(4); *see Hill v. McDonald*, 28 Vet.App. 243, 251 (2016) (citing *Struck v. Brown*, 9 Vet.App. 145, 152-53 (1996)).

37 *Martinez v. Wilkie*, 31 Vet.App. 170, 175 (2019) (citing 38 U.S.C. § 7261(a)(1)); *see Lane v. Principi*, 339 F.3d 1331, 1339 (Fed. Cir. 2003).

38 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

39 *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

40 *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991); *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (requiring the Board to address all issues explicitly raised by the claimant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

41 Secretary's Br. at 10.

42 2 Vet.App. 530, 532 (1992).

43 *See* Appellant's Br. at 9-12 (citing *Duro*, 2 Vet.App. at 532).

44 *Duro*, 2 Vet.App. at 532.

45 *Id.*; *see Tagupa v. McDonald*, 27 Vet.App. 95, 100 (2014).

46 *Soria v. Brown*, 118 F.3d 747, 749 (Fed. Cir. 1997).

47 *Id.*

48 Secretary's Br. at 9-12.

49 *See generally* 38 C.F.R. § 3.14. We discuss this regulation in detail below.

50 *See* 10 U.S.C. § 1553; 32 C.F.R. §§ 70.4, 581.3 (2023).

51 *See Soria*, 118 F.3d at 749; *Duro*, 2 Vet.App. at 532.

52 We acknowledge that a non-precedential decision of the Court has applied *Soria* and *Duro* in the way the Secretary advocates. *See Mullen v. McDonough*, No. 20-5581, 2021 WL 5578075, 2021 U.S. Vet. App. LEXIS 2101 (Nov. 30, 2021). We have carefully considered *Mullen's* reasoning. However, we ultimately reach a different conclusion on the issue. As we explain in detail, VA has adopted a regulation that specifically describes how the Agency is to assess eligibility for benefits in the context of a voided enlistment. The existence of that regulation makes clear that the situation we face here (and that the Court addressed in *Mullen*) is starkly different from the one at issue in *Soria* and *Duro.*

53 *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) (" '[C]ourts may not accept appellate counsel's *post hoc* rationalization for agency action.' " (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962))); *Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020).

54 VA Gen. Coun. Prec. 16-1999 (Dec. 15, 1999).

55 *See id.*

56 *Id.* at 3. Although VA's General Counsel wrote this opinion in the context of Air Force regulations, we see no reason why VA would treat the "net active service" entry on the DD Form 214 differently for other service departments. We know that the Army will always put a "zero" in block 12c of a DD-214 for the days served when it voids an enlistment. *See* Army Regulation (AR) 635-5, ch. 2-7(d)(2); AR 635-200, ch. 5-21; AR 635-200, ch. 14-4. So, if the Army always records zero active duty days in the same way as it appears the Air Force does, we see no reason not to treat the Army's notation as an analogous personnel management tool.

57 *Walsh v. Wilkie*, 32 Vet.App. 300, 305 (2020). Although we are not bound by General Counsel's opinions, the Board is. *See* 38 U.S.C. § 7104(c). Yet, the Board did not discuss this opinion in its decision, an omission that further undermines the adequacy of the Board's reasons or bases. We address the inadequacies in the Board's reasoning in detail below.

58 Neither party has challenged the validity of 38 C.F.R. § 3.14, so we proceed on the basis that the regulation is valid.

59 *Martinez*, 31 Vet.App. at 175.

60 *Brown v. Gardner*, 513 U.S. 115, 120, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994).

61 *Id.*

62 We will discuss § 3.14 in greater detail later in the next section. But it is necessary to explain here why § 3.14 does not support the position that VA is bound by the service department's voided enlistment finding for the purpose of establishing eligibility for VA benefits.

63 38 C.F.R. § 3.14(a)-(d).

64 38 C.F.R. § 3.14(a), (b).

65 38 C.F.R. § 3.14.

66 38 C.F.R. § 3.14(a).

67 As we will discuss, if VA determines that a particular voided enlistment falls within § 3.14 (a), VA's analysis is not finished. VA must then move on to the next step of characterizing that period of service under 38 C.F.R. § **3**.**12**.

68 38 C.F.R. § 3.14(a).

69 *Id.*

70 *See* R. at 248 (Appellant's DD-214 reflecting a "not applicable" character of service). In 1984, VA amended 38 C.F.R. § **3**.**12** in response to the Department of Defense (DOD) creating new categories of administrative separation that do not include a characterization of the individual's service. 49 Fed. Reg. 44,099 (1984); *see* § **3**.**12**(k) (2023). In its rulemaking, VA explained that since the DOD is no longer required to characterize service in certain circumstances, the Agency intended to provide a uniform rule for determination of veteran status. 49 Fed. Reg. 44,099. VA then issued a rule requiring its adjudicators to ascertain "veteran status" based on the facts and circumstances of service. *Id.* Although § **3**.**12** was amended effective October 1, 1982, the facts of appellant's pre-amendment, uncharacterized separation appear to implicate the exact scenario contemplated by VA. Moreover, we know that starting before appellant's separation, the Army will always put a "zero" in block 12c of a DD-214 for the days served when it voids an enlistment. *See* AR 635-5, ch. 2-7(d)(2); AR 635-200, ch. 5-21; AR 635-200, ch. 14-4. In other words, if a service department follows the rule about putting a zero in block 12c, there will never be a period of service that could be subject to characterization.

71 *See* 38 C.F.R. § **3**.**12**(d).

72 *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, 12 L. Ed. 1009 (1849)); *Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 70 (2016); *Gazelle v. McDonald*, 27 Vet.App. 461, 464 (2016) ("[S]tatutes must be considered as a whole and in the context of the surrounding statutory scheme").

73 *Gazelle*, 27 Vet.App. at 464.

74 38 C.F.R. § 3.14(a).

75 *Id.* ("Benefits may not be paid, however, unless the discharge is held to have been under conditions other than dishonorable.").

76 Appellant's Br. at 14-23.

77 *Id.*

78 R. at 5.

79 *See Cranford v. McDonough*, 55 F.4th 1325, 1328-29 (Fed. Cir. 2022).

80 R. at 248.

81 R. at 8, 10.

82 *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009).

83 R. at 8, 11.

84 38 C.F.R. § 3.14(b).

85 *See* R. 436 (FBI report detailing that appellant served 12 total days in jail for both convictions).

86 *See* Appellant's Br. at 18; *see generally* Secretary's Br. at 19-22 (arguing that the distinction between felony and misdemeanor is irrelevant, but not contesting appellant's characterization of the convictions as misdemeanors).

87 R. at 7-8.

88 R. at 5-11.

89 38 C.F.R. § **3**.**12**(k).

90 R. at 248.

91 *See Quirin*, 22 Vet.App. at 395 ("[T]he Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion."); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (same).

92 *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order).

93 *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991).

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief
Chapter I. Department of Veterans Affairs (Refs & Annos)
Part 3. Adjudication (Refs & Annos)
Subpart A. Pension, Compensation, and Dependency and Indemnity Compensation (Refs & Annos)
General

This section has been updated. Click here for the updated version.

38 C.F.R. § 3.12

§ 3.12 Character of discharge.

Effective: May 3, 2022 to June 24, 2024

(a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or

general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term established basic eligibility to receive Department of Veterans Affairs benefits means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child

molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

(e) An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (h)(1), (2) and (3) of this section by a discharge review board established under 10 U.S.C. 1553 set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d), but not paragraph (c), of this section provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval, air, or space service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(h) Unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (g) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(Authority: 38 U.S.C. 5303 (e))

(i) No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions

other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(j) No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

(k) Uncharacterized separations. Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1) Entry level separation. Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2) Void enlistment or induction. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of § 3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3) Dropped from the rolls. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable.

(Authority: 38 U.S.C. 501)

Credits

[28 FR 123, Jan. 4, 1963, as amended at 41 FR 12656, Mar. 26, 1976; 43 FR 15153, Apr. 11, 1978; 45 FR 2318, Jan. 11, 1980; 49 FR 44099, Nov. 2, 1984; 54 FR 34981, Aug. 23, 1989; 62 FR 14823, March 28, 1997; 87 FR 26125, May 3, 2022]

Cross References: Validity of enlistments. See § 3.14. Revision of decisions. See § 3.105. Effective dates. See § 3.400(g). Minimum active-duty service requirement. See § 3.12a.

SOURCE: 54 FR 34978, 34981, Aug. 23, 1989; 56 FR 65846, 65847, 65849, 65851, 65853, Dec. 19, 1991; 57 FR 8268, March 9, 1992; 57 FR 10425, March 26, 1992; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992; 57 FR 59296, Dec. 15, 1992, unless otherwise noted.

AUTHORITY: 38 U.S.C. 501(a).

End of Document

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Chapter I. Department of Veterans Affairs (Refs & Annos)
Part 3. Adjudication (Refs & Annos)
Subpart A. Pension, Compensation, and Dependency and Indemnity Compensation (Refs & Annos)
General

38 C.F.R. § 3.12

§ 3.12 Benefit eligibility based on character of discharge.

Effective: June 25, 2024
Currentness

(a) General rule. If the former service member did not die in service, then pension, compensation, or dependency and indemnity compensation is payable for claims based on a period of service that was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)) A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) Insanity exception. No bar to benefits under this section shall be applied if VA determines that the former service member was insane at the time he or she committed the offense(s) leading to the discharge or release under dishonorable conditions. (38 U.S.C. 5303(b)) Insanity is defined in § 3.354.

(c) Statutory bars to benefits. Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days (38 U.S.C. 5303(a)).

(i) Compelling circumstances exception. This paragraph (c)(6) does not apply if compelling circumstances mitigate the prolonged unauthorized absence, as discussed in paragraph (e) of this section.

(ii) Applicability prior to October 8, 1977. This paragraph (c)(6) applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (i) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. Basic eligibility for purposes of this paragraph (c)(6)(ii) means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (i) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits.

(d) Regulatory bars to benefits. Benefits are not payable where the former service member was discharged or released under one of the conditions listed in paragraph (d)(1) or (2) of this section.

(1) Compelling circumstances exception is not applicable for:

(i) Discharge in lieu of trial. Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial.

(ii) Mutiny or espionage. Mutiny or spying.

(2) Compelling circumstances exception is applicable for:

(i) An offense involving moral turpitude. This paragraph (d)(2)(i) includes, generally, conviction of a felony.

(ii) Willful and persistent misconduct. For purposes of this section, instances of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is persistent; and instances of more serious misconduct occurring within five years of each other are persistent. For purposes of this section, minor misconduct is misconduct for which the maximum sentence imposable pursuant to the Manual for Courts–Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.

(e) Compelling circumstances exception. The bar to benefits for prolonged AWOL under paragraph (c)(6) of this section and the two types of misconduct described in paragraph (d)(2) of this section will not be applied if compelling circumstances mitigate the AWOL or misconduct at issue. The following factors will be considered in a determination on this matter:

(1) Length and character of service exclusive of the period of prolonged AWOL or misconduct. Service exclusive of the period of prolonged AWOL or misconduct should generally be of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation.

(2) Reasons for prolonged AWOL or misconduct. Factors considered are as follows:

(i) Mental or cognitive impairment at the time of the prolonged AWOL or misconduct, to include but not limited to a clinical diagnosis of (or evidence that could later be medically determined to demonstrate existence of) posttraumatic stress disorder (PTSD), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities.

(ii) Physical health, to include physical trauma and any side effects of medication.

(iii) Combat-related or overseas-related hardship.

(iv) Sexual abuse/assault.

(v) Duress, coercion, or desperation.

(vi) Family obligations or comparable obligations to third parties.

(vii) Age, education, cultural background, and judgmental maturity.

(3) Whether a valid legal defense would have precluded a conviction for AWOL or misconduct under the Uniform Code of Military Justice. For purposes of this paragraph (e)(3), the defense must go directly to the substantive issue of absence or misconduct rather than to procedures, technicalities, or formalities.

(f) Board of corrections upgrade. An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(g) Discharge review board upgrades prior to October 8, 1977. An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (i)(1) through (3) of this section by a discharge review board established under 10 U.S.C. 1553, sets aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(h) Discharge review board upgrades on or after October 8, 1977. An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d) of this section, but not under paragraph (c) of this section, provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval, air, or space service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(i) Special review board upgrades. Under 38 U.S.C. 5303(e), unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (h) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(j) Overpayments after October 8, 1977, due to discharge review board upgrades. No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (i) of this section which would not be awarded under the standards set forth in paragraph (h) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (h) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(k) Overpayments after October 8, 1977, based on application of AWOL statutory bar. No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

(l) Uncharacterized separations. Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1) Entry level separation. Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2) Void enlistment or induction. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of § 3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3) Dropped from the rolls. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable.

(Authority: 38 U.S.C. 101, 501, and 5303)

Credits

[28 FR 123, Jan. 4, 1963, as amended at 41 FR 12656, Mar. 26, 1976; 43 FR 15153, Apr. 11, 1978; 45 FR 2318, Jan. 11, 1980; 49 FR 44099, Nov. 2, 1984; 54 FR 34981, Aug. 23, 1989; 62 FR 14823, March 28, 1997; 87 FR 26125, May 3, 2022; 89 FR 32372, April 26, 2024]

Cross References: Validity of enlistments. See § 3.14. Revision of decisions. See § 3.105. Effective dates. See § 3.400(g). Minimum active-duty service requirement. See § 3.12a.

SOURCE: 54 FR 34978, 34981, Aug. 23, 1989; 56 FR 65846, 65847, 65849, 65851, 65853, Dec. 19, 1991; 57 FR 8268, March 9, 1992; 57 FR 10425, March 26, 1992; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992; 57 FR 59296, Dec. 15, 1992, unless otherwise noted.

AUTHORITY: 38 U.S.C. 501(a).

Notes of Decisions (76)

Current through December 15, 2025, 90 FR 58139. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief
Chapter I. Department of Veterans Affairs (Refs & Annos)
Part 3. Adjudication (Refs & Annos)
Subpart A. Pension, Compensation, and Dependency and Indemnity Compensation (Refs & Annos)
General

This section has been updated. Click here for the updated version.

38 C.F.R. § 3.12

§ 3.12 Character of discharge.

Effective: [See Text Amendments] to May 2, 2022

(a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or

general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term established basic eligibility to receive Department of Veterans Affairs benefits means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child

molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

(e) An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (h)(1), (2) and (3) of this section by a discharge review board established under 10 U.S.C. 1553 set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d), but not paragraph (c), of this section provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval or air service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(h) Unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (g) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(Authority: 38 U.S.C. 5303 (e))

(i) No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been

upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(j) No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

(k) Uncharacterized separations. Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1) Entry level separation. Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2) Void enlistment or induction. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of § 3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3) Dropped from the rolls. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable.

(Authority: 38 U.S.C. 501)

Credits

[28 FR 123, Jan. 4, 1963, as amended at 41 FR 12656, Mar. 26, 1976; 43 FR 15153, Apr. 11, 1978; 45 FR 2318, Jan. 11, 1980; 49 FR 44099, Nov. 2, 1984; 54 FR 34981, Aug. 23, 1989; 62 FR 14823, March 28, 1997]

Cross References: Validity of enlistments. See § 3.14. Revision of decisions. See § 3.105. Effective dates. See § 3.400(g). Minimum active-duty service requirement. See § 3.12a.

SOURCE: 54 FR 34978, 34981, Aug. 23, 1989; 56 FR 65846, 65847, 65849, 65851, 65853, Dec. 19, 1991; 57 FR 8268, March 9, 1992; 57 FR 10425, March 26, 1992; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992; 57 FR 59296, Dec. 15, 1992, unless otherwise noted.

AUTHORITY: 38 U.S.C. 501(a).

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55 F.4th 1325
United States Court of Appeals, Federal Circuit.

Kristopher CRANFORD, Claimant-Appellant

v.

Denis MCDONOUGH, Secretary of Veterans Affairs, Respondent-Appellee

2021-1973
|
Decided: December 19, 2022

Synopsis

Background: Former service member of the United States Army brought action challenging the denial by the Veterans Administration, affirmed by the Board of Veterans' Appeals, of his request for benefits. The Court of Appeals for Veterans Claims, Joseph L. Falvey, J., affirmed the denial of benefits. Former service member appealed.

The Court of Appeals, Hughes, Circuit Judge, held that former service member's other-than-honorable (OTH) discharge accepted in lieu of trial by general court-martial was an undesirable discharge, and he thus was not a "veteran" entitled to benefits from the Veterans Administration.

Affirmed.

Reyna, Circuit Judge, filed concurring opinion.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-6580, Judge Joseph L. Falvey, Jr.

Attorneys and Law Firms

Kenneth Dojaquez, Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

Kyle Shane Beckrich, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Brian M. Boynton, Claudia Burke, Patricia M. McCarthy; Evan Scott Grant, Y. Ken Lee, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Reyna, Hughes, and Stoll, Circuit Judges.

Opinion

Concurring Opinion filed by Circuit Judge Reyna.

Hughes, Circuit Judge.

***1326** Kristopher Cranford appeals a decision by the United States Court of Appeals for Veterans Claims affirming the denial of his request for benefits. Because Mr. Cranford is not a "veteran" entitled to receive benefits under 38 U.S.C. § 101(2), we affirm.

I

Mr. Cranford is a former service member for the United States Army. In 2011, while on active duty, he was charged with possession and use of Spice, an unregulated intoxicant, in violation of a lawful general order. Captain Lucas Lease recommended that Mr. Cranford be tried by general court-martial and forwarded the charges to Lieutenant Colonel (LTC) Erick Sweet. *Cranford v. McDonough*, No. 19-6580, 2021 WL 787510, at *1 (Vet. App. Mar. 2, 2021). LTC Sweet received the charges and recommended that a pretrial investigating officer be appointed. *Id.*

In response, Mr. Cranford submitted a request to be discharged in lieu of trial by court-martial. *Id.* In that document, Mr. Cranford stated that he "underst[oo]d that [he] may request discharge in lieu of trial by court-martial because ... [the] charges ... against [him] under the Uniform Code of Military Justice [(UCMJ)] ... authorize the imposition of a bad conduct or dishonorable discharge." *Id.* (final alteration in original). Mr. Cranford further admitted guilt for at least one of the charges and acknowledged that, by accepting a discharge in lieu of trial by general court-martial, he would instead qualify for an "other than honorable" (OTH) discharge, potentially barring him from receiving benefits. *Id.*

Captain Lease and LTC Sweet recommended that Mr. Cranford's request for discharge be approved. *Id.* at *2. The general court-martial convening authority agreed and ordered that Mr. Cranford receive an OTH discharge in lieu of trial. *Id.* Mr. Cranford was then separated from service.

Mr. Cranford later filed a request for benefits with a Veterans Affairs (VA) regional office. The regional office denied that request on the grounds that Mr. Cranford's discharge status barred him from receiving benefits. *Cranford*, 2021 WL 787510, at *2. Mr. Cranford then filed a Notice of Disagreement, to which the VA responded with a Statement of the Case affirming its prior determination. *Id.*

Mr. Cranford appealed the VA's decision to the Board of Veterans' Appeals. *Id.* The Board affirmed the denial of benefits based on Mr. Cranford's OTH discharge, reasoning that Mr. Cranford had requested the OTH discharge to escape trial by general court-martial. Applying 38 C.F.R. § **3**.**12**(d)(1), the Board concluded that Mr. Cranford had been discharged under dishonorable conditions and was thus ineligible for benefits as a non-veteran under 38 U.S.C. § 101(2).

Mr. Cranford appealed the Board's decision to the Veterans Court, arguing that (1) the Board mischaracterized his discharge ***1327** as being "in lieu of a *general* court-martial," instead of a summary court-martial, *Cranford*, 2021 WL 787510, at *2 (emphasis added), and (2) § **3**.**12**(d)(1) did not apply to him because he had accepted an OTH discharge, not an "undesirable discharge," *id.*

The Veterans Court rejected both arguments, reasoning that (1) Mr. Cranford had been referred for a general court-martial, since he had acknowledged as much in his request for discharge, *id.* at *2–3, and (2) an OTH discharge accepted in lieu of a general court-martial is equivalent to an undesirable discharge—despite the military service departments' shift in terminology, *id.* at *3–4

Mr. Cranford appeals. We have jurisdiction under 38 U.S.C. § 7292.

II

At issue in this appeal is whether the service departments' shift in terminology from "undesirable" to "OTH" discharge affects Mr. Cranford's eligibility for benefits under 38 C.F.R. § **3**.**12**(d)(1).[1] Under 38 U.S.C. § 7292(a), we have jurisdiction to review the Veterans Court's interpretation of that regulation. We review questions of statutory and regulatory interpretation de novo. *Martinez-Bodon v. McDonough*, 28 F.4th 1241, 1243 (Fed. Cir. 2022).

A

38 U.S.C. § 101(2) defines a veteran as a "person who served ... and who was discharged or released therefrom under conditions other than dishonorable." The Secretary of the VA has the "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the department and are consistent with those laws." 38 U.S.C. § 501(a). The nature of this rulemaking authority is "broad." *Snyder v. McDonough*, 1 F.4th 996, 1003 (Fed. Cir. 2021). Apart from certain statutory bars, the Secretary has discretion to define what conditions fall outside "conditions other than dishonorable," and thus bar a former service member from receiving benefits. *Garvey v. Wilkie*, 972 F.3d 1333, 1340 (Fed. Cir. 2020) (holding that "the VA has authority to define the term ['conditions other than dishonorable'] consistent with Congressional purpose.").

In promulgating 38 C.F.R. § **3**.**12**(d), the Secretary of the VA used this broad rulemaking authority to define which discharges are issued under dishonorable conditions. *See* Character of Discharge, 41 Fed. Reg. 12,656 (Mar. 26, 1976) ("The Veterans Administration is charged with the responsibility of determining whether such discharges were granted under conditions other than dishonorable. The provisions of § **3**.**12**(d) were established for the purpose of making such determinations."). Under § **3**.**12**(d)(1), one discharge issued under dishonorable conditions is "[a]cceptance of an undesirable discharge to escape trial by general court-martial." 28 Fed. Reg. 123 (Jan. 4, 1963). The VA has understood § **3**.**12**(d)(1) to bar service members who accepted discharges to avoid general court-martial from accessing benefits because such discharges are considered "dishonorable" and disqualify those individuals from the definition of "veteran" in 38 U.S.C. § 101(2). *See* Veterans Benefits: Character of Discharge, 40 Fed. Reg. 56,936–37 (Dec. 5, 1975) (currently codified as 38 C.F.R. § **3**.**12**) (discussing the relationship between § **3**.**12** and the legislative bars to benefits, including 38 U.S.C. § 101(2)).

At the time § **3**.**12**(d)(1) was implemented, the service departments used five terms to describe categories of discharge, including "undesirable discharge." ***1328** 41 Fed. Reg. 12,656; Major Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 3 (1973) (citing Army Reg. No. 635-200, para. 1–5 (July 15, 1966)). In 1977, after the Vietnam War, the service departments stopped using

the term "undesirable" to describe such discharges, opting instead to use the "OTH" descriptor to refer to the same class of individuals. Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41,474 (proposed July 10, 2020).

The VA did not update § 3.12(d)(1) at the time the service departments shifted terminology, and the regulation continues to use the old term. In 2020, the VA proposed to clarify § 3.12(d)(1) by replacing "undesirable discharge" with "other than honorable discharge or its equivalent." 85 Fed. Reg. 41,474–75. The stated purpose of this update was to "conform" to the current terminology used by the service departments. *Id.* at 41,474. The VA has not yet implemented its proposal.

B

The only question before us is one of interpretation: whether those who accept an OTH discharge in lieu of trial by general court-martial are barred from receiving VA benefits based on the meaning of "undesirable discharge" in § 3.12(d)(1).[2,3] When interpreting a regulation, we start by exhausting all traditional tools of interpretation to determine whether the plain meaning of the regulation can be discerned or whether it is truly ambiguous. *Kisor v. Wilkie*, —— U.S. ——, 139 S. Ct. 2400, 2415, 204 L.Ed.2d 841 (2019). Here, because we determine that the regulation is unambiguous on its face, we need not address any non-textual canons of interpretation. *Id.* at 2415.

That § 3.12(d)(1) applies to Mr. Cranford is clear "from the text, structure, history, and purpose" of § 3.12(d)(1). *Id.* The VA's usage of the term "undesirable discharge" has not been rendered ambiguous or as having any interpretative doubt simply because the service departments have updated their terminology. *See id.*

First, the VA's recent proposed clarification of § 3.12(d)(1) confirms that "undesirable discharge" is unambiguous. 85 Fed. Reg. 41,474 (proposed July 10, 2020). Along with proposed substantive amendments to § 3.12, the VA's proposal recognizes that "undesirable discharge" and "OTH discharge" have been understood as equivalents for over four decades. *Id.* (finding that replacing the term "undesirable discharge" with "a discharge under other than honorable conditions or its equivalent" will simply "conform to the terminology that has been used since 1977."). More than 70 comments were filed ***1329** in response to the VA's notice of proposal. 86 Fed. Reg. 50,513 (Sept. 9, 2021). These comments did not protest that changing "undesirable" to "OTH" would somehow change the class of individuals to which it referred. To the contrary, while the commenters' substantive objections varied, the comments reflected a general understanding that an OTH discharge is equivalent to an undesirable discharge. In other words, the definition of "undesirable discharge" was clear; the issue debated was whether those who fall within that definition should be barred from receiving VA benefits.

Second, the history of the term "undesirable discharge" further supports that the term is unambiguous. Although the VA determines whether a discharge bars an individual from receiving benefits, it is the service departments—not the VA—that provide the terms used for discharges. *See* 41 Fed. Reg. 12,655–56 (Mar. 26, 1976) (acknowledging that the service departments are responsible for making the discharge determinations, and the VA is only responsible for deciding whether the given discharge disqualifies them from receiving benefits). Section 3.12(d)(1) was introduced at a time the service departments were still using the term "undesirable discharge" to describe a particular class of individuals. *See, e.g.*, 32 C.F.R. § 41.6(c) (1961); 32 C.F.R. § 41.3(n) (1967). At that time, the service departments defined "undesirable discharge" as "separation from the service 'Under Conditions Other than Honorable.' " 32 C.F.R. § 41.6(c) (1961); *see also* 32 C.F.R. § 41.3(n) (1967) (defining the term as "[s]eparation from an Armed Force under conditions other than honorable"). It was in this context that the VA chose to use this same term in § 3.12(d)(1). In doing so, the VA understood "undesirable discharge" to describe the same class of individuals designated as "undesirable" by the service departments. *See* 41 Fed. Reg. 12,655–56.

When the service departments transitioned from the term "undesirable discharge" to "OTH discharge" in the 1970's, they did not change the class of individuals to which the terms refer. *Compare* 32 C.F.R. § 41.3(n) (1975) (defining "Undesirable Discharge" as "[s]eparation from an Armed Force under conditions other than honorable"), *with* 32 C.F.R. § 41(l) (1977) ("The three characterizations are: (1) Honorable, (2) Under Honorable Conditions (General Discharge), and (3) Under Other Than Honorable Conditions (Undesirable Discharge)."). *See also, e.g.*, 32 C.F.R. § 70.9(b)(4)(i) ("An Other than Honorable (formerly undesirable) Discharge ..."). The only change was the *term* the service departments used to refer to that class of individuals. The class

of individuals itself remained the same, as did the meaning of "undesirable discharge" in § 3.12(d)(1).

Accordingly, all the available evidence points to the same unambiguous reading of § 3.12(d)(1): Mr. Cranford's OTH discharge in lieu of trial by court-martial falls within the meaning of and is equivalent to an undesirable discharge.

III

We have considered Mr. Cranford's remaining arguments and find them unpersuasive. Because the plain meaning of § 3.12(d)(1), as implemented by the VA, has not changed, we affirm the Veterans Court's decision to deny Mr. Cranford benefits.

AFFIRMED

Costs

No costs.

Reyna, Circuit Judge, concurring.

The majority affirms a decision by the U.S. Court of Appeals for Veterans Claims affirming the denial of Cranford's request ***1330** for veterans' benefits. For the following reasons, I concur only in the result reached.

I

The Secretary has broad authority to prescribe rules and regulations that are necessary or appropriate to carry out the laws administered by the Department of Veterans Affairs ("VA"). *See Snyder v. McDonough*, 1 F.4th 996, 1003 (Fed. Cir. 2021); 38 U.S.C. § 501(a). Accordingly, the Secretary has the authority to determine the conditions under which individuals, other than those who receive dishonorable discharges, might be precluded from receiving veterans' benefits. *See Camarena v. Brown*, 6 Vet. App. 565, 567 (1994), *aff'd*, 60 F.3d 843 (Fed. Cir. 1995).

The issue presented in this appeal is whether the VA can deny benefits under 38 C.F.R. § 3.12(d)(1) where the servicemember receives a "discharge under other than honorable conditions" ("OTH discharge") in lieu of a trial by general court-martial. Under that regulation, a servicemember's "[a]cceptance of an *undesirable discharge* to escape trial by general court-martial" is considered a dishonorable discharge, which thereby constitutes a bar to benefits. 38 C.F.R. § 3.12(d)(1) (emphasis added); *see* 38 U.S.C. § 101(2).

In the 1960s, a servicemember separating from service could be discharged under one of five discharge characterizations: honorable, general, undesirable, bad conduct, or dishonorable. J.A. 37. A servicemember facing trial by general court-martial could request a punitive administrative discharge (then-characterized as an undesirable discharge) as a plea bargain to avoid trial and the potential consequences of trial. *See id.*

This process of issuing punitive administrative discharges in lieu of trial by court-martial perpetuated the wrongful discrimination of minority servicemembers upon their return to civilian life. *See* General Accounting Office, FPCD-80-13, *Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed*, at 71 (1980) ("Those most frequently given less than honorable discharges [we]re the less educated and minorities, who are already at a competitive disadvantage in the labor market."). For example, servicemembers might have been fooled into requesting a quick discharge to skip trial when the punitive consequences would be more severe than what would have otherwise been imposed by a military court. *See id.* at 68 ("In most cases a discharge in lieu of court-martial is not a bargain for the accused in the long run.... [M]ilitary courts were far more hesitant to impose a sentence which included a punitive discharge than were discharge authorities to approve discharges in lieu of court-martial.... [W]e question whether they understand its potential long-term consequences.").

In 1976, amidst growing awareness of the harms caused by discriminatory discharge practices, the Department of Defense ("DoD") directed the service branches to cease issuing the "undesirable" discharge characterization altogether. *See id.* at 92. The military complied with the directive, but it has continued to issue punitive administrative discharges in lieu of trial by court-martial, and it has characterized those discharges as being issued "under other than honorable conditions." *See id.*; *Cranford v. McDonough*, No. 19-6580, 2021 WL 787510, at *3–4 (Vet. App. Mar. 2, 2021).

Despite the change in DoD discharge policy, § 3.12(d)(1) was not amended to reflect the DoD directive. As a result, the regulation still employs the old characterization term, "undesirable discharge," instead of "discharge under other than honorable conditions." *See* ***1331** 38 C.F.R. § 3.12(d)(1). Based on this agency practice and Cranford's acceptance of an OTH discharge in lieu of trial by court-martial, the VA denied Cranford benefits under § 3.12(d)(1), and the Board of Veterans' Appeals ("Board") and U.S. Court of Appeals for Veterans Claims ("Veterans Court") affirmed. *See Cranford*, 2021 WL 787510, at *3–4.

On appeal, Cranford's sole argument is that the Board and Veterans Court violated the plain language of § 3.12(d)(1) by barring him from receiving benefits as a result of his acceptance of an OTH discharge in lieu of trial by general court-martial. Cranford insists that § 3.12(d)(1) applies only to discharges characterized as "undesirable," which his was not. *See* Appellant's Br. 6–12.

II

I begin my review of § 3.12(d)(1) with the plain language of the regulation and the common meaning of the terms. *See Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017) (en banc). Section 3.12(d)(1) provides that a discharge is considered to be issued under dishonorable conditions if it results from "acceptance of an undesirable discharge to escape trial by general court-martial." *See also* 38 C.F.R. § 3.12(a) (providing that benefits are "not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable").

The Veterans Court determined that the purpose of § 3.12(d)(1) is to preclude benefits for those who accept any punitive administrative discharge in lieu of a trial by general court-martial. Therefore, according to the Veterans Court, the operative trigger of § 3.12(d)(1) depends only on the basis for discharge (in lieu of trial by general court-martial), not the servicemember's characterization of service. *See Cranford*, 2021 WL 787510, at *3.

Neither the parties nor the Veterans Court have cited any legal authority demonstrating why that must be the case. Cranford only maintains that § 3.12(d)(1) does not apply to him because the military began using the term "other than honorable" in place of "undesirable" when issuing administrative discharges in lieu of court-martial, and the Secretary failed to timely update the language of the regulation. *See* Appellant's Br. 5–6; Oral Arg. 10:30–35 ("[Q:] You're just making a technical argument, right? They changed the name, so it no longer applies? [A:] That's correct, your Honor ...."). And the Secretary only recites the Veterans Court's conclusions without explaining *why* the sole criterion for applying § 3.12(d)(1) should be the basis for discharge. *See* Appellee's Br. 6–7. In addition, the mere fact that the basis of discharge is distinguishable from the characterization of service does not explain why one criterion ought to be ignored for the other when both are expressed in § 3.12(d)(1).

The majority fails to resolve these issues. The majority first explains that "the VA's recent proposed clarification of § 3.12(d)(1) confirms that 'undesirable discharge' is unambiguous." Op. 1328. But the fact that the proposal is still pending, and necessary in the first place, indicates that § 3.12(d)(1) may not be unambiguous. Next, the majority reviews the regulatory history, Op. 1328–29, but I do not think the history is clear enough on the current record to resolve the dispute.

Further, the majority engages in interpretation, with the result of deciding policy concerning the scope of veterans' benefits, when it is unnecessary to do so. *See Guillory v. Shinseki*, 669 F.3d 1314, 1319 (Fed. Cir. 2012) (declining to interpret a regulation where it was unnecessary to resolve the appeal); *see also Viale v. Wilkie*, 747 F. App'x 843, 845 n. 1 (Fed. Cir. 2018). I find this particularly concerning because the ***1332** majority opinion results in a regulatory interpretation that precludes a veteran from receiving benefits, but the majority never mentions the pro-veteran canon. *See Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor."); *see also Hudgens v. McDonald*, 823 F.3d 630, 639 (Fed. Cir. 2016).

Interpreting § 3.12(d)(1) is unnecessary here because Cranford does not dispute that he received notice of, and recognized, the consequences of his requested plea bargain—namely, an OTH discharge and a bar to veterans' benefits. *See* Appellant's Br. (raising no argument that notice was inadequate); Oral Arg. 3:24–42 (acknowledging that Cranford received notice his request for discharge could result in a bar to benefits and that the issue of notice was not asserted on appeal). Nor does Cranford argue or demonstrate that he was forced into making a hasty or illinformed decision. What Cranford ultimately seeks to obtain through this action is

access to benefits that the record demonstrates he voluntarily relinquished. He cannot escape the fact that in 2011, he requested a plea bargain discharge to avoid trial by court-martial, and he acknowledged that acceptance of his request meant relinquishing future entitlement to veterans' benefits. *See Cranford*, 2021 WL 787510, at *1; *see also generally Munoz-Perez v. Shulkin*, 688 F. App'x 930 (Fed. Cir. 2017) (dismissing an appeal of a denial of benefits under § **3**.**12**(d)(1), based on an OTH discharge in lieu of trial by general court-martial, where the appellant failed to identify a due process issue by pointing to lack of notice or an opportunity to be heard). On this record, I cannot say that the Veterans Court erred in affirming the Board's decision to deny Cranford benefits as a result of that plea bargain.

Thus, while I agree with the majority's ultimate conclusion, I do not believe is it necessary, or prudent on this record, to resolve whether § **3**.**12**(d)(1) applies to an OTH discharge. I would instead find that the VA properly denied benefits to Cranford under the terms of the plea bargain, in which he accepted the potential loss of benefits and a discharge under other than honorable conditions in lieu of trial by court-martial.

All Citations

55 F.4th 1325

Footnotes

1 Mr. Cranford did not appeal the Veterans' Court's determination that he was facing a *general* court-martial when he accepted discharge.

2 The concurrence would have us decide this case based on waiver alone. Concurring Op., 1331–32. But we decline to do so here. The Veterans Court did not rely on waiver as a legal basis for its determination, and therefore, we lack jurisdiction to consider that issue. 38 U.S.C. § 7292(a) (providing jurisdiction to review the Veterans Court's decision "on a rule of law or of any statute or regulation ... *that was relied on* by the Court in making the decision" (emphasis added)); *see also, e.g., Carr v. Wilkie*, 961 F.3d 1168, 1176–77 (Fed. Cir. 2020) (declining to consider an issue that was not relied upon by the Veterans Court). In any case, the acknowledgment Mr. Cranford made when accepting his request for discharge was that "he understood that if his request for discharge was accepted, he *might* be discharged under conditions other than honorable and that, as a result, he *might* be ineligible for VA benefits." *Cranford*, 2021 WL 787510, at *1 (emphasis added). We do not view this as an unequivocal waiver of benefits.

3 Moreover, it is not for this court to decide, as a matter of policy, whether veterans who accept an OTH discharge in lieu of general court-martial *should* receive VA benefits. That is a responsibility for Congress and the VA.

972 F.3d 1333
United States Court of Appeals, Federal Circuit.

Diana GARVEY, Claimant-Appellant

v.

Robert WILKIE, Secretary of Veterans Affairs, Respondent-appellee

2020-1128
|
Decided: August 27, 2020

Synopsis

Background: Widow appealed from Department of Veterans Affairs' (VA) denial of dependency and indemnity compensation and death pension benefits on the basis of former servicemember's Army service. The Court of Appeals for Veterans Claims, Robert N. Davis, Senior Judge, 2019 WL 4739435, affirmed the denial, and widow appealed.

The Court of Appeals, Dyk, Circuit Judge, held that the "willful and persistent misconduct" bar in rule governing the character of a servicemember's discharge was not contrary to the statute that specified the conditions under which a former servicemember was ineligible for benefits.

Affirmed.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

***1334** Appeal from the United States Court of Appeals for Veterans Claims in No. 18-5059, Senior Judge Robert N. Davis.

Attorneys and Law Firms

Robert C. Brown, Jr., Norman, OK, for claimant-appellant.

Amanda Tantum, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by Ethan P. Davis, Tara K. Hogan, Robert Edward Kirschman, Jr.; Jonathan Krisch, Y. Ken Lee, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Lourie, Schall, and Dyk, Circuit Judges.

Opinion

Dyk, Circuit Judge.

Diana Garvey is the widow of John P. Garvey. Mr. Garvey served in the Army from 1966 to 1970. Mrs. Garvey sought dependency and indemnity compensation and death pension benefits on the basis of Mr. Garvey's Army service. The Department of Veterans Affairs ("VA") denied Mrs. Garvey's claim because Mr. Garvey was discharged from the Army for "willful and persistent misconduct," and thus he was ineligible for benefits under the applicable regulation. *See* 38 C.F.R. § **3**.**12**(d)(4). Mrs. Garvey now challenges the validity of Rule **3**.**12**(d)(4) as being contrary to 38 U.S.C. § 5303.

We hold that the regulation is consistent with, and authorized by, the statute. Section 5303, contrary to Mrs. Garvey's assertion, is not the exclusive test for benefits eligibility. A former servicemember is ineligible for benefits unless he or she is a "veteran" as defined in 38 U.S.C. § 101(2). To be a "veteran" under section 101(2), a former servicemember must have been discharged "under conditions other than dishonorable." *Id.* The VA was authorized to define a discharge for willful and persistent misconduct as a discharge under "dishonorable conditions." *See* 38 C.F.R. § **3**.**12**. We therefore affirm.

Background

John P. Garvey served in the U.S. Army from February 1966 to May 1970. After training, Mr. Garvey was posted to Germany, where he served until November 1967. While in Germany, Mr. Garvey was punished under Article 15 of the Uniform Code of Military Justice for "disorderly conduct" in an incident with a German taxi driver.[1] J.A. 74. However, Mr. Garvey's service record indicates that his "conduct" and "efficiency" while in Germany were "[e]xc[ellent]." J.A. 10.

Beginning in December 1967, Mr. Garvey was posted to Vietnam, where his record deteriorated significantly. In June 1968, Mr. Garvey was convicted by special court-martial of possessing four pounds of cannabis with intent to sell. He was sentenced 90 days of confinement, ordered to forfeit a portion of his pay, and reduced in rank. In November 1968, Mr. Garvey was convicted by special court-martial of being absent without leave ("AWOL") from September 9, 1968, to

October 1, 1968. In June 1969, he was convicted by special court-martial of being AWOL from April 18, 1969, to June 5, 1969. For each of these convictions he was given a suspended sentence of confinement and ordered to forfeit a portion of his pay. In April 1970, Mr. Garvey was convicted by special court-martial of being AWOL from February 16, ***1335** 1970, to April 1, 1970. For this conviction, he was sentenced to five months of confinement and again forfeited a portion of his pay.

Because of these events of misconduct, Mr. Garvey was discharged as unfit for service on May 13, 1970, with an "Undesirable Discharge."[2] J.A. 32. He waived consideration of his case before a board of officers and acknowledged that he "may be ineligible for many or all benefits as a veteran under both Federal and State laws." J.A. 66. On June 23, 1977, under the Special Discharge Review Program, a procedure by which Vietnam-era servicemembers could have their discharge status upgraded if they met certain criteria, Mr. Garvey's discharge status was upgraded to "Under Honorable Conditions (General)." J.A. 35. However, on August 1, 1978, a Discharge Review Board found that Mr. Garvey would not have been entitled to an upgrade under generally applicable standards. The apparent effect of this finding was to prevent Mr. Garvey from receiving benefits on the basis of his upgraded status. *See* 38 U.S.C. § 5303(e); 38 C.F.R. § **3**.**12**(h).

Claimant-appellant Diana Garvey married Mr. Garvey on November 10, 1979. Mr. Garvey died on August 13, 2010. On September 4, 2012, Mrs. Garvey applied for dependency and indemnity compensation and death pension benefits on the basis of Mr. Garvey's service.

On August 28, 2018, the Board of Veterans' Appeals ("Board") denied Mrs. Garvey's claim. The Board concluded that Mr. Garvey was ineligible for benefits because he was discharged for "willful and persistent misconduct," which under 38 C.F.R. § **3**.**12**(d)(4) is a bar to benefits. On September 30, 2019, the United States Court of Appeals for Veterans Claims ("Veterans Court") affirmed the Board's decision, rejecting Mrs. Garvey's contention that the "willful and persistent misconduct" bar, section **3**.**12**(d)(4), is contrary to statute.

Mrs. Garvey appealed to this court. We have jurisdiction under 38 U.S.C. § 7292.

Discussion

On review of a decision from the Veterans Court, this court "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). This court "shall hold unlawful and set aside any regulation ... that was relied upon in the decision of the [Veterans Court] that [this court] finds to be ... not in accordance with law." *Id.* § 7292(d)(1)(A).

I

On appeal Mrs. Garvey does not dispute that Mr. Garvey was discharged for willful and persistent misconduct, or that this rendered him ineligible for benefits under the regulation, but renews her argument that the "willful and persistent misconduct" bar is contrary to statute.

We have previously upheld the regulation in a two-paragraph non-precedential decision that affirmed the Veterans Court. *Camarena v. Brown*, 60 F.3d 843 (Fed. Cir. 1995). We now address the issue in a precedential decision.

We begin with a summary of the relevant statutes and regulations. For purposes of eligibility for veterans' benefits, section 101(2) defines a "veteran" as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2). Section 5303(a) lists several situations, such as discharge due to general court-martial or desertion, in which a former servicemember is barred from receiving veterans' benefits.[3] Section 5303 does ***1336** not list "willful and persistent misconduct" as one of its statutory bars.

Sections 101 and 5303 are implemented in 38 C.F.R. § **3**.**12**. As relevant here, Rule **3**.**12**(c) provides that "[b]enefits are not payable" under specified conditions. These include those listed in section 5303(a).[4] Mirroring the "conditions other than dishonorable" language of section 101(2), Rule **3**.**12**(a) provides that:

> If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38

> U.S.C. 101(2)). A discharge under honorable conditions is binding on the [VA] as to character of discharge.

38 C.F.R § 3.12(a) (emphasis added). Rule 3.12(d) further defines "dishonorable conditions," providing that:

> A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions. ...
>
> > (4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

Id. § 3.12(d) (emphasis added).

Every servicemember is assigned a status—Honorable, Dishonorable, or an intermediate status—upon discharge. Under Rule 3.12, a former servicemember's discharge status might be, but is not necessarily, determinative of eligibility for benefits. A servicemember with an Honorable discharge is eligible for benefits because a discharge "under honorable conditions" is "binding" on the VA as to benefits eligibility. *Id.* § 3.12(a). A servicemember with a Dishonorable discharge is ***1337** ineligible for benefits because a Dishonorable discharge is a discharge by sentence of a general court-martial—a bar to benefits under Rule 3.12(c)(2). A former servicemember's discharge status is not determinative, however, when it is neither "under honorable conditions" nor Dishonorable. The military has issued several types of discharges of this sort over the years, including Undesirable, Ordinary, and Without Honor discharges. Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from "Veteran" Services*, 122 Penn. St. L. Rev. 69, 80 (2017). For servicemembers discharged with one of these intermediate statuses, the character of their service governs. The VA deems servicemembers with an intermediate discharge status who were discharged for "willful and persistent misconduct" to have been discharged under "dishonorable conditions," rendering them ineligible for veterans' benefits.[5] *See* 38 U.S.C. § 3.12(d)(4).

II

Mrs. Garvey contends that the "willful and persistent misconduct" bar in Rule 3.12(d) is contrary to statute. Mrs. Garvey argues that because section 5303(a) specifies six conditions under which a former servicemember is ineligible for benefits, it was improper for the VA to add a seventh, unlisted "willful and persistent misconduct" bar. We disagree.

Neither section 5303 nor any other statute provides that section 5303 contains the exclusive list of conditions for benefits eligibility. On the contrary, the definition of "veteran" in section 101(2) expressly limits benefits to those discharged "under conditions other than dishonorable." 38 U.S.C. § 101(2). The central question here is the meaning of this language in section 101(2).

In section 101(2), Congress chose not to use a "Dishonorable discharge" bar. Instead, it used the phrase "conditions other than dishonorable." Unlike a Dishonorable discharge, the phrase "conditions other than dishonorable" is not a term of art in the military.[6] In view of the ambiguity of that phrase, we turn to the statute's legislative history to determine its meaning. *Adm'r, Fed. Aviation Admin. v. Robertson*, 422 U.S. 255, 263, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975) (reasoning that an "unclear and ambiguous" statute "compell[ed] resort to the legislative history").

Section 5303 and the "conditions other than dishonorable" requirement of section 101(2) trace their origin to the Servicemen's Readjustment Act of 1944 ("the G.I. Bill"). Pub. L. No. 78-346, 58 Stat. 284; *see generally* Adams & Montalto, *supra*, at 84–85. The G.I. Bill provided a variety of educational, financial, and other benefits to former servicemembers. However, not all former servicemembers would be eligible. In the version of the G.I. Bill first introduced in Congress, section 300 barred the provision of benefits to servicemembers discharged for any of several enumerated reasons, including discharge: (1) by sentence of a court-martial (e.g., a Dishonorable discharge); (2) for being a conscientious objector; (3) as a deserter; or (4) of an officer by resignation for the good of ***1338** the service. S. 1767, 78th Cong. § 300 (as introduced, Mar. 13, 1944).[7]

The Senate committee amended the bill to add a new section, section 1603, while retaining the statutory bars in section 300. New section 1603 provided that:

> A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans' benefits provided by this [A]ct ....

S. 1767 § 1603 (as reported to the Senate, Mar. 18, 1944). The committee report explained the dual purposes of this provision: to provide benefits to deserving servicemembers with "honest and faithful or otherwise meritorious" service even if they did not receive Honorable discharges, but to deny benefits to "unworthy" former servicemembers even if they were not given a Dishonorable discharge. S. Rep. No. 78-755, at 15 (1944). Specifically, the report explained:

> The purpose of this section is to provide a uniform basic entitlement contingent upon the type of release from active military or naval service. It provides that in order to be entitled to any veterans' benefits provided by this act ... a veteran must have been discharged or released from active service under conditions other than dishonorable .... The amendment would remove a discrepancy in existing law which has been found to be highly undesirable, ... relating to hospitalization whereby a veteran not dishonorably discharged may be entitled to hospitalization benefits. In practice it has been found that this permits most unworthy cases to be hospitalized often to the detriment of persons honorably discharged or discharged under conditions other than dishonorable. It is believed that the hospital facilities of the Veterans' Administration should be maintained for veterans whose service was honest and faithful or otherwise meritorious.
>
> Further, the amendment will correct hardships under existing laws requiring honorable discharge as prerequisite to entitlement. Many persons who have served faithfully and even with distinction are released from the service for relatively minor offenses, receiving a so-called blue discharge if in the Army or a similar discharge without honor if in the Navy. It is the opinion of the committee that such discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such, as for example those mentioned in section 300 of the bill, as to constitute dishonorable conditions. A dishonorable discharge is effected only as a sentence of court martial, but in some cases offenders are released or permitted to resign without trial—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to dishonorable discharge by court martial.

Id. (emphasis added).

The committee's amendment was agreed to on the Senate floor. 90 Cong. ***1339** Rec. 3075 (1944). There, the sponsor of the G.I. Bill,[8] Senator Champ Clark, similarly explained the purpose of the "conditions other than dishonorable" standard on the Senate floor where the committee amendment was adopted. He reasoned that a person with poor conduct in the service might nevertheless be discharged without a court-martial because the military "did not want to take the trouble to court martial them and give them what they deserved —a dishonorable discharge." *See* 90 Cong. Rec. 3077. To Senator Clark, such a servicemember should not receive benefits. Senator Clark stated that the "conditions other than dishonorable" language meant that:

> if a man's service has been dishonorable, if he has been convicted of larceny or any other crime or has been convicted of chronic drunkenness or anything else one might think of, the [VA] will have some discretion with respect to regarding the discharge from the service as dishonorable.

Id. (emphasis added).[9] The House of Representatives version of the G.I. Bill would have restricted benefits to those discharged "under honorable conditions." S. 1767 § 1503 (as passed by the House, May 18, 1944). However, on the recommendation of the conference committee, both houses ultimately adopted the Senate's "conditions other than dishonorable" standard. H.R. Rep. No. 78-1624, at 26 (1944); 90 Cong. Rec. 5754 (June 12, 1944); 90 Cong. Rec. 5847 (June 13, 1944). The G.I. Bill was thus enacted with the section 300 bars and the "conditions other than dishonorable" requirement.

In enacting the G.I. Bill, Congress intended for benefits to be provided to former servicemembers "whose service was honest and faithful or otherwise meritorious," even if they were not discharged with Honorable status. S. Rep. No. 78-755, at 15. However, benefits were not to be provided to former servicemembers whose misconduct was "not less serious than those giving occasion to dishonorable discharge by court-martial," even if they did not receive a Dishonorable discharge. *Id.* Congress provided the VA with "discretion," 90 Cong. Rec. 3077, in determining the "conditions" under which a former servicemember was "[ ]worthy" of benefits, S. Rep. No. 78-755, at 15. Congress did not intend the specific provisions of section 300 to be the sole bar to veterans' benefits.

Though the section 300 bars are now codified at 38 U.S.C. § 5303(a)[10] and the ***1340** "conditions other than dishonorable" requirement is codified at 38 U.S.C. § 101(2),[11] the meaning of and relationship between these statutory provisions have not materially changed since the G.I. Bill's enactment in 1944. Whether the statute is

interpreted to expressly delegate to the VA the interpretation of "conditions other than dishonorable," or instead the delegation is implicit, we conclude that the VA has authority to define the term consistent with the Congressional purpose. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (discussing "express delegation" and "implicit" delegation of an interpretive question to an agency).

Since 1946, VA regulations have provided that a discharge for "willful and persistent misconduct" was under "dishonorable conditions," and thus was a bar to benefits. 11 Fed. Reg. 12,869, 12,878 (Oct. 31, 1946). The bar has existed in its current form—codified at 38 C.F.R. § **3**.**12**(d)(4)—since 1963. 28 Fed. Reg. 123 (Jan. 4, 1963). The "willful and persistent misconduct" bar is consistent with the statute in denying benefits to those who committed serious misconduct even if they did not receive a Dishonorable discharge.

Our conclusion is further supported by Congress' 1977 amendment to what is now section 5303. On April 5, 1977, President Carter initiated the Special Discharge Review Program. Under the Program, as relevant here, a Vietnam-era servicemember with a discharge "Under Other than Honorable Conditions" could obtain an upgrade to a "general discharge under honorable conditions" if a Discharge Review Board found that "such action is appropriate based on all of the circumstances of a particular case and on the quality of the individual's civilian records since discharge." *Discharge Review Boards*, 42 Fed. Reg. 21,308, 21,310 (Apr. 26, 1977).[12] Because Rule **3**.**12**(a) provides that "[a] discharge under honorable conditions is binding on the [VA] as to character of discharge," some servicemembers who were ineligible for benefits (due, for example, to the "willful and persistent misconduct" bar), would become eligible because of their upgrade under the Program.

Congress concluded that this aspect of the Program was unfair because it upgraded Vietnam-era servicemembers but not other servicemembers, and because it unfairly allowed those with problematic service records to obtain veterans benefits. S. Rep. No. 95-305, at 3 (1977); 123 Cong. Rec. 28,193, 28,198 (Sep. 8, 1977). Because of these concerns, in 1977, Congress passed an "Act to deny entitlement to veterans' benefits to certain persons who would otherwise become so entitled solely by virtue of the administrative upgrading under" the Program. Pub. L. No. 95-126, 91 Stat. 1106 ("the 1977 Act"). The 1977 Act provided, in relevant part, that servicemembers upgraded to "a general or honorable discharge" under the Program ***1341** were ineligible for veterans benefits unless, after a case-by-case review by a Discharge Review Board, the VA determined that the veteran would have received the upgraded discharge status even under generally applicable standards. *Id.*[13]

The structure and purpose of the 1977 Act support the "willful and persistent misconduct" bar. The Act presupposes that a servicemember discharged under less than honorable conditions would, but for his or her upgrade under the Program, not have been eligible for benefits in at least some circumstances. At the time, the "willful and persistent misconduct" bar had been in force for over three decades. *See* 11 Fed. Reg. at 12,878 (amending regulation to add the "willful and persistent misconduct" bar). And Congress was well aware that if the servicemember had been discharged for "willful and persistent misconduct" he or she would not be not entitled to veterans' benefits. *See, e.g.*, S. Rep. No. 95-305, at 27 (quoting 38 C.F.R. § **3**.**12** (1977)); H.R. Rep. No. 95-580, at 9 (same); *Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings: Hearing Before the Committee on Veterans' Affairs*, 95th Cong. 354–55 (1977) (statement of Sen. Thurmond) (same). That Congress required an upgraded servicemember to remain subject to the VA's rules under his or her original discharge status (absent a specific dispensation) suggests approval of those rules, including the "willful and persistent misconduct" bar.

We reject Mrs. Garvey's challenge to the "willful and persistent misconduct" regulatory bar.

Conclusion

We uphold the VA's interpretation that a discharge for "willful and persistent misconduct" is, under the statute, "issued under dishonorable conditions." See 38 C.F.R. § **3**.**12**(d). Mr. Garvey's discharge was for willful and persistent misconduct, so Mrs. Garvey is not entitled to veterans' benefits. The decision of the Veterans Court is

AFFIRMED

All Citations

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Footnotes

1 Article 15 authorizes commanding officers to impose certain "disciplinary punishments for minor offenses without the intervention of a court-martial." 10 U.S.C. § 815(b).

2 We capitalize formal discharge status (e.g., Honorable, Dishonorable, Undesirable, etc.).

3 Specifically, section 5303(a) provides that:

> The discharge or dismissal [1] by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person [2] on the ground that such person was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or [3] as a deserter, or [4] on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence, or [5] of an officer by the acceptance of such officer's resignation for the good of the service, or [6] (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Secretary [of the VA]. ...

38 U.S.C. § 5303(a).

4 Section **3**.**12**(c) states that:

> Benefits are not payable where the former service member was discharged or released under one of the following conditions:
>
> (1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.
>
> (2) By reason of the sentence of a general court-martial.
>
> (3) Resignation by an officer for the good of the service.
>
> (4) As a deserter.
>
> (5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).
>
> (6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. ...

38 C.F.R. § **3**.**12**(c).

5 Discharges for "[m]utiny," "spying," and "[a]cceptance of an undesirable discharge to escape trial by general court-martial" are also deemed by the VA to "have been issued under dishonorable conditions." 38 C.F.R. § **3**.**12**(d).

6 There is a statement in the Senate floor debate on the provision now present in section 101(2) that the phrase "conditions other than dishonorable" was "well-understood," 90 Cong. Rec. 3077 (1944), but this appears only to suggest that the core concept was well understood, not that the full scope of the term was well understood. Indeed, as described below, Congress left it to the VA to define the term by regulation.

7 Specifically, as relevant here, section 300 stated that:

> The discharge or dismissal by reason of the sentence of a general court-martial of any person from the military or naval forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of a competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, shall bar

> all rights of such person, based upon the period of service from which he is so discharged or dismissed, under any laws administered by the [VA] ....

S. 1767, 78th Cong. § 300 (as introduced, Mar. 13, 1944).

8 "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (quoting *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964)).

9 In the same vein, a later report of the President's Commission on Veterans' Pensions, chaired by General Omar Bradley (VA Administrator from 1945 to 1947), explained that:

> The Congress did not want to use the words "honorably discharged" or "discharged under honorable conditions," because it was felt that such an eligibility requirement was too restrictive. Neither did Congress want to use the words "not dishonorably discharged" because such words would have been too broad and opened the door to persons who were administratively discharged for conduct that was in fact dishonorable. The controversy was finally resolved by adopting the words "conditions other than dishonorable." .... The eligibility of persons discharged with [neither Honorable nor Dishonorable] discharges was left to a determination by the [VA] based on the pertinent facts ....

President's Comm'n on Veterans' Pensions, Staff of H. Comm. on Veterans' Affairs, 84th Cong., Rep. On Discharge Requirements for Veterans' Benefits 15–16 (Comm. Print 1956).

10 In a 1958 reorganization of veterans' benefits statutes, section 300 was codified at 38 U.S.C. § 3103(a). Pub. L. No. 85-857 § 3103, 72 Stat. 1105, 1230 (1958). In 1991, section 3103 was renumbered as 5303. Pub. L. No. 102-40, Title IV, § 402(b)(1), 105 Stat. 187, 238–39 (1991).

11 Section 606 of the House version of the 1944 G.I. Bill provided that "[t]he term 'veteran' as used in this title shall mean a person who served in the active service of the armed forces during a period of war in which the United States has been or is engaged and who has been discharged or released therefrom under honorable conditions." S. 1767 § 606 (as passed by the House, May 18, 1944). At conference committee, section 606 was moved to section 607 and revised to use the "under conditions other than dishonorable" standard. H.R. Rep. No. 78-1624, at 13. Section 607 was part of the enacted G.I. Bill. G.I. Bill § 607. The current definition of "veteran," codified at 38 U.S.C. § 101, derives from section 607 and was enacted in the 1958 reorganization of veterans' benefits statutes. Pub. L. 85-857 § 101, 72 Stat. at 1106.

12 Mr. Garvey's upgrade to an "Under Honorable Conditions (General)" discharge status was under the Special Discharge Review Program.

13 More specifically, the 1977 Act's exclusion is now codified at 38 U.S.C. § 5303(e)(2), which provides:

> Notwithstanding any other provision of law ... no person discharged or released from active military, naval, or air service under other than honorable conditions who has been awarded a general or honorable discharge under revised standards for the review of discharges ... as implemented on or after April 5, 1977, under the Department of Defense's special discharge review program ..., shall be entitled to benefits under laws administered by the Secretary except upon a determination, based on a case-by-case review, under [uniform and historically consistent] standards ... that such person would be awarded an upgraded discharge under such standards.

South Carolina Bar
Continuing Legal Education Division

The Commander's Decision-Making Process on Discharges

Lt. Colonel James Smith
Ian Murphy

No Materials Available