

Date: October 28, 1996

VAOPGCPREC 10-96

From: General Counsel (022)

Subj: Statutory Bars to Benefits: Effect of Substituted Discharge
Under 10 U.S.C. § 874(b)--XXXXXX, XXXXXXX X., XXX XXX XX XXXX

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Does the action of the Secretary of a Service Department under 10 U.S.C. § 874(b), substituting an administrative discharge for a discharge or dismissal executed in accordance with the sentence of a general court-martial, remove the statutory bar to benefits under 38 U.S.C. § 5303(a)?

COMMENTS:

1. While on active duty with the United States Army, appellant pleaded guilty before a general court-martial to a charge of narcotics possession and was sentenced to be discharged from the service with a bad conduct discharge. Pursuant to that sentence, appellant was discharged under other than honorable conditions on August 24, 1970. In 1984, appellant petitioned the Secretary of the Army, pursuant to Article 74(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 874(b), to substitute an administrative discharge for the punitive discharge executed pursuant to the sentence of the general court-martial. In September 1984, the Assistant Secretary of the Army for Manpower and Reserve Affairs issued an order, pursuant to 10 U.S.C. § 874(b), directing that "so much of the sentence [of the general court-martial] as provides for a bad conduct discharge is changed to a general discharge under honorable conditions, and that a General Discharge Certificate be issued." A revised Department of Defense Form 214, Certificate of Release or Discharge From Active Duty, (DD 214) was issued, indicating that appellant was discharged under honorable conditions and stating the reason for separation as "other than desertion (court-martial)."

<Page 2>

2. A Department of Veterans Affairs (VA) regional office denied appellant's claim for service-connected disability compensation on the ground that his discharge pursuant to the sentence of a general court-martial constitutes a statutory bar to benefits under 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c). You have requested our opinion on the legal effect, for purposes of VA benefits, of the upgraded discharge issued pursuant to 10 U.S.C. § 874(b).

3. Section 5303(a) of title 38, United States Code, provides that:

The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces . . . shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10.

Section 5303(a) lists a number of other circumstances leading to discharge or dismissal which will serve to bar VA benefits. VA's implementing regulation provides that a discharge under honorable conditions issued through a board for the correction of records established under 10 U.S.C. § 1552 will remove any prior bar to benefits under 38 U.S.C. § 5303(a), but that an honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. § 1553 does not set aside any bar to benefits under 38 U.S.C. § 5303(a). 38 C.F.R. § 3.12(e) and (g). The statute and regulation are silent as to whether a discharge issued pursuant to 10 U.S.C. § 874(b) would remove a bar to benefits under section 5303(a). As discussed below, however, the history of the statutory and regulatory provisions governing the effects of upgraded discharges issued under 10 U.S.C. §§ 1552 and 1553 provide guidance in determining the effect of discharges issued under 10 U.S.C. § 874(b).

4. At the outset, it is necessary to distinguish the various means by which a service department may correct service records or issue upgraded discharges. Under 10 U.S.C. § 1552(a), a board for the correction of military records may correct any

military record "to correct an error or remove an injustice." The board's action may include correction of the records of a court-martial to reflect actions taken by a reviewing authority under the UCMJ or action on the sentence of a court-martial for purposes of clemency. 10 U.S.C. § 1552(f). Under 10 U.S.C. § 1553, a discharge review board may change a discharge or dismissal or issue a new discharge or dismissal, based on its review of an individual's service records. With respect to a discharge or dismissal pursuant to a court-martial, a discharge review board's authority is limited to "issuance of a new discharge for purposes of clemency." 10 U.S.C. § 1553(a). Under 10 U.S.C. § 874(b), the Secretary of a service department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

5. Prior to 1977, VA had concluded that an upgraded discharge issued by either a board for correction of military records or a discharge review board could remove the statutory bars to benefits in 38 U.S.C. § 3103(a) (now § 5303). Admin. Dec. No. 980 (1962); Undigested Opinion, 8-13-75 (1-17 38 C.F.R. § 3.12); 38 C.F.R. § 3.12(e) and (f) (1977). The only exception was that a discharge review board could not remove the statutory bar based on discharge or dismissal by reason of the sentence of a general court-martial, because discharge review boards at that time lacked authority under 10 U.S.C. § 1553 to upgrade discharges which were based on the sentence of a general court-martial.

6. On October 8, 1977, Congress enacted Pub. L. No. 95-126, 91 Stat. 1106 (1977), in part to address what it perceived as VA's erroneous interpretation of 38 U.S.C. § 3103(a). That statute amended 38 U.S.C. § 3103(a) to state that the statutory bars to benefits would be effective "notwithstanding any action subsequent to the date of . . . discharge by a board established pursuant to section 1553 of title 10." In a report prepared in connection with that legislation, the House Committee on Veterans' Affairs explained its disagreement with VA's conclusion that an upgraded discharge issued by a discharge review board would remove a statutory bar to benefits under section 3103(a). The Committee stated that, although the type or characterization of a veteran's discharge may be

<Page 4>

relevant for purposes of determining "veteran" status under 38 U.S.C. § 101(2), the statutory bars in section 3103(a) operate "regardless of the type or characterization of [an individual's] discharge." H.R. Rep. No. 580, 95th Cong., 1st Sess. 9 (1977), *reprinted at* 1977 U.S.C.C.A.N. 2844, 2852. Accordingly, the Committee indicated that the mere issuance of an upgraded discharge would not, in itself, remove a statutory bar under section 3103(a). *Id.* The Committee drew a distinction between upgraded discharges issued by a board for the correction of military records and those issued by a discharge review board:

The Committee concurs with the VA regarding the power and authority of the Board for Corrections of Military Records which, like a special act of Congress, can alter the individual's service record in upgrading a discharge. . . . However, the Committee does not agree that the actions taken by the discharge review boards carry the same weight since the discharge review boards do not have the power and/or authority to alter service records.

Id. at 12, *reprinted in* 1977 U.S.C.C.A.N. at 2855. The Committee further stated:

A reasonable interpretation of [38 U.S.C. § 3103(a)] would indicate that so long as the reasons for discharge or release remain, the individual will be barred from receiving veterans' benefits under section 3103(a). Only in instances when the Board for Correction of Military Records change the reasons for discharge should the bar be waived or removed.

Id. at 11, *reprinted in* 1977 U.S.C.C.A.N. at 2854.

7. The history of the 1977 amendments to 38 U.S.C. § 3103(a) reflects Congress' understanding that issuance of an upgraded discharge would not in itself remove the statutory bars to benefits under current 38 U.S.C. § 5303(a). The statutory bars are predicated upon the reasons for discharge or dismissal rather than the character or type of discharge, and the issuance of an upgraded discharge does not in itself alter the reasons for discharge or dismissal. Accordingly, Congress has

indicated that the statutory bars in section 5303(a) may be removed only by action of a proper authority which alters the individual's service records to change the reasons for discharge or dismissal.

8. Congress did not address the effect of an upgraded discharge issued pursuant to 10 U.S.C. § 874(b) with respect to the statutory bars in section 5303(a). As stated above, however, Congress has indicated that section 5303(a) will bar benefits, regardless of the issuance of an upgraded discharge, unless the relevant service records have been altered, by proper authority, to change the reasons for discharge or dismissal which would otherwise bar entitlement to benefits. Section 874(b) authorizes the Secretary of a service department to "substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial." The authority granted under section 874(b) is more analogous to the authority granted to discharge review boards under section 1553 than to the authority granted to boards for the correction of military records under section 1552. Section 874(b) authorizes the Secretary concerned to alter the type or character of a discharge issued pursuant to a general court-martial, but does not provide authority to alter service records, including the records of a general court-martial, to change the underlying reasons for discharge or dismissal.

9. The UCMJ provides that the findings and conclusions of a court-martial may be directly reviewed by a judge advocate, a court of military review, and the United States Court of Military Appeals, each of whom is authorized to set aside the findings of the court-martial. 10 U.S.C. §§ 864, 866, 867. Further, 10 U.S.C. §§ 871(b) and 874(a) authorize the Secretary of a service department to remit or suspend any unexecuted part of the sentence of a court-martial, including an unexecuted sentence of dismissal. When a sentence of discharge or dismissal has been executed, however, the Secretary's authority under section 874(b) is limited to substituting an administrative form of discharge for the executed discharge or dismissal. Viewed in this statutory context, it is clear that section 874(b) does not authorize the Secretary to set aside the findings of a court-martial or to set aside a previously-executed sentence of discharge or dismissal, but

<Page 6>

merely authorizes the Secretary to substitute a different form of discharge.

10. The legislative history of section 874 indicates that that provision was intended to give the secretaries of the service departments "clemency and parole power as well as ultimate control of sentence uniformity." S. Rep. No. 486, 81st Cong., 2d Sess. 31 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2257. Accordingly, an upgraded discharge issued pursuant to section 874(b) is generally in the nature of a grant of clemency and does not serve to invalidate or abate the general court-martial proceedings or the executed sentence of discharge or dismissal. See *Kaiser v. Secretary of the Navy*, 542 F. Supp. 1263, 1266 (D. Col. 1982); *U.S. v. Woods*, 21 M.J. 856, 873 (A.C.M.R. 1986). We note that the Department of the Navy has concluded that section 874(b) authorizes only grants of clemency, based primarily upon an applicant's record in the civilian community subsequent to discharge, and does not permit review of questions of guilt or innocence or other legal questions attendant to the court-martial which resulted in the punitive discharge or dismissal. 32 C.F.R. § 719.155(c)(18). Although we do not know whether the other service departments have similarly construed section 874(b), it is clear that the authority to substitute an administrative form of discharge under section 874(b) does not authorize the secretaries of the service departments to invalidate or abate a court-martial which led to an individual's discharge or dismissal.

11. In view of the foregoing, we conclude that an upgraded discharge awarded pursuant to 10 U.S.C. § 874(b) does not alter an individual's service records to change the fact that the individual was discharged or dismissed by reason of the sentence of a general court-martial. In the instant case, the revised DD 214 issued to the appellant, while reflecting a discharge under honorable conditions, continues to identify the sentence of the court-martial as the reason for his discharge. Congress has made clear that a statutory bar to benefits under 38 U.S.C. § 5303(a) will be removed "[o]nly in instances when the Board for Correction of Military Records change the reasons for discharge." H.R. Rep. No. 580, 95th Cong., 1st Sess. at 11, *reprinted at* 1977 U.S.C.C.A.N. at 2854. Accordingly, because an upgraded discharge issued under 10 U.S.C. § 874(b) changes the character of discharge, but not

<Page 7>

the reasons for discharge, an upgraded discharge issued pursuant to 10 U.S.C. § 874(b) does not remove the statutory bar to benefits under section 5303(a) as to individuals discharged or dismissed by reason of the sentence of a general court-martial.

HELD:

An upgraded discharge issued pursuant to 10 U.S.C. § 874(b) does not remove the statutory bar to benefits under 38 U.S.C. § 5303(a) for individuals discharged or dismissed by reason of the sentence of a general court-martial.

Mary Lou Keener