Psychiatric Disorders, Military Misconduct, and Discharge Status for U.S. Veterans

Neil Krishan Aggarwal, MD, MBA, MA

For three years, the U.S. District Court for the District of Connecticut has issued rulings in *Manker v. Spencer* and *Kennedy v. Esper* to certify veterans as a legal class to sue the United States Navy and Army, respectively. Each dispute centers on whether the military denied discharge upgrades to personnel who developed mental health disorders during their service. This article analyzes the facts, reasoning, and dispositions of each case, which address medicolegal standards for evaluating the relationships among psychiatric disorders, alleged misconduct during military service, and military discharge status. Implications for psychiatrists are considered in the military and civilian health sectors.

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United States military personnel receive one of five discharge statuses that characterizes their service and affects their eligibility for benefits and support services from the Department of Veterans Affairs (VA) and states where they reside: Honorable, General (Under Honorable Conditions), Other Than Honorable (OTH), Bad Conduct, or Dishonorable.[1–4] In 2018, judges from the U.S. District Court for the District of Connecticut certified two classes of defendants in two cases that share common characteristics. The defendants had to: be veterans discharged with a less than Honorable service characterization (including General and OTH but excluding Bad Conduct or Dis-honorable discharges), not receive upgrades to Honorable from their military branch's discharge review board, and have documented symptoms or diagnoses of posttraumatic stress disorder (PTSD), traumatic brain injury (TBI), or a related mental health condition at the time of their discharge and attributable to their service.

The cases differ according to the military branch named in the lawsuit. On November 15, 2018, in *Manker v. Spencer*, Judge Charles Haight, Jr., certified Navy, Navy Reserves, Marine Corps, or Marine Corps Reserve veterans of the Iraq and Afghanistan wars from October 7, 2001 to the present as a class.[5] On December 21, 2018 in *Kennedy v. Esper*, Judge Warren Eginton certified Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan wars from October 7, 2001 to the present as a class.[6] By 2019, both judges refused to dismiss the cases, stating that the U.S. District Court for the District of Connecticut has appropriate jurisdiction to provide relief to the plaintiffs and the class action claims were not moot.[7,8]

The plaintiffs were contending that the Army Discharge Review Board (ADRB) and Navy Discharge Review Board (NDRB) did not implement medicolegal standards identified in a memo from Secretary of Defense Charles Hagel (the "Hagel Memo") recommending discharge upgrades for military personnel who developed mental disorders during service. This article analyzes both cases. First, the medicolegal standard in the Hagel Memo is reviewed for determining discharge upgrades on the basis of the presence of a mitigating psychiatric disorder. Next, the facts, reasoning, and dispositions of each case are analyzed. Finally, their implications are considered. Their impact is significant, with at least 50,000 Army veterans eligible to join the class in *Kennedy v. Esper*.[9] In 2019, the United States began implementing the

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Dr. Aggarwal is Research Psychiatrist and Assistant Professor of Clinical Psychiatry, New York State Psychiatric Institute, Columbia University Medical Center, New York, NY. Address correspondence to: Neil Krishan Aggarwal, MD, MBA, MA. E-mail: aggarwa@nyspi.columbia.edu.

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Veterans Affairs Maintaining Internal Systems and Strengthening Integrated Outside Networks (VA MISSION) Act of 2018,[10] allowing veterans to seek treatment from non-VA providers. This legislation increases the likelihood that civilian psychiatrists and psychologists will treat veterans who claim that a psychiatric disorder is related to alleged misconduct during their military service.[11] The VA benefits system or appeals process for denials to upgrade applications from discharge review boards are not discussed because they are detailed elsewhere[12] and fall outside the practice of mental health professionals.

The Hagel Memo's Standards

On March 3, 2014, five Vietnam veterans and members of the Vietnam Veterans of America, Vietnam Veterans of America Connecticut State Council, and the National Veterans Council for Legal Redress (NVCLR) alleged that Vietnam veterans were discharged with OTH statuses for misconduct that was later attributable to PTSD.[13] The NVCLR is a nonprofit organization that refers veterans to agencies for social and legal services. This discharge status disqualified them from disability compensation, educational benefits, and social services. The complaint alleged that the military had not instituted procedures to consider PTSD in the discharge upgrade applications of Vietnam veterans despite having procedures for today's servicemembers who claim PTSD.[14,15] The complaint listed a common fact pattern for each of the five named plaintiffs: developing PTSD symptoms in response to military combat, going absent without leave (AWOL) from duty, an OTH discharge status in response to this misconduct, a diagnosis of PTSD years later, and denials from Military Department Boards for Correction of Military/Naval Records (BCMRs) to upgrade discharges.[13] BMCRs are divided by military branch and consist of agencies that review and correct the files of service personnel. The complaint cited data that Vietnam-era PTSD-specific discharge applications are upgraded in 4.53 percent of cases compared with 30.58 percent for all veteran applications.[13]

The complaint proposed a class action lawsuit, with the class defined as veterans who served in Vietnam, were discharged under OTH conditions, did not receive discharge upgrades to Honorable or General, and have been diagnosed with PTSD attributable to their military service.[13] The complaint alleged that the U.S. government violated: the Administrative Procedure Act[16] because BCMRs have not reconsidered discharge upgrades on the basis of new evidence of PTSD; the due process clause of the Fifth Amendment because the government has not acted in accordance with its rules; and Section 504 of the Rehabilitation Act of 1973,[17] which states that no individual with a disability shall be denied the benefits of any program or activity receiving federal financial assistance on the basis of that disability.

Secretary of Defense Chuck Hagel observed that Vietnam veterans were requesting discharge upgrades on the basis of PTSD, which was only recognized with the 1980 publication of the Diagnostic and Statistical Manual of Mental Disorders, Third Edition, after the Vietnam War ended.[18] Faced with unavailable or incomplete records, Secretary Hagel directed BCMRs on September 3, 2014, to give "liberal consideration" in upgrading discharges for all veterans, not just those from the Vietnam era.[19] Liberal consideration would apply for: "treatment record entries which document one or more symptoms which meet the diagnostic criteria of [PTSD] or related conditions" (Ref. 19, p 3); "cases where civilian providers confer diagnoses of PTSD or PTSD-related conditions" (Ref. 19, p 3); records containing a veteran's narrative of symptoms that occurred during military service; and cases indicating that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated any misconduct. The Hagel Memo loosened deadlines to reconsider upgrades, and BCMRs could obtain advisory opinions from Department of Defense (DoD) clinicians to assess PTSD.[19] A year after the Hagel Memo, PTSD upgrades across the military increased five-fold, and the overall rate of approved discharge upgrades for Army veterans alone rose from 3.7 percent in 2013 to 45 percent.[20]

On November 14, 2014, in *Monk v. Mabus*, Judge Eginton did not certify the proposed class but ordered BCMRs to decide each resubmitted application of a named plaintiff within 120 days on the basis of the standards outlined in the Hagel Memo.[21] On June 22, 2015, the BCMRs granted discharge upgrades to all five named plaintiffs.[22] *Monk v. Mabus* established the legal reasoning that veterans from the Global War on Terror have used to propose class action lawsuits.

Manker v. Spencer

On March 2, 2018, attorneys for Tyson Manker and the NVCLR filed a complaint[23] that the NDRB

was rejecting petitions of veterans requesting upgrades for less than Honorable discharges. The complaint[23] stated that Mr. Manker served in the military from 1999 to 2003. Deployed to Iraq as a Marine, he witnessed direct combat and multiple casualties. He developed nightmares, hypervigilance, mood swings, and anxiety, with symptoms of PTSD and TBI documented on his Postdeployment Health Assessment Form. He returned to the United States in September 2003. He smoked marijuana with two subordinates the night before taking a month of leave. Upon returning to base, he was charged with use or possession of a controlled substance and failure to prevent subordinates from using methamphetamine and marijuana. He received an OTH discharge in December 2003.

In spring 2004, a social worker in private practice diagnosed Mr. Manker with PTSD and recommended his local VA center for follow-up care. When he contacted the center, a representative said, "Sorry, we don't help OTH vets" (Ref. 23, p 12). Mr. Manker consumed drugs, alcohol, and contemplated suicide until returning to the social worker for treatment in 2011. In 2016, he applied to the VA for a Character of Service Determination, which determined that his service was "other than dishonorable," entitling him to restricted benefits. The complaint contended that Mr. Manker's illegal substance use resulted from service-connected PTSD and TBI, that his military separation for "misconduct" did not take into account his diagnoses, and that the NDRB refused his application without explanation despite documentation from his social worker and physician.[23]

The complaint also details that a "Mr. Doe" enlisted in the Marine Corps in December 2000.[23] During the invasion of Iraq, he witnessed firefights and direct combat. Upon returning to the United States, he developed nightmares, insomnia, memory loss, and anxiety, exacerbating his alcohol consumption. In August 2003, he was charged with an unlawful bodily piercing and fell sick during mandatory gym sessions, leading to an OTH discharge in January 2004. In July 2004, he received a diagnosis of PTSD. Mr. Doe's discharge upgrade applications to the NDRB were denied in 2009, in 2014, and in 2017 without addressing how his body piercing and sickness during gym sessions occurred because of episodes of alcohol intoxication that he claimed were a result of PTSD.

The complaint cited a report from the Government Accountability Office showing that 62 percent of service members from 2011 through 2015 who were separated for misconduct had received diagnoses of PTSD, TBI, or a mental disorder within two years that could be associated with their misconduct.[24] The Government Accountability Office criticized the Navy for not having PTSD screening procedures consistent with DoD requirements.[24] The complaint cited an unreferenced record, released by the DoD as a result of a Freedom of Information Act lawsuit, which showed that the NDRB approved upgrades in 15 percent of cases where PTSD was a factor, compared with 37 percent of approvals from the Air Force Discharge Review Board and 45 percent of approvals from the ADRB from January 2016 until an unspecified end date.[23] The NDRB cited the Hagel Memo in only two-thirds of its decisions. The complaint proposed a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure[25] because the NDRB failed to apply standards consistently in its review process, did not comply with the Hagel Memo, and deprived plaintiffs of due process, violating the Administrative Procedure Act and the Fifth Amendment.[23]

In his ruling, Judge Haight first noted that the plaintiffs had met their burden to be certified as a class.[5] With Rule 23(a) satisfied, the judge turned to "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications" (Ref. 25, (b)(1)(B)). As the judge reasoned: "The injunctions sought would provide relief to each member of the class because, although they would not guarantee each member an upgrade to an 'Honorable' disposition, they would ensure that their applications are being reviewed under the standard that both Plaintiffs and Defendant say applies to the NDRB" (Ref. 5, p 20).

Kennedy v. Esper

On April 17, 2017, attorneys for Stephen M. Kennedy and Alicia J. Carson filed a complaint that the ADRB was wrongfully denying discharge upgrade applications.[26] The complaint stated that Mr. Kennedy joined the Army in May 2006; he was deployed to Iraq from June 2007 to July 2008 and witnessed direct combat. On returning to the United States, he developed insomnia, survivor's guilt, depression, alcohol use, and self-harming behaviors.

Denied leave of absence to attend his wedding in 2009 despite prior verbal approval, he went AWOL. On returning to base, Mr. Kennedy was given a diagnosis of major depressive disorder but not PTSD by a DoD psychologist, and was ordered to meet with a psychiatrist. He was discharged in July 2009 with a General status for going AWOL. VA and private clinicians later diagnosed PTSD. The ADRB denied his upgrade applications in 2010 and 2015 without referencing the Hagel Memo or justifying why it prioritized his DoD diagnosis of depression over his later diagnosis of PTSD in its determination.[26]

The complaint also detailed that Ms. Carson joined the National Guard in 2008 and was deployed to Afghanistan in 2010.[26] Upon returning to the United States, she experienced nightmares, loss of consciousness and memory, trouble sleeping, and irritability. A VA psychiatrist diagnosd PTSD and TBI in March 2012. Ms. Carson developed photosensitivity, which an optometrist attributed to PTSD and TBI. She submitted medical documentation to be excused from her drills, but the Connecticut National Guard declared her AWOL in May 2012. She was discharged with a General status, asked to repay her enlistment bonus, and rendered ineligible for educational benefits. In 2015, the ADRB denied her upgrade application to Honorable and did not reference the Hagel Memo.

The complaint contended that thousands of veterans with OTH discharges are ineligible for government benefits.[26] The complaint also pointed out that the ADRB acknowledges that the Hagel Memo applies to its adjudications, but a randomly selected sample of cases showed that the ADRB cited the Hagel Memo in 58 percent and 67 percent of instances where PTSD and a PTSD-related condition, respectively, were the basis for a discharge upgrade request. Hence, the ADRB's inconsistent application of the Hagel Memo constituted a pattern and practice of arbitrary adjudication. The complaint proposed a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure[25] because the ADRB did not comply with the Hagel Memo, violating the Administrative Procedure Act.

In his December 2018 ruling, Judge Eginton referenced *Manker v. Spencer*, finding that Rules 23(a) and (b)(2) were satisfied to certify a class of plaintiffs.[6] Since the complaint was filed, the Connecticut Army National Guard and ADRB granted Ms. Carson and Mr. Kennedy Honorable discharges, respectively. The Secretary of the Army challenged the court's standing to issue relief. Judge Eginton cited his 2014 ruling in *Monk v. Mabus*, ordering that the BCMRs review discharge upgrade applications from Vietnam veterans on the basis of the Hagel Memo.[21] Since *Kennedy v. Esper* was filed after his 2014 decision, Judge Eginton referenced *Comer v. Cisneros*[27] to hold that class action lawsuits should not be considered moot "if the defendant has not sustained a heavy burden of demonstrating with assurance that there is no reasonable expectation that the illegal conduct will recur" (Ref. 6, p 8). To date, the U.S. government has not responded.

Possible Legal and Medical Consequences

Manker v. Spencer and *Kennedy v. Esper* allow class action lawsuits to proceed against the government. On August 25, 2017, A. M. Kurta of the DoD issued a memo[28] (the "Kurta Memo") with the stated aim of "greater uniformity among the review boards" (Ref. 28, p 1). The Kurta Memo expanded the sources of evidence for discharge upgrades to permit documentation from counseling centers, hospitals, physicians, and statements from relatives, friends, roommates, coworkers, servicemembers, and clergy.[28] Unlike the Hagel Memo, which suggested that a psychiatric disorder could be related to misconduct, the Kurta Memo interpreted misconduct to be evidence of a disorder: "Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment" (Ref. 28, p 2). The Kurta Memo also asked BCMRs and discharge review boards to consider a veteran's account of symptoms absent a formal diagnosis: "A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist will receive liberal consideration of evidence that may support the existence of such a condition" (Ref. 28, p 3).

Certain conditions apply. The DoD is not bound to VA determinations that a mental health condition existed during military service. Also, severe misconduct can outweigh mitigation from a mental health condition, and premeditated misconduct is not excused by mental health conditions. Finally, the Kurta Memo stated: "Liberal consideration does not mandate an upgrade" (Ref. 28, p 5).

It remains to be seen if the VA and DoD harmonize policies. In 2014, the U.S. Court of Appeals, Federal Circuit, upheld a Veterans Court decision that VA service connection should start when the earliest medical diagnosis of PTSD is established, not a veteran's first report of symptoms.[29] The case affirmed the role of medical testimony in establishing a diagnosis to prevent abuse of the VA benefits system.[30] Under the Kurta Memo, the DoD is not bound by the VA's determinations and permits lay testimony as evidence of a mental disorder underlying misconduct. The DoD's legal standard for "liberal consideration" is not defined. When commanders separate soldiers for misconduct, they consult legal advisors and might additionally consult military behavioral health for guidance on how a proposed discharge status may affect future care and VA service eligibility. Legal advisors note that "liberal consideration" is not defined in the Hagel Memo, the Kurta Memo, or the National Defense Authorization Acts of 2017 and 2018.[31]

BCMRs and discharge review boards have not publicly revealed how they will determine whether behaviors are due to a mental illness rather than bad conduct. Without guidance, "liberal consideration" could allow anyone with a less than Honorable discharge to claim PTSD symptoms for benefits, especially because legal complaints have raised discrepancies in diagnoses between DoD and VA or civilian clinicians. The question of veteran malingering has elicited debates since the VA's Office of the Inspector General found that the number of veterans receiving PTSD-related disability payments from 1999 to 2004 increased by 79.5 percent compared with 12.2 percent for other disabilities, and that the number of payments increased by 148.8 percent for PTSD-related disabilities compared with 41.7 percent for other disabilities.[32] Some wonder if the VA's benefits system incentivizes symptom exaggeration, misrepresentation of combat experiences, and economic invalidism.[33] Others counter that symptom exaggeration can be a sign of psychiatric distress, not just malingering.[34] Forensic psychiatrists have recommended systematic methods to detect false PTSD such as reviewing collateral information and records, conducting examinations, determining whether symptoms are volitionally produced, and obtaining psychological testing.[35] Evaluators can expose themselves to liability, however, when evaluees claim that a diagnosis of malingering defames their character, is incorrect, and costs them money or benefits.[36] BCMRs and discharge review boards should provide guidance for evaluators in such situations.

Indeed, these rulings come amid greater regulations for psychiatrists and psychologists. The National Defense Authorization Act of 2020 permits the Secretary of Defense to pay up to $100,000 for medical malpractice claims against DoD employees and contractors.[37] Service members can collect damages from the federal government for injuries sustained in the performance of their duties, which had been restricted for 70 years since *Feres v. United States*.[38] No servicemember has sued a DoD psychiatrist or psychologist to date for medical malpractice, and the Act may help implement the DoD's guidelines for servicemembers charged with misconduct to be screened for mental disorders, as recommended by the Government Accountability Office.[24]

Although veterans with OTH, bad conduct, and dishonorable discharges cannot access VA healthcare,[39] VA psychiatrists and psychologists may be asked to support upgrade applications for veterans with a General discharge status. Veterans with mental disorders who are not eligible for VA health benefits and served in a combat zone can access one of 300 community Vet Centers, and local Community Resource and Referral Centers can help veterans locate non-VA resources.[40] The Hagel[19] and Kurta[28] Memos permit veterans to request records from VA and non-VA treatment providers as evidence. Treatment providers should understand that the VA's compensation and pension (C&P) examinations for psychiatric disorders follow a different procedure[41] and standard of evaluation.[42] Under the Kurta Memo, discharge upgrade applications need to show that a psychiatric disorder merely existed during military service.[28] This is a different standard than for C&P examinations; for PTSD C&P examinations, evaluators must document causation between exposure to military stressors and current PTSD symptoms.[43]

Finally, recent legislation increases the likelihood that veterans may ask civilian psychiatrists and psychologists to support discharge upgrade applications. Congress passed the VA MISSION Act of 2018[10] to address the alarming rate of veteran suicides (i.e., nearly 20 per day in 2019).[44] The Act allows eligible veterans to access nonurgent care VA providers when: the VA does not offer necessary services; there

is no in-state, full-service VA medical facility; average drive time for mental health care is greater than 30 minutes; appointment wait time is greater than 20 days for mental health care; or the veteran and VA provider agree that treatment with a non-VA provider is in the veteran's "best medical interest," which is left undefined.[10] Any licensed clinician working with VA-contracted organizations in the academic, community, and private health sectors could qualify as a nonurgent care VA provider.[11] The Hagel and Kurta Memos specifically name PTSD and TBI, and veterans with these disorders report greater legal problems in civilian life than veterans without these disorders.[45] Civilian evaluators may encounter veterans with mental disorders seeking discharge upgrade applications for misconduct in veteran-specific jail diversion services, specialty courts, and prison reentry activities.[46]

Civilian evaluators should recall that the evidentiary standard for discharge upgrade applications is lower than for C&P, fitness for duty, and suicide or violence risk evaluations.[41] Forensic tools to evaluate the PTSD and TBI combat exposure-civilian violence relationship[47] or false PTSD[35] assume an adversarial setting where evaluators must take precautions against relying only on an evaluee's self-report.[48] The Hagel and Kurta Memos lower this standard by allowing evaluators to document symptoms, without determining whether symptoms meet full criteria for a disorder. The limits of liberal consideration are unclear, and it is currently unknown whether BCMRs and discharge review boards will grant upgrades to veterans with certain types or numbers of symptoms, or whether certain symptom clusters or diagnostic classes are more likely to result in discharge upgrades than others. Time will tell, as servicemembers invoking psychiatric disorders to mitigate military misconduct in upgrading their discharge status represents a new area for psychiatry and the law.

Conclusion

Manker v. Spencer and *Kennedy v. Esper*, along with the Hagel and Kurta Memos, allow servicemembers to request discharge upgrades by submitting evidence that any alleged misconduct during military service was related to a mental disorder. Psychiatrists and psychologists in the military, veteran, and civilian health systems may be asked to furnish documentation to support discharge upgrade applications. Mental health professionals should recognize that the Hagel and Kurta Memos lower the evidentiary burden for such applications. They should keep current with medicolegal standards that are evolving in this area.

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