

ATTENTION ALL FORMER MEMBERS OF THE ARMY, ARMY RESERVE, AND ARMY NATIONAL GUARD WHO HAVE SERVED SINCE OCTOBER 7, 2001, AND WHO WERE DISCHARGED WITH A LESS-THAN-HONORABLE SERVICE CHARACTERIZATION WHILE HAVING A DIAGNOSIS OF, OR SHOWING SYMPTOMS ATTRIBUTABLE TO, PTSD OR PTSD-RELATED CONDITIONS:

YOUR RIGHTS MAY BE AFFECTED BY A PROPOSED SETTLEMENT IN THE KENNEDY CLASS ACTION.

PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(e) YOU ARE NOTIFIED AS FOLLOWS:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEPHEN M. KENNEDY and ALICIA J.
CARSON, et al.,

Plaintiffs,

No. 3:16-cv-2010-CSH

-against-

RYAN D. McCARTHY, Acting Secretary
of the Army,

Defendant.

BACKGROUND

In 2017, plaintiffs Stephen Kennedy and Alicia Carson (“Plaintiffs”) filed an Amended Complaint alleging that since the start of military operations in Iraq and Afghanistan, the Army discharged thousands of people with Other Than Honorable (“OTH”) or General (Under Honorable Conditions) (“GEN”) statuses due to misconduct attributable to post-traumatic stress disorder (“PTSD”), traumatic brain injury (“TBI”), military sexual trauma (“MST”), and other

behavioral health conditions (“OBH”). Specifically, the Amended Complaint alleged that upon their return from Iraq and Afghanistan, veterans with service-connected PTSD, TBI, and other related mental health conditions received OTH and GEN discharges and were systematically denied status upgrades by the Army Discharge Review Board (“ADRB”).

The Amended Complaint further alleged that these veterans were denied status upgrades even as scientific and medical understandings of PTSD and TBI advanced and explained how these conditions can affect Soldiers’ behavior. Plaintiffs further alleged that, despite the 1944 statute creating the ADRB, longstanding regulations, and binding Department of Defense guidance that clarified the ADRB’s obligation to give liberal consideration to the applications of former Soldiers who incurred these mental health conditions, the ADRB systematically failed to apply appropriate decisional standards or provide veterans with due consideration, in violation of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.

Defendant has denied and continues to deny each and all of the claims and contentions alleged by Plaintiffs. Defendant has expressly denied and continues to deny all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged by Plaintiffs. The Defendant specifically denies the allegations in the Amended Complaint, including any allegation that the Army violated the APA or failed to follow appropriate procedures, that the allegedly relevant DOD guidance was binding on the ADRB, that the Army otherwise acted arbitrarily and capriciously, that the Plaintiff’s raised an actionable Due Process/Fifth Amendment claim, and all other allegations of wrongdoing.

The Court has certified a settlement class in this civil action (“The Settlement Class”), defined as follows:

“Members and former members of the Army, Army Reserve, and Army National Guard who served during the Iraq and Afghanistan era — the period between October 7, 2001 to the Effective Date of Settlement — who

- (1) were discharged with a less-than-Honorable service characterization (this includes GEN and OTH discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);
- (2) have not received discharge upgrades to Honorable; and

(3) have diagnoses of PTSD or PTSD-related conditions or records documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.”

The Court named Plaintiffs as class representatives in this civil action and the Jerome L. Frank Legal Services Clinic of Yale Law School and Jenner & Block LLP as Class Counsel (“Class Counsel”). Throughout 2019 and 2020, Plaintiffs and Defendant engaged in motion practice and discovery, and eventually settlement negotiations supervised by the Court. After extensive arm’s-length negotiations and exchanges of multiple proposals, Plaintiffs and Defendant reached an agreement in principle (“Joint Settlement Agreement”) on November 17, 2020, to settle the claims in the Amended Complaint. The Joint Settlement Agreement, if approved by the Court, will settle the claims in the Amended Complaint in the manner and upon the terms summarized and described below.

SUMMARY OF SETTLEMENT TERMS

The full text of the proposed Joint Settlement Agreement can be viewed at <https://arba.army.pentagon.mil/adrb-overview.html>.

Automatic Reconsideration for Certain 2011-2020 Applicants and Reapplication Rights for Certain 2001-2011 Applicants

- The ADRB will automatically reconsider its decisions that meet all of the following three criteria: (a) Special Cases (cases that include a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH), (b) issued on or after April 17, 2011 until the Effective Date of Settlement, (c) whose grant state indicates the applicant did not receive the full relief they requested. The Defendant will identify these applicants by conducting an electronic search of ADRB data to identify individuals whose record “grant state” indicates they did not receive the full relief that they requested, and whose Case Data raises PTSD, TBI, MST, or OBH.
- The Army will send notice of this automatic reconsideration process to all eligible applicants, inviting them to submit additional evidence within 60 days of the notice date

to ensure that new evidence is considered when their application is reviewed and providing them with referral information for potential free legal representation. This notice will be posted to <https://arba.army.pentagon.mil/adrb-overview.html> and <https://www.kennedysettlement.com>, and sent to eligible veterans within 120 days of the date the settlement is approved.

- Previous applicants to the ADRB who are not eligible for automatic reconsideration according to the paragraph above, and whose cases were either denied or only granted partial relief by the ADRB between April 17, 2011, and September 4, 2014, are eligible to reapply to the ADRB. Plaintiff will send notice to these applicants informing them of their right to reapply, including referral information for potential free legal representation.
- Previous applicants to the ADRB whose applications (a) are Special Cases, (b) were issued between October 7, 2001 and April 16, 2011, and (c) whose grant state indicates they did not receive the full relief they requested, have the right to apply anew to the ADRB or, if the applicant was discharged more than 15 years ago, to the Army Board for Correction of Military Records. This is because the ADRB's statute of limitations is 15 years. The Defendant will identify these applicants by conducting an electronic search of ADRB data to identify individuals whose record "grant state" indicates they did not receive the full relief that they requested, and whose Case Data raises PTSD, TBI, MST, or OBH. For most cases in the 2001–2004 timeframe, the only grant states recorded were "grant" or "deny." For these cases, "deny" will be used as the grant state indicating the applicant did not receive the full relief they requested.
- The Army will provide contact information to the Plaintiffs for previous applicants eligible to reapply to the ADRB, and Plaintiffs will send notice to these previous applicants providing referral information for potentially free legal representation and informing them of their right to reapply.
- Defendant will post notice of reapplication rights for 2001-2011 applicants and reconsideration for 2011-2020 applicants on its website, including at <https://arba.army.pentagon.mil/adrb-overview.html> and <https://arba.army.pentagon.mil/adrb-faq.html>, within 45 days of the date the settlement is approved.

Revised Decisional Documents & Procedures

- Defendant agrees to incorporate new language and procedures into the Military Review Boards Standard Operating Procedures that governs applications including a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. If the ADRB finds that there is insufficient evidence per the four factors (“Kurta Factors”) set forth in paragraph two (2) of the Kurta Memorandum issued on August 25, 2017 to warrant a grant of a full upgrade to Honorable, including that the evidence in mitigation does not outweigh the severity of misconduct in these applications, the Board must, in the decisional document sent to the applicant:
 - respond to each of the applicant’s contentions;
 - describe the evidence on which it relied on consideration of each of the applicable Kurta Factors;
 - explain why it decided against the veteran with respect to each applicable Kurta Factor;
 - ensure it draws a rational connection between facts found and conclusions drawn; and
 - distinguish any prior Board decisions cited by the applicant in accordance with applicable law and regulations.
- Defendant will revise the decisional document template used by the ADRB to reflect the new language and procedures and will consider revising the ADRB voting sheet and/or issuing a guidance memo explaining these new procedures.
- Defendant will conduct annual training for ADRB members and staff tailored to applications that include a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. This training will include information on the new procedures in the Joint Settlement Agreement and the telephonic hearings program.

Universal Option for Telephonic Personal Appearance Board Program

- Defendant will implement a Telephonic Personal Appearance Board Program for the ADRB within 18 months of the final approval of the settlement. All applicants who request a Personal Appearance hearing will be eligible for this telephonic program and

may elect to participate in a telephonic hearing from their personal residences or other location of their own choice.

Notice for New Applications

- For all discharge upgrade applications submitted to the ADRB after the date the settlement is approved, when the Board writes the applicant to acknowledge receipt of their application, the Board letter will inform the applicant of how to find legal counsel and Veterans Service Organizations to assist with their application.
- This notice will also encourage applicants to seek out and provide additional evidence related to an applicant's possible diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. The notice will provide information helping applicants to submit this additional evidence and informing them that they may be able to obtain mental health evaluation and treatment at Department of Veterans Affairs facilities.

Attorneys' Fees and Costs

- If the settlement is approved by the Court, defendant agrees to pay \$185,000 in attorneys' fees and costs to Class Counsel. A portion of these fees will be used by Class Counsel to pay for the production and mailing of notices to some members of the class informing them of their right to reapply to the ADRB.

THE SETTLEMENT HEARING

A. Before the settlement can become final, it must be approved by the Court. Any affected person may comment for or against the proposed settlement.

B. In order to give class members an opportunity to express their comments in support or objection to the settlement, a hearing will be held before the Hon. Charles S. Haight, Jr., via the videoconferencing software Zoom on **March 24, 2021 at 10:00 a.m.** Eastern Time. Class members or their attorneys can attend the hearing using the following link, <https://www.zoomgov.com/j/1617763525?pwd=dmpTVnRSL2xGZ3J2MVBXYYVhIVIVjZz09>, or by dialing in to +1 (646) 828-7666. The meeting ID for the hearing is 161 776 3525 and the passcode is 071273.

C. If you wish to comment for or against the settlement, you must serve by hand, mail, or e-mail your written objection and support papers, including any legal support for your objection and your status as a class member, upon Class Counsel: Michael J. Wishnie, Jerome N. Frank Legal Services Organization, Yale Law School, P.O. Box 209090, New Haven, CT 06520-9090, kennedy.settlement@yale.edu; and Defendant's Counsel: Natalie N. Elicker, U.S. Attorney's Office for the District of Connecticut, 157 Church St, 25th Floor, New Haven, CT 06510, Natalie.Elicker@usdoj.gov; and also file these documents with the Clerk of the Court: United States District Court for the District of Connecticut, 141 Church Street, New Haven, CT 06510. All written objections must be received by March 3, 2021. **Objections or comments will not be considered by the Court unless you have given notice in the manner described.** If you intend to object to the Settlement and desire to present evidence at the fairness hearing, you must include in your written objections the identity of any witnesses you may call to testify and the exhibits you intend to introduce into evidence at the fairness hearing. If you fail to object in the manner described you shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to any aspect of the Settlement, unless otherwise ordered by the Court. You may present your comments yourself or you may have an attorney present them for you. You are invited to attend the hearing whether or not you have given notice that you want to comment on the settlement.

D. This settlement, if approved by the Court, will be a full and final adjudication of the issues raised on behalf of the settlement class in the Amended Complaint and of any and all claims resulting from the facts, circumstances and subject matter that gave rise to the Amended Complaint and that were known to Class Counsel on the date the settlement is approved.

Dated: New Haven, CT
 January ____, 2021