

United States Court of Appeals for the Federal Circuit

KRISTOPHER CRANFORD,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2021-1973

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

Decided: December 19, 2022

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 for the court filed by *Circuit Judge* HUGHES.

Concurring Opinion filed by *Circuit Judge* REYNA.

HUGHES, *Circuit Judge*.

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 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

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

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.” 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”

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