

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 December 2023

DOCKET NUMBER: AR20230003475

APPLICANT REQUESTS:

- an upgrade of his characterization of his service from under honorable conditions (general) to honorable
- a personal appearance hearing before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Pages 3 and 4 of his Department of Veterans Affairs (VA) Rating Decision

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, he was misdiagnosed, and his mental health issues led to a discharge for misconduct (drug abuse). During his time in service, he was deployed to a combat zone and exposed to traumatic events which had a profound impact on his mental health. As a result, his misconduct was attributed to drug abuse which was seen as a personal failure rather than the symptoms of a mental health condition. The applicant believes that his discharge was the result of untreated post-traumatic stress disorder (PTSD) with unspecified depressive disorder, alcohol abuse, and traumatic brain injury (TBI), which were not fully understood at the time of his discharge. He has taken steps to address his mental health and has been in recovery for several years. The correction of his military records would recognize the true cause of his misconduct and would provide the applicant with the benefits and opportunities that come with an honorable discharge.
3. The applicant enlisted in the Regular Army on 25 July 2001. He served in military occupational specialty 92G (Food Service Operations). Evidence shows he served in

Kuwait and Iraq from 28 April 2003 to 26 April 2004 and 16 December 2004 to 27 November 2005.

4. The applicant provided a urine specimen for drug testing on 15 December 2005.

a. On 29 December 2005, the drug testing results show the applicant's urine sample tested positive for cocaine.

b. On 3 January 2006, the Alcohol and Drug Control Officer, Army Substance Abuse Program (ASAP) informed the applicant's commander of the applicant's positive test results for cocaine. The commander was further informed he was required to report the positive results to the Criminal Investigation Division (CID), initiate a suspension of favorable personnel actions (FLAG) against the applicant, and he was required to refer the applicant to ASAP. The commander was also informed he should consider adverse action and initiate separation action.

5. The applicant received counseling on the following dates:

a. On 17 January 2006, the applicant was counseled regarding drug/cocaine use.

b. On 13 February 2006, his commander rendered counseling to inform him of his intent to initiate actions to separate the applicant under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c for commission of a serious offense.

6. On 23 February 2006, the applicant received a medical and mental status evaluation, which found no psychiatric disease or defect which warranted disposition through medical channels and found he was medically qualified for administrative separation. The applicant was cleared for any administrative actions deemed appropriate by the command to include separation in accordance with Army Regulation 635-200 (Active Duty Enlisted Administrative Separations).

7. His records contain DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)), dated 23 January 2006, which shows he received punishment under Article 15, UCMJ for on or about 11 December 2005 and 15 December 2005, wrongfully use cocaine in violation of Article 112a of the UCMJ. Among the punishment imposed was a reduction in rank/grade to private first class (PFC)/E-3; forfeiture of \$846.00 pay per month for two months; extra duty for 45 days; restriction for 45 days, suspended, to be automatically remitted if not vacated before 22 July 2006.

8. On 25 January 2006, the applicant's commander flagged the applicant for adverse action.

9. A DA Form 4187, Personnel Action, dated 28 February 2006, shows the applicant was reduced in rank/grade to private first class (PFC)/E-3.
10. A memorandum, dated 1 March 2006 shows the applicant, who was enrolled in ASAP, failed to report to his group counseling appointment on 22 February 2006.
 - a. His squad leader rendered a counseling statement on 5 March 2006, regarding the applicant's failure to report to his ASAP counseling.
 - b. The applicant's platoon sergeant rendered a memorandum for record (MFR), dated 6 March 2006. This MFR shows the applicant missed his ASAP counseling appointment because he overslept; his platoon sergeant requested UCMJ action.
11. On 21 March 2006, the Alcohol and Drug Control Officer, ASAP informed the applicant's commander was informed of the applicant's positive test results for cocaine, dated 24 February 2006. The commander was further informed he was required to report the positive results to the CID, initiate a FLAG against the applicant, and he was required to refer the applicant to ASAP. The commander was also informed he should consider adverse action and initiate separation action.
12. On 13 September 2006, the applicant's company commander informed the applicant he was initiating action to separate him for under the provisions of Army Regulation 635-200, chapter 14-12c, commission of a serious offense, with a characterization of service of under honorable conditions (general). His commander cited the applicant's abuse of illegal drugs (positive urinalysis for cocaine). On the same day, the applicant acknowledged receipt of notification of separation under the provisions of Army Regulation 635-200, chapter 14-12c, Commission of a Serious Offense.
13. On 14 September 2006, he consulted with counsel, he waived consideration of his case by an administrative separation board, elected not to submit statements in his own behalf and requested representation by counsel. He acknowledged he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to him. He further understood he may be ineligible for many or all benefits as a veteran under both Federal and State law.
14. On 14 September 2006, the applicant's commander formally requested he be separated prior to expiration of his current term of service due to a positive urinalysis for cocaine.
15. On 14 September 2006, the applicant's intermediate commander concurred with the recommendation to separate him before his expiration term of service and

recommended the applicant's service be characterized as under honorable conditions (general).

16. On 18 September 2006, the 43rd Area Support Group commander concurred with the recommendation to separate him before his expiration term of service and recommended the applicant's discharge be approved and his service be characterized as under other than honorable conditions (general).

17. On 18 September 2008, the separation authority directed the applicant be discharged under the provisions of Army Regulation 635-200, chapter 14-12c, with a General (under honorable conditions) discharge. The reason for separation was misconduct – drug abuse.

18. On 19 October 2006, he was discharged in accordance with the separation authority's decision. His DD Form 214 shows he completed 5 years, 2 months, and 17 days of net active service this period.

a. His DD Form 214 lists the following pertinent awards:

- Army Commendation Medal
- Army Achievement Medal
- Army Good Conduct Medal
- Global War on Terrorism Expeditionary Medal
- Iraq Campaign Medal

b. His DD Form 214 contains the following entries or information:

- Item 4a (Grade, Rate or Rank) PFC
- Item 4b (Pay Grade) E03
- Item 24 (Character of Service), his service was characterized as under honorable conditions (general)
- Item 26 (Separation Code) "JKK"
- Item 27 (Reentry Code), the entry "4"
- Item 28 (Narrative Reason for Separation), the entry Misconduct (Drug Abuse)
- he had lost time from 11 October 2006 to 18 October 2006.

19. The applicant provides pages 3 and 4 of his VA Rating Decision which states his evaluation of PTSD with unspecified depressive disorder, alcohol abuse, and TBI is currently evaluated as 50 percent disabling. The evaluation of PTSD with unspecified depressive disorder is increased to 70 percent disabling effective 13 April 2021.

20. There is no indication he applied to the Army Discharge Review Board for an upgrade of his discharge within that board's 15-year statute of limitations.

21. Soldiers discharged under the provision of Army Regulation 635-200, paragraph 14-12c general receive an under other than honorable conditions characterization of service.

22. The Board should consider the evidence and the applicant's statements in accordance with the 25 July 2018, Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and BCM/NRs regarding equity, injustice, or clemency determinations.

23. MEDICAL REVIEW:

a. Background: The applicant is requesting an “upgrade of his characterization of his service from under honorable conditions (general) to honorable” and a “personal appearance hearing before the Board.” He contended that his “mental health issues led to a discharge for misconduct (drug abuse).” He further clarified, “deployed to a combat zone and exposed to traumatic events which had a profound impact on my mental health.”

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory.

- Applicant enlisted in the Regular Army on 25 July 2001. He served in the MOS, 92G (Food Service Operations).
- He served in Kuwait and Iraq from 28 April 2003 to 26 April 2004 and 16 December 2004 to 27 November 2005.
- During his time in service, his awards included the Army Commendation Medal, Army Achievement Medal, Army Good Conduct Medal, Global War on Terrorism Expeditionary Medal and the Iraq Campaign Medal.
- On 29 December 2005, the “drug testing results show the applicant's urine sample tested positive for cocaine.” He subsequently received counseling and an Article 15 for this misconduct in Jan 2006.
- On 22 February 2006, the applicant did not show for his group counseling appointment with ASAP, and tested positive again for cocaine (24 February 2006).
- The applicant's service record includes the DD Form 214 (Report of Separation from Active Duty), which shows that applicant received an Under Honorable

Conditions (General) discharge on 19 Oct 2006. The reason for separation stated, "misconduct – drug abuse."

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's ABCMR Record of Proceedings (ROP), applicant's statements regarding behavioral health difficulties, his DD Form 214, as well as documents from his service record. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

d. The applicant asserted that PTSD, depression, alcohol abuse and a TBI should have been considered as mitigating factors in his discharge. Included in his service record and supporting documents is reference to a VA document assigning him with a 70% service-connected evaluation for PTSD. No other medical or behavioral health records were provided. Per the applicant's VA EHR, he is 100% service connected with a disability rating of 70% for PTSD. The remaining disability ratings are for various medical conditions.

e. There is noted evidence in JLV that the applicant was diagnosed and treated for non-mitigating conditions (alcohol dependence and cocaine abuse) while on active duty. He attended six clinical sessions through psychiatric services from 07 Mar 2006 up to a couple of months prior to his discharge. His express desire conveyed to the provider was to remain in the Army. JLV also included three sessions with a Deployment Cycle Care Manager (Aug -Sep 2006). It was noted he had reported sleep problems, short-term memory loss, low interest in doing things and depressed mood particularly from his first deployment. The care manager diagnosed him with an Adjustment Disorder with Anxious Mood from one of his sessions.

f. Following his discharge from the Army, applicant was initially diagnosed with PTSD (05 May 2011), as noted on the JLV problem list. This diagnosis was updated a few more times with the last entry on 17 Mar 2016. Major Depressive Disorder, Recurrent, Moderate was added to the problem list on 03 May 2017. Substance abuse with both alcohol and cocaine was diagnosed on the problem list as well. Applicant was additionally evaluated for a TBI (29 Sep 2011) and was diagnosed with a Mild TBI by the attending neuropsychologist. Applicant has continued to be seen periodically by behavioral health providers up to this current year 2023.

g. After reviewing the application and all supporting documents, it is the opinion of this Agency Medical Advisor that there is sufficient evidence of a mitigating condition (PTSD) in relationship with the specific misconduct of cocaine abuse. Adequate documentation was provided in JLV to support the contention that the applicant had

experienced PTSD (i.e. 70% service connected disability rating) during his time of service.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. Yes, he experienced PTSD symptoms contributing to his cocaine abuse while still on active duty that was subsequently identified as a service-connected disability in JLV.

(2) Did the condition exist or experienced occur during military service? Yes, there is considerable evidence he initially encountered PTSD related symptoms while on active duty as a result of his deployment to Iraq and Kuwait.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, it mitigates for his misconduct of cocaine abuse as PTSD is often associated with the emergence or escalation of illicit drug use.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents and the evidence found within the military record, the Board determined that relief was warranted. The Board carefully considered the applicant's request, supporting documents and evidence in the records. The Board considered the applicant's period of active duty and deployments to Iraq and Kuwait. The Board considered the frequency and nature of the misconduct, the reason for separation and published DoD guidance for consideration of discharge upgrade requests. After due consideration of the case, the Board found sufficient evidence of in-service mitigating factors to overcome the misconduct and weigh in favor of a clemency determination.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned by amending the applicant's DD214 ending 19 October 2006 showing:

- Characterization of Service: Honorable
- Separation Authority:
- Separation Code: No change
- Reentry (RE) Code: No change
- Narrative Reason for Separation: No change

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense, to include abuse of illegal drugs, convictions by civil authorities and desertion or absence without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed. Army policy states that an under other than honorable conditions discharge is normally considered appropriate for a Soldier discharged for misconduct. However, a discharge under honorable conditions (general) or an honorable discharge may be granted.

b. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs

shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

4. Army Regulation 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires. The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

5. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//